Managing Radical Disputes:
Public Reason, The American Dream, and the Case of Same-Sex Marriage

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ABSTRACT

This paper proposes that ambiguous arguments play a crucial role in the management of radical disputes in democratic deliberation. Lofty though it might be, "public reason" is an impoverished ideal, and its celebrated role in democratic deliberation is vastly overrated, particularly among liberal theorists. In the courts of law and in the larger world, radical disputes unfold as messy, incomplete, ambiguous arguments are proposed by parties. This does not mean that all communication between parties must break down because parties do not abide by the "rules" of argumentation and evidentiary reasoning. It only implies that the language of ambiguity offers possibilities for democratic deliberation that are different from those presented in the discourse on "public reason." Ordinary people have strong opinions but their arguments are, more often than not, incompletely theorized – a fact that by no means indicates that such arguments are failures. We illustrate our argument by examining the ambiguous, fragmented use of American Dream talk in the debate over same-sex marriage.

Managing Radical Disputes:

Public Reason, The American Dream, and the Case of Same-Sex Marriage[1]

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What role does reasoned argument play in politics? In *The Federalist Papers*, Alexander Hamilton argued that public reason is often undermined by the basic elements of political life. "Ambition, avarice, personal animosity, party opposition" are motives that drive parties on both sides of any given debate, warping arguments to suit the passions and interests of the advocates. Even if we somehow manage to filter out impure motives, Hamilton noted, reasoned argument will be still beset by "the honest errors of minds led astray by preconceived jealousies and fears." "So numerous indeed and so powerful the causes which serve to give a false bias to the judgment," Hamilton argued, "that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society" (34).

The dim possibilities for reasoned politics envisioned by Hamilton grow even darker when we consider political conflicts between parties separated by starkly different frames of reference. Conflicts between people who inhabit different social worlds – people who have very different moral, psychological, and philosophical standards for evaluating facts and claims – are radical disputes in which contending parties have "almost no common premises and very little common language" (Luker 1984:2). Reasoned argument, already weakened by the passions and interests of ordinary politics, would seem to be entirely overmatched in the context of clashing worldviews.

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[1] This paper is available at http://ssrn.com/abstract=1247302

And yet there are many who claim that reasoned argument plays a central role in political life. Hamilton cast doubt on the efficacy of public reason, but he did so in the course of making an extended series of reasoned arguments in favor of the newly proposed constitution. More recently, radical disputes like those over abortion have attracted the attention of scholars who have insisted that even the most profound political divides can be bridged by reasoned argument (Cf. Guttmann and Thompson 1998). When it comes to public reason, it would seem that there is cause for both hope and despair.

In this paper, we take up the question of public reason's role and reach an answer that is at once optimistic about the capacity for reasoned argument in politics and critical of such reasoning's weaknesses. More specifically, we submit that ambiguous and incompletely theorized arguments dominate the discussion of radical disputes and can be just as useful as a medium for resolving such disputes as "public reason." To illustrate this point, we select the same-sex marriage (SSM) dispute and demonstrate how an ambiguous and incompletely theorized set of arguments about national ideals, particularly the ideals of the American Dream, (i) characterize much of the debate over SSM, and (ii) offer the possibility of a language that can help bridge the divide between the contending parties to this dispute.

The paper proceeds in three parts. In Part I, we begin with John Rawls and his famous claim that the United States Supreme Court is the exemplar of public reason. We agree that the high bench provides a model of reasoned argument, but we disagree with Rawls about the kind of reasoned argument in which members of the Court engage. Drawing on the work of Charles Lindblom, Edward Levi, and Cass Sunstein, we argue that judicial reasoning is actually often piecemeal and ambiguous, without developed premises or well-specified conclusions. This

fragmented, ambiguous reasoning employed by the Court may point beyond itself, promoting deliberation as actors attempt to work out the issues left unsettled in judicial opinions.

Such deliberation is a possibility, not an inevitability. We recognize that unfinished, ambiguous reasoning of Court decisions may not lead to fruitful discussion and substantive agreement. In that case, then the Court will have produced piecemeal decisions that do not point beyond themselves. Without stimulating further deliberation, ambiguous and incomplete judicial decisions are problematic: they can be seen as unpredictable (in the sense that judicial rulings do not logically vindicate pre-existing principles) and partial (in the sense that decisions remain limited to the shifting distribution of interests). In the absence of supplementary discussion and debate to refine and develop the terms of judicial decisions, the Court's muddled public reasoning will remain a muddle.

In concluding Part I, we ask if the Court's model of incompletely theorized reasoning extends beyond the judiciary and into the public domain. What would be necessary for ordinary citizens to pursue the promise and risk the pitfalls of judicial-style argumentation? We hypothesize that for this to occur, disputants in the public domain would have to engage in ambiguous, piecemeal, and partial forms of reasoning that everyone can live with. At minimum, ambiguous forms of reasoning thus require some baseline commonalities among disputants that provide the raw material for making fragmented arguments.

In Part II, we illustrate that even in heterogeneous polities divided by radical disputes, such baseline commonalities among disputants might be found. The American polity, for instance, routinely identifies itself as a nation of believers in the values of the American Dream (Citrin 1994; Hochschild 1995; Cullen 2003; Jillson 2004; Schildkraut 2007; Ghosh 2008). Most Americans believe that those who work hard should succeed. In addition, they also believe that

the quintessential feature of being American is to do better in life than some earlier stage. One

of the core elements of the American Dream is the idea of a level playing field. Most Americans

hold steadfastly to the belief that under conditions of equal opportunity an individual can go as

far as their talents will take them (Hochschild 1995). To be sure, the Dream is ambiguous and

incompletely theorized, even to the point that it is extremely difficult to articulate an exact

definition of the Dream. Yet the Dream persists among a diverse group of Americans as a shared

set of national ideals.

Given that both radical disputes and a common set of bedrock values shared by most

Americans exist, we raise the following question: Can the national values of Americans, as

expressed in the American Dream, be a form of incompletely theorized reasoning that replaces

"public reason" when parties are engaged in a radical dispute? That is, can shared ideals, even if

they are ambiguous and incompletely theorized, offer a language or a medium that enables

parties to a radical dispute to talk to each other? In order to examine this, we turn to the case of a

real-world radical dispute: same-sex marriage.

In Part III we examine the oft-cited dispute over SSM and argue that it is indeed a radical

one, with the contending parties separated by very different views about the meaning and value

of sexuality and family. To be sure, SSM is not the only radical dispute in contemporary

American political life. Yet, for our purposes, we are interested in examining the extent to which

the shared set of values of the American Dream might inform this particular dispute.

We find that on both sides of the dispute parties formulate arguments about SSM in terms

of the American Dream. These arguments are often incomplete and ambiguous. We submit that

the partial, unfinished nature of the American Dream arguments offers a vocabulary for the

parties to this dispute to communicate with each other and proceed toward some resolution of the

conflict that coheres with the American Dream values they cherish. But we also warn that the

shared use of American Dream does not in and of itself bring disputants any closer to reasoned

consensus. Without joint deliberation that seeks to agree on a single, more complete

understanding of the American Dream, the joint invocations of the same ambiguous claims

simply provide a means by which partisans may continue to talk past one another.

Unfortunately, it is precisely this kind of incomplete and ambiguous reasoning without

consensus that has permeated the contemporary debate over SSM to date. We conclude by

briefly considering what might help move this debate toward deeper agreement.

PART I

Public Reasoning as Judicial Reasoning

The most exhaustive account of public reason as the mechanism for resolving radical

disputes is John Rawls's Political Liberalism (Rawls 2005). The use of public reason, according

to Rawls, will lead to an "overlapping consensus" that will trump all sorts of conflicts involving

reasonable comprehensive doctrines held by disparate communities. This consensus stems from

a "freestanding political conception of justice" which is itself not reducible to any one of the

comprehensive conceptions in the polity. Rawls famously identified the United States Supreme

Court as the central, functioning source of reasoned argument in American politics.[2]

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[2] Other theorists have subsequently extended the idea of public reason. For instance, Macedo
argues, "The demand for public reasonableness is especially important where fundamental rights
and liberties are at stake, and in the face of a long history of arbitrary and invidious forms of
discrimination. Here the modern Supreme Court has rightly insisted that before the government
can infringe fundamental rights, or before it can subject a 'discrete and insular minority' to
unequal treatment, a high burden of reasoned justification must be met" (Macedo 1997).
Gutmann and Thompson point out that reasoned resolutions are possible through democratic
deliberation if certain moral principles – such as reciprocity, fair opportunity, publicity, and
accountability – apply to both the process and substance of democratic decision-making

For Rawls, the Court, by virtue of its principled working out of higher law, is the exemplar of public reason. The members of the Court do not always agree as they reason; nor do they always do a good job of reasoning in every case. Yet public reason is what the Court does. Indeed, according to Rawls, public reasoning is the only kind of reasoning the Court can legitimately do and it forms the basis of the Court's authority. The Court is, Rawls writes, "the only branch of government that is visibly on its face a creature of [public] reason and of that reason alone" (235). It is "the task of the justices to try to develop and express in their opinions the best interpretation of the constitution they can, using their knowledge of what the constitution and constitutional precedents require" (236). In carrying out this task, the justices must "justify by public reason why they vote as they do" as well as "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions" (235).

We follow Rawls and treat the Court as enacting a model of public reason. The Court occupies a unique position in our politics: it strives to reason about the most controversial issues in our society in terms that are not reducible to the ideology of any one party or group. The Court takes up political questions but does not give them partisan answers. In important respects, the Court supplies the central template for how to reason about conflict in ways that are responsive to the values which all citizens may reasonably be expected to endorse.

We do not follow Rawls, however, in our understanding of how the Court reasons. Rawls emphasizes the judicial duty to craft "the best interpretation of the constitution" and, in doing so, Rawls seems to suggest that the justices will produce fully articulated judicial

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(Gutmann and Thompson 1998; Cf. Fish 1997b). Deliberative democracy is also expected to give rise to free political discussion, open legislative deliberations, and a pursuit of common good (Freeman 2000). Although it has no monopoly over reason, deliberative politics emphasizes applying cognitive judgment, and therefore cognitive reason, to moral and political questions (Estlund 1993).

arguments that move from well-developed premises to well-considered conclusions.[3] In his

emphasis on principled argument, Rawls echoes the conventional understanding of judicial

action. According to the conventional view, judicial decisionmaking is meant to be rooted in the

clear articulation and neutral application of general principles (Peretti 1999:11-35).[4] Jurists may

disagree about the origin and content of these general principles. In whatever way they are

understood, however, the principles are taken to be of primary importance. Judges should strive

to assimilate each dispute into a principled order, articulating a framework of rules and standards

capable of regulating subsequent judicial decisions (Wasserstrom 1961:14-22). In the ideal case,

the principled legal order makes judicial action perfectly reasoned and predictable: every legal

outcome is reached by the logical application of pre-existing rules and standards to each new fact

situation. Moreover, within such an ideal system the exercise of judicial power is restrained and

impartial: court decisions do not depend on the private whim or bias of the judge presiding over

the case, but on a publicly known set of legal principles.[5]

       We take a different approach. Our argument is not that the justices attempt to craft

principled arguments and sometimes fall short. Instead, drawing on the work of Charles

Lindblom, Edward Levi, and Cass Sunstein, we claim that members of the high bench are often

not attempting to work out fully principled arguments in the first place. Thus the Court models a

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[3] Rawls likens his account of judicial reasoning to Ronald Dworkin's, and Dworkin has written
extensively about principled judicial argument (236, note 23).
[4] In the rest of this section and in the following section we draw on Bybee (2001).
[5] This view of judicial action has deep roots, reaching back at least to the nineteenth-century
"legal science" of Christopher Columbus Langdell (Grey 1983). Even though Langdell's
particular theories have long since fallen into disrepute, the claim that judicial decisionmaking
ideally rests on the articulation and application of impartial principles has survived (Wechsler
1959; Singer 1988; Fischer 1991). It is still the pursuit of such principles that is commonly
thought to give court decisions a distinctively legal quality, distinguishing the judiciary from the
other branches of government.

kind of public reason quite different from what Rawls and the conventional view of judicial decisionmaking would lead one to expect.

Judicial Reasoning as Incompletely Theorized Agreements

To begin, consider the opinions written by the now-retired Justice Sandra Day O'Connor. For much of her time on the high bench, Justice O'Connor sat in the center of the Supreme Court's ideological spectrum, a position that made her views decisive in controversies ranging from abortion to affirmative action. O'Connor generally used her swing position to forge a narrow path. She routinely restricted her rulings to the facts of the case at hand, reaching results that resolved specific aspects of the dispute while leaving broader legal questions open (Maveety 1996). Instead of adhering to a comprehensive jurisprudential theory or overarching constitutional vision, she tended to fashion her opinions around limited cores of agreement, blurring hard-edged principles for the sake of limited solutions. O'Connor moved from decision to decision pursuing small-scale settlements rather than seeking sweeping conclusions.

O'Connor is not the only justice in the history of the Supreme Court who might be described as following a path of piecemeal argumentation (Jeffries 1994). And the practice of such argumentation goes well beyond individual justices. Although it is not true of all judicial opinions, it is the case that many judicial opinions appear to be fragmented, ramshackle affairs cobbled together to dispose of the case at hand. Indeed, judicial decisions often look less like exemplars of careful justification rather than like the choices a person makes when picking out a midnight snack from whatever looks good in the refrigerator (Carter 1985:22).

Why would judges reason in such a fragmented and incomplete way? The political scientist Charles Lindblom suggested an answer nearly fifty years ago (Lindblom 1988a). In

theory, Lindblom observed, policymakers are expected to formulate plans in a comprehensive

fashion, clearly identifying their objectives and carefully comparing every alternative means of

action. Yet in practice, Lindblom argued, comprehensive policy formulation is almost never

performed. Policymaking cannot begin with the ranking of goals because the necessary

consensus on political ends usually does not exist and cannot be manufactured. With high-level

agreement practically impossible, policymakers seek agreement on a more concrete plane: they

limit their attention to policy alternatives that differ only slightly from the status quo, thereby

reducing debate to a narrow set of marginal comparisons. Rather than developing a

comprehensive account of the best policy option, policymakers simply muddle through, making

whatever limited judgments the prevailing conditions of incomplete information and partial

agreement will allow.

    According to Lindblom, policymaking decisions do not flow strictly from the logical

application of pre-existing principles – a result that falls far short of meeting the expectations for

principled reasoning that are shared by Rawls and the conventional understanding of judicial

decisionmaking. The problem here is, as Lindblom suggests, with the expectation that principled

reasoning will always be performed.[6] Policymakers for the most part cannot deal with uncertain,

conflict-laden issues except by muddling through them, regardless of what others might expect

policymakers to do.

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[6] As Lindblom wrote twenty years after the publication of his original article, "I have never
understood why incrementalism in its various forms has come to so prominent place in the policy
making literature. [My original] article has been reprinted in roughly forty anthologies. I always
thought that, although some purpose was served by clarifying incremental strategies of policy
analysis and policy making, to do so was only to add a touch of articulation and organization to
ideas already in wide circulation. Nor have I well understood the frequency with which
incremental analysis as a norm is resisted. That complex problems cannot be completely
analyzed and that we therefore require strategies for skillful incompleteness still seem close to
obvious to me" (Lindblom 1988b: 257).

In this vein, one could argue that piecemeal judicial opinions are often the only effective kind of judicial decisions possible under conditions of disagreement and limited information. Members of the bench may try to ignore such political limits and, in doing so, they may consistently strive to apply general principles to concrete controversies. But decisions that ignore political context are unlikely to be actual successes (Rosenberg 1991). If judges want to be (and understand how to be) effective, they will see that judicial action is bound up with political circumstance. When the political context is fragmented and in flux, the conventional ideal of principled judicial decisionmaking will be put aside for the sake of acceptable settlements, as the practical task of resolving disputes crowds out the aspiration for carefully reasoned legal judgment. As Edward Levi once put it, "The pretense is that the law is a system of known rules applied by a judge…. [Yet in] an important sense legal rules are never clear, and if a rule had to be clear before it could be imposed, society would be impossible" (Levi 1949: 1).

If one considers judicial action as an exercise in the logical application of general principles to specific controversies, then any judicial process that proceeds from one ambiguous decision to another is a disaster. But, as we have suggested, there are reasons to believe that consistency and completeness are not the standards against which the judicial process should be measured in the first place. Although it may lack logical elegance and rigor, a legal system in which the rules are incomplete and in flux is "the only kind of system which will work when people do not agree completely" (Levi 1949: 104).

Indeed, the case for incomplete reasoning by judges may be strongest at the level of the Supreme Court – the very institution that Rawls deemed the principal exemplar of public reason. As Cass Sunstein notes, the issues before the Court are often deeply controversial, with no clear consensus on how to proceed and contradictory information on the consequences of alternative

approaches. Mired in disagreement and uncertainty, members of the Court may find it difficult

to reach consensus on comprehensive conclusions. Even if judicial consensus can be achieved,

sweeping decisions may be nothing more than stabs in the dark that yield unintended and

unfortunate consequences. The high cost of reaching broad agreement, coupled with the risk of

making blunders, leads members of the Court to incremental rulings – a practice Sunstein calls

"decisional minimalism" (Sunstein 1999: 4; see also Sunstein 1996). Hobbled by conflict and

poor information, the minimalist justices choose to forego the forced resolution of fundamental

issues and to settle instead for agreement on a few particulars. Judicial minimalism is valuable,

Sunstein argues, because it facilitates political accommodation on the Court in times of conflict

and uncertainty. Instead of seeking broad settlements, the minimalist members of the Court "ask

that decisions be *narrow rather than wide*. They decide the case at hand; they do not decide

other cases too, except to the extent that one decision bears on other cases, unless they are pretty

much forced to do so" (Sunstein 1999:10, emphasis original). Moreover, minimalist justices

"generally try to avoid issues of basic principle. They want to allow people who disagree on the

deepest issues to converge. In this way they attempt to reach *incompletely theorized*

agreements" (Sunstein 1999:11, emphasis original). Minimalists thus serve the "great goal" of a

free society, "making agreement possible when agreement is necessary, and making agreement

unnecessary when it is impossible" (Sunstein 1999:50).

As Sunstein argues, incomplete judicial decisions are not only a result of the Court's

adaptation to conditions of uncertainty and conflict, but also a potential means for creating the

ground on which uncertainty and conflict may be overcome. Political actors may accept narrow,

thinly justified judicial decisions because such decisions create a flexible framework in which

political argument can continue to unfold (Henderson 2007). It remains true, of course, that in

any given legal dispute each party will prefer a ruling in its favor. And it is also true that in any

given decision the Court will in fact declare one party the winner. But the Court often does so by

leaving many dimensions of the dispute open and the principled underpinning of the opinion

incomplete. As a consequence, the Court rewards victorious litigants with less than they might

have won and divests defeated litigants of less than they might have lost. Both winner and loser

might have done better, but they also could have done worse. Moreover, both winner and loser

are left with a flexible legal framework that over time can be invoked to meet different demands,

adapted to address developing disputes, and called upon to mobilize political action. In this way,

the ambiguous, fragmented decision that the Court develops in response to its own confrontation

with disagreement may end up creating new opportunities for reasoning toward consensus.[7]

The above-described sequence will unfold, of course, only if piecemeal decisions actually

do *in fact* stimulate deliberation. Without deliberation developing and refining the terms of

ambiguous judicial decisions, these decisions remain localized responses to specific conditions

of disagreement, merely temporary settlements dependent on the parties in the case and the

justices on the bench. Such results may pacify disputants in the short term – and this may be all

the Court can do under the circumstance that it operates. Yet without deliberation, judicial

decisions will not lead to the development of principled agreement capable of producing lasting

resolutions of conflicts. Reasoning will be on display, but no consensus will be produced.

For the purposes of this paper, however, we are less interested in the Court's reasoning in

and of itself. Instead, our goal is to consider whether the Court's model of incompletely

theorized reasoning extends into the public domain of democratic deliberation. A court may

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[7] Rawls seems to accept a version of this argument about how a modus vivendi may lead to
overlapping consensus, but he sees it as developing over the course of long periods of time
(Rawls 2005:159ff.)

allow parties with deep differences to converge by issuing narrow, incremental decisions that

everyone can live with: "making agreement possible when agreement is necessary, and making

agreement unnecessary when it is impossible." For such a form of dispute management to work

in the public domain, disputants need to agree wherever possible (such as in the case of

commonly held ideals and values) and implicitly refrain from addressing those issues where

agreement seems impossible (such as, ideals and values that are group-specific). Thus,

disputants have to agree to a set of baseline values that each of them can and does adhere to,

even though they are aware of their disagreements with other parties about values and ideals that

are specific to their group. Such an agreement would necessarily be limited and amorphous,

unlike Rawls's elaborately worked-out "principles of justice." In addition, they would be

expressed in incomplete, messy, and not fully-reasoned terms. Such agreements would also *co-exist* with conflict about larger differences, which are cold-bloodedly bracketed out in the case of

a Rawlsian public reason.

The conditions necessary for the use of incomplete and ambiguous reasoning by the

public prevail in contemporary America. That is, there is in the American polity a common set

of values *and* a set of radical disputes that defy the methods and rules of textbook public

reasoning. In Part II below, we begin with a discussion of the "American Dream" – a set of

highly flexible ideals that "make agreement possible" because they are shared by a majority of

Americans. We extend the discussion in Part III, where we examine the SSM debate and

consider the ramifications of appealing to the American Dream in radical disputes like SSM.

PART II

Americans constitute a community of people who share the same ideals about American political culture (Huntington 1981). They have always "imagined" (the term is Benedict Andersen's [1983]) themselves as a community, not in terms of race, ethnicity, language, religion (although at various points, these elements of national identity have been important for some groups in the U.S.) but, instead, in terms of a "civil religion" (Bellah 1967; Wilcox and Larso 2006; Fowler et al 2004). Bellah (1967) has clarified the concept of civil religion by pointing out how religion is always a background condition in American public life. It ties the nation to a higher purpose that echoes John Winthrop's call to create a "city upon a hill" in America,[8] "a promised land," an "American Israel," a "beacon of hope" for the rest of the world, where everyone is free – in general – but particularly free to pursue the religion of their choice. In this sense the national purpose is divine, although it is not associated with any particular form of divinity, institutionalized religion, or even any given, specific, God. For Bellah, this American civil religion derives from the "words and acts of the founding fathers" and is expressed in a "set of beliefs, symbols, and rituals" that symbolize the "religious dimension for the whole fabric of American life" (Bellah 1967).

Thus, a set of values characterize American national identity. This set of values are best represented in the contemporary notion of the American Dream which encompasses individualism, equal opportunity, and the idea of "success" (Hochschild 1995; Cullen 2003; Jillson 2004; Ghosh 2008). Schildkraut (2007) has discovered that a "broad range of constitutive norms define being American" thus confirming that "multiple traditions" (Smith 1997) inform American national identity. She thereby documents an account of American national identity

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[8] There are many "Americas." Here, we use the word interchangeably with the "United States."

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that counters other studies that point out the pervasive influence of liberalism in the U.S. (Citrin et al 1994; Feldman 1988; Lipset 1963; McClosky and Zaller 1984). Yet, although these multiple traditions do exist, favorable dispositions toward the values of the American Dream are ubiquitous in America. Various surveys, questionnaires, interviews have routinely testified to the fact that most Americans, regardless of what socioeconomic locus they occupy, believe in (or demonstrate a fondness for) the dicta of the Dream (Hochschild 1995; Scott and Leonhardt 2005; Cullen 2003; Jillson 2004; Citrin et al. 1994).

For instance, in 1994, Citrin et al. reported: "The pervasive agreement that getting ahead on one's own is important in making one a 'true American' reflects the country's persistent cultural emphasis on individual achievement. Polls typically show that two-thirds of both white and black Americans believe that hard work will lead to success and that people should strive hard to get ahead" (Citrin et al. 1994: 14). Belief in the ideal that hard work will lead to success is pervasive in America. It traces its roots back to the founding values of the nation (Ghosh 2008), in the Puritan injunction to work hard and dedicate oneself to one's "calling" (Weber 2002; Tawney 1926; Poggi 1983; Morgan 1965; Marshall 1982; Dunn 1969).

Diverse accounts of the Dream exist (Adams 1931; Tebbel 1963; Nackenoff 1994; Hochschild 1995; Cullen 2003; Jillson 2004) but few offer a comprehensive disambiguation of this incompletely theorized concept. One definition of the Dream is:

> *Ceteris paribus*, the American Dream is the belief or hope that in America every individual possesses (or ought to possess) an equal opportunity to succeed in life, regardless of how she defines success for herself. (Ghosh 2008)

This definition captures the "deep structures" (Frohock 1978) of the Dream but refuses to stipulate the exact nature of the individualism, equal opportunity, and success that are celebrated

in the American Dream. Indeed, each of these terms admits of multiple interpretations. This particular characteristic of the American Dream – that its constitutive elements can accommodate a diverse range of meanings – disallows any complete theorization of the concept. The American Dream is, therefore, always an ambiguous set of ideals that nonetheless represent some of Americans' core beliefs.

Political leaders have dramatically increased their use of the rhetoric of the American Dream in late 20th-century America in part because Dream rhetoric can serve the politically useful purpose of bridging divides between groups (Ghosh 2008). The Dream offers a universal promise of democratic inclusion that addresses contemporary America's growing heterogeneity, particularly during the last four decades - a period marked by the ascendance of identity politics and open immigration. Its constitutive elements – individualism, equal opportunity, and success – are each open to rival interpretations, which makes the Dream appealing for most people irrespective of their ascriptive identities and ideological predilections, thus making the Dream an ideal candidate for a rhetoric of inclusion (particularly since 1965) in the aftermath of the civil rights, feminist, and gay rights movements, and in a period characterized by open immigration policies.

Consider some of the multiple interpretations that may be given to each of these elements: Individualism ranges from atomistic to moral individualism to individuality, which emphasizes autonomy and creativity; belief in equal opportunity implies the affirmation of both level starting points and equal outcomes; success, too, is open to plural interpretations including but not limited to material success, celebrity status, and even living in the suburbs. In addition, success can be private or public, in the sense that when political leaders speak of success they might refer to the success of the individual (as in, say, upward mobility or immigration) or they

might choose to refer to the success of the collective (as in, say, widespread opportunities, suburban bliss, abundance, and so on) (Ghosh 2008).

These ambiguities make the Dream sufficiently flexible for a wide variety of groups to find the Dream attractive because they supply each group something they can find appealing about the Dream although they might reject competing interpretations of the Dream. Thus, the American Dream provides some baseline commonality of ideals that most Americans share.

For our purposes, we are interested in finding out the following: When it comes to management of radical disputes, does adherence to the ideals of the American Dream translate into "making agreement possible when agreement is necessary, and making agreement unnecessary when it is impossible"? That is, do parties to a radical dispute actually frame their arguments by drawing from this shared set of values that everyone can, and wants to, live with? If this is the case, then we can conclude that there is some hope of dispute management – even in radical settings – that uses a shared set of incomplete and partially theorized set of ideals as a shared language to frame arguments. In order to examine whether this is what, in fact, goes on in the real world of radial disputes, we now turn in Part III to our case study: the SSM debate that has polarized the American electorate in recent years.

Part III

The Same-Sex Marriage Debate as a Radical Dispute

Radical disputes are disputes among constituencies divided by deep differences that relate to their comprehensive beliefs about their sense of self and their purpose in this world (Luker 1984). Typically, such deep differences are animated by constituencies' religious beliefs

(Frohock 2006; Owen 2001; Fish 1997a; 1997b). What makes these differences deep is the

seemingly non-negotiable nature of the core beliefs of the contending parties. Examples of these

deep differences include belief in the practices of animal sacrifice in religious ceremonies,

veiling, female genital mutilation, and abortion. Giving up on such practices constitutes, for

these parties, giving up an important sense of their self and, therefore, a major loss of their

identity and indeed their reason for being.

There is evident disagreement about SSM in the United States today. Indeed, most

opinion polls indicate that substantial numbers of Americans have preferences both for and

against SSM. That is, neither support nor hostility toward SSM is a fringe opinion. For instance,

a June 2008 CBS poll shows that although Americans' views on gay marriage are changing, they

nonetheless remain polarized around this issue. Most Americans think there should be some

form of legal recognition for same-sex couples. Yet, about 30% think this recognition should be

in the form of SSM while about 36% think there should be no recognition at all for gay and

lesbian couples (*CBS News* 2008). According to a May 2008 poll conducted by the Pew

Research Center, 49% of Americans are against SSM while 38% favor gay marriages (Pew

Research Center 2008). A Quinnipiac University Polling Institute national poll released in July

2008 indicates that "given three choices, 32 percent of American voters say same-sex couples

should be allowed to marry while 33 percent support civil unions for same-sex couples and 29

percent say there should be no legal recognition for same-sex couples" (Quinnipiac University

2008).

The disagreement over SSM is deeper than the polls numbers suggest. There is the sort

of moral outrage (Morone 2003: 4) in the debate that has marked "clash of cultural values"

disputes throughout American history. Anti-SSM advocates argue that SSM will lead to society's

ruination, while pro-SSM advocates argue that denying SSM is a constitution-killing civil rights violation. In other words, the SSM debate has traits of a radical dispute.

More specifically, one can say that the SSM debate is a radical dispute because in it disputants start from entirely different premises about the meaning and purpose of marriage, sexuality, and family. Consider, first, the views of the opponents of SSM. Gerstmann has pointed out that there are four general categories of reasons that deny SSM: definition, tradition, and religion; natural law; the equation of marriage with procreation and child rearing; and moral disapproval of homosexuality and the question of government endorsement (2008: 21-47; Cf. Cohen 2004).[9] For some of these opponents of SSM, the definition of marriage is entirely non-negotiable. It is necessarily an institution that represents a union between a man and a woman. According to some, particularly those who draw from natural law theory, this union represents two lives that are conjoined around the biological function of reproduction, friendship, and a sense of community between a man and a woman (Finnis 1994; 1997; Lee and George 1997). Without an insistence on such a reproduction-oriented view of marriage, these groups are unable to make sense of what marriage could possibly mean. Others view SSM as an assault on the traditional family structure. They are appalled at the suggestion that what they view as aberrant sexual behavior might be given recognition and legitimacy through a radically new and inclusive

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[9] Sean Cahill, Director of the National Gay and Lesbian Task Force Policy Institute, has usefully compiled the following list of arguments proposed against SSM: allowing gay couples to marry will damage or destroy the institution of marriage; gay relationships are unhealthy; gay relationships are unsafe; because gay people and their relationships are unhealthy and destructive they are a drain on the economy; gay parenting is a looming threat that endangers children and society; gay parents are more likely to abuse their children; gay men are more likely to be pedophiles; gay marriage is a threat to religious freedom: religions will be forced to recognize and sanction gay unions; gay rights advances are akin to terrorism; SSM signals the breakdown of society and is part of a satanic plot to destroy civilization; gay couples do not need the legal protections of marriage; gay people already get married; gays seek to legalize polygamy or group marriage; gay marriage threatens accepted gender roles and will lead to a decline in the population (Cahill 2004: 26-42).

definition of marriage (The Center for Public Justice 2003; Dobson 2007). Those who invoke tradition as an argument against SSM claim that traditional ways of life posit marriage as heterosexual and therefore SSM is intolerable (Duncan 1994; Dupuis 2002; Hull 2006; Rimmerman & Wilcox 2007). Finally, religious arguments against SSM stem from a condemnation of homosexuality itself and submit that any homosexual behavior is inherently immoral (The Pew Forum on Religious and Public Life 2008). SSM, on this view, is out of the question, given that homosexual behavior itself goes against the Scriptures and the word of a Judeo-Christian God (American Family Association 2003-2005; Wildmon 2004).

Proponents of SSM deny each one of the claims made by SSM opponents. Although most of these assertions in this back-and-forth debate admit of some form of reasoning based on evidentiary rules, the assertions at their very core they represent a set of beliefs that opponents to SSM have and proponents of SSM deny. At the end of the day, both parties speak without the use of reason, particularly as it is celebrated in Rawls. Indeed, most disputants do not seek evidence to be persuaded about what they already claim to know and believe about SSM.

Denying the legitimacy of the anti-SSM arguments, some advocates of SSM argue that marriage is a right to a contract that should be granted to all mutually consenting couples. Others argue that it is more than a right, and that is a celebration of same-sex couples' love and commitment for one another and social and cultural recognition (Pinello 2006; Hull 2006). On such a view, a denial of the right to marry to any two individuals who are in love, and are committed to being with each other for their entire lives, is incomprehensible.

Pro-SSM activists avoid stipulating the gender identity of the parties to a marriage contract and refrain from talking about the biological function of reproduction as essential to marriage. For them, marriage is a not necessarily a union between a man and a woman. Against

the reproduction and "biological unity" view of marriage, proponents of SSM argue that this narrow, tenuous claim is insupportable because a range of marriages do not admit of the possibility of reproduction for a variety of reasons including physical barriers between partners (such as in the case of marriages where one contracting party is in prison), or incapacity (as in the case of older couples who are incapable of being sexually active), or even infertility (cases where one of the partners to a marriage is infertile).

Furthermore, given their core beliefs about the meaning and purpose of marriage, some of these advocates are entirely unable to see why reproduction and heterosexual, procreative acts should be an essential component of marriage. In addition, these advocates of SSM do not adhere to the "tradition" argument against SSM and claim that just because something has been a tradition does not mean it is also legitimate. For them, even if marriage has been exclusionary in the past, there is no reason for it to remain so in the future.

Thus, there are deep differences between proponents and opponents of SSM about the meaning of marriage, sexuality, and family. Given these deep differences, it is not surprising to find that they often talk past one another and do not use the language of public reason that is celebrated in Rawls in order to arrive at a resolution of the conflict. In other words, these disputants do not behave "reasonably" with respect each other. They assume their respective positions to be so fundamentally different that resolution appears to be impossible. Under these circumstances, the only way out of the impasse, for most, seems to reside in coming up with some way to stamp out the antagonistic party's beliefs by fiat. Thus, as far as their understanding of the meaning and purpose of marriage is concerned, each side views its position as non-negotiable. Under such circumstances, democratic deliberation and public reason is unlikely to yield resolutions to the conflict as "overlapping consensus" is the last thing one

expects to find among these radical disputants. Oddly, therefore, public reason fails exactly where it is most necessary.

Is there another form of reasoning, even if it is partial and incomplete, that might serve as a medium to arrive at resolutions that parties to this dispute can live with? As pointed out above, this will require some baseline agreement among contending parties with regard to certain ideals, such as those of the American Dream. Given the fact of a broad consensus about the American Dream, we are interested in examining here how this consensus might inform the radical SSM debate, and whether or not any possibility of resolution might exist in that sphere of ambiguous reasoning.

Same-Sex Marriage Disputants and the Ideals of the American Dream

Our research indicates that both parties to the dispute rely on tenets of the American Dream to articulate their positions. To be sure, these are not the only voices present. Yet two features of the American Dream are particularly relevant to the SSM debate. The first is the Dream's explicit relationship with social and racial justice and inclusion (Hochschild 1995; Hochschild and Scovronick 2003; also see Cullen 2003; Jillson 2004; Ghosh 2008); the American Dream trope permeated the rhetoric of Reverend Martin Luther King Jr. culminating most famously in his "I Have a Dream" speech. According to King: "We are simply seeking to bring into full realization the American Dream – a Dream yet unfulfilled. A Dream of equality of opportunity, of privilege and property widely distributed; a Dream of a land where men no longer argue that the color of a man's skin determines the content of his character" (King, quoted in Cullen 2003: 126).

The second attribute relevant for this discussion is the Dream's insistence on a level playing field (Hochschild 1995; Hochschild and Scovronick 2003; also see Cullen 2003; Jillson 2004; Ghosh 2008). The Dream is agnostic about the specific identity of the individual. America, the Dream insists, offers a level playing field to absolutely any individual, regardless of her identity, to achieve some form of success. Opportunities, on this view, are widely and equally distributed and nobody is left out or discriminated against, on the basis of their identity, some inherited characteristic, or accident of birth. Among believers in the American Dream, anyone appearing to be accorded special treatment is looked down upon because they violate the very notions of fairness and justice the American Dream celebrates. Americans of virtually any political persuasion agree on the ideal of a level playing field. It is the abiding metaphor of American political life.

Many proponents of SSM draw directly on the American Dream's relationship to social and racial inclusion, comparing SSM with the Civil Rights movement and analogizing the denial of marriage rights to LGBTs with Jim Crow laws and the proscription of interracial marriage (outlawed in *Loving v. Virginia* 1967) (Strasser 2004; Chauncey 2004; Eskridge 2002; Goldberg-Hiller 2002; Bonauto 2003). This view is reaffirmed in the *Goodridge* decision which cites the creation of "second class citizens" in reaching its conclusions. The court held that the Massachusetts Constitution "affirms the dignity and equality of all individuals," and "forbids the creation of second-class citizens." Thus, Bonauto (2003) has contended that ending the exclusion of gay and lesbian couples from civil marriage would honor the letter and spirit of Constitution. Additionally, as with other civil rights movements, it would acknowledge that gay and lesbian people and families already are part of the civil community.

Within this trope of social and political inclusion, there are two broad genres of arguments within the pro-SSM position that draw from the American Dream. The first relies upon an abstract individualism while the other builds on a group-specific point of view. The first set of arguments proposes that the opportunity to marry should be granted to all members of the political community regardless of their color, creed, sexual orientation, gender identity, religion, or socioeconomic class. These proponents of SSM who rely on abstract individualism assume the position that every individual should have an opportunity to marry whoever they wish to as long as the partner concerned is a consenting adult. On this view, SSM is taken not simply as a right but also, and perhaps more importantly, as an opportunity to lead a life marked by recognition and respect that heterosexuals enjoy as a matter of fact (Pinello 2006; Eskridge 2002). The question here turns not so much on the issue of having a right but instead on having access to marriage. This argument is analogous to Judith Shklar's (1991) thesis on the inclusion of African-Americans within American society in which she points out that the rights to work and vote are essential for political and social inclusion and, therefore, anyone deprived of these rights are essentially deprived of full citizenship in America including social and cultural recognition (Hull 2006). When LGBTs are denied the right to marry, the argument proceeds, they are denied access to full citizenship in a manner that runs counter to the promise of the American Dream. The Dream promises that opportunities for success should be equally available for anyone regardless of her identity. It further stipulates that an individual is allowed to define success for herself (Hochschild 1995). Therefore, if a member of the LGBT community sees herself as successful only in a marital relationship, denying that individual this opportunity is tantamount to denying her a shot at her American Dream.

The second genre of arguments in favor of SSM considers it to be a group-specific right that has been historically denied to LGBT people. These proponents of SSM who view it as a group-specific right also draw their rhetoric from the American Dream of social justice and inclusion. They argue that, as a group, LGBTs have been historically denied the opportunity to marry. This denial runs counter to the American Dream's promise of equal opportunity for all. Just as African-Americans were denied full inclusion in mainstream American society by a system of formal segregation, which denied equal opportunity, LGBTs are also excluded from mainstream American society by being denied an equal opportunity to marry.

The American Dream, however, is not the sole prerogative of advocates of SSM. Dream language is also used by opponents of SSM. These activists, typically belonging to the religious right, insist on the American Dream of a level playing field by articulating their opposition to SSM as a question of "special rights" for a particular group of Americans (McKissick 2006; Savage 2006). For these individuals, allowing SSM marriage is a way to offer, in the domain of marriage, preferential treatment to a group of people who already have a right to marry (a person of the opposite sex), and, in addition, are seeking the right to marry a person of the same sex. These opponents to SSM argue that the equal distribution of the right to marry is not open to doubt or question. All individuals have the fundamental right to marry a person of the opposite sex. The dispute arises only when an individual insists on marrying a person of the same sex. That is, those individuals – in this case, LGBT people – who wish to marry a person of the same sex are asking for special privileges and an extra set of group-specific rights over and above the equal right to marry they possess in common with others. Thus, Jan LaRue, Chief Counsel for Concerned Women of America, argues that: "homosexuals are seeking a special right. They already have the same right to marry the rest of us have-the right to marry a person of the

opposite sex. Limiting marriage to one man and one woman doesn't discriminate on the basis of sex or sexual orientation" (LaRue 2003).

President George W. Bush, widely known for his sympathy for the religious right, and a supporter of a federal ban on SSM, also thinks that "sexual orientation non-discrimination laws represent 'special rights'" (Cahill 2004: 72). The "special rights" discourse is ubiquitous among religious conservatives. In South Bend, IN, an anti-gay rights group organized to "defend traditional marriage as between one man and one woman" goes by the name of "No Special Rights" (http://www.nospecialrights.net/indiana_defense_marriage.html). Similarly, in early 2008, an anti-gay rights group in Maine, the Christian Civic League initiated a referendum banning SSM. The central question posed in the referendum is: "Do you want to protect traditional marriage and eliminate *special* rights laws in Maine?" (Russell 2008; emphasis added). On the Christian Civic League's website, executive director Michael Heath states: "It is time for another referendum on gay rights. We have been licking our wounds long enough. I'm not going to sit by doing nothing really meaningful and watch either the courts or the legislature further advance special rights for homosexuality" (Heath 2008). Public Agenda, the non-partisan opinion research and civic engagement organization offers a useful synopsis of the disagreement:

> Gay rights activists say it's a matter of equality: They suggest that homosexuals should have the same rights and protections as heterosexuals… Others, though, say special rights shouldn't be granted on the basis of behavior – particularly one that many Americans find offensive. And some say that current laws are adequate to protect all Americans, regardless of their sexual orientation. (Public Agenda 2008)

The entire discourse on special rights in relation to SSM is predicated on the tacit assumption that special rights are somehow inherently wrong. Here is the structure of the argument: "SSM is a special right. Therefore, SSM should be prohibited." But this is not a valid

argument unless we also accept that special rights are bad for America. It is this latter, enthymematic premise of the argument that special rights are bad for America that draws from the American Dream's explicit commitment to a level playing field, in which any special rights, preferences, or privileges are intolerable.

Each side of the SSM dispute thus invokes its own version of the American Dream and they do so while each seemingly referring to the same ideals. For proponents of SSM, the only way a level playing field can be guaranteed is by making marriage inclusive. Thus exclusion from marriage counts as a systematic marginalization of the LGBT community, just as segregation laws and the institution of "separate but equal" facilities systematically marginalized African-Americans from the American Dream of equal opportunity. Proponents therefore view the American Dream as a work-in-progress and one that is rooted in the idea of progressive inclusion. Opponents, on the other hand present, their own version of the American Dream of a level playing field in which the Dream is already a reality. According this view, the introduction of SSM will dismantle the American Dream as it already exists in the U.S. by *unleveling* the playing field in the domain of marriage. This conservative worldview wishes to preserve the status quo and argues that there already exists an equal opportunity to marry. Any new kind of marriage simply makes a new right available to some while denying them to others.

The different versions are ambiguous in the sense that they rely on key terms open to multiple meanings. For one group the Dream is yet to be achieved while for the other the Dream is already a reality and any changes to the status quo violates the Dream's ideals. Because the American Dream can accommodate an extraordinary range of meanings, both sides to the SSM dispute can appropriate Dream language and demonstrate a belief in its ideals while disagreeing about what elements of the Dream lie at its core. Dream language, thus, affords both consensus

(belief in the ideal of a level playing field) and disagreement (what a level playing field actually entails).

Furthermore, the versions of the American Dream that SSM disputants present are incomplete. The American Dream encompasses ideas that go beyond a level playing field and equal opportunity, including notions of hard work and playing by the rules (Ghosh 2008). Yet, when SSM disputants invoke the values of the Dream, they always do so selectively, appropriating only those elements of the Dream that strengthen (or seemingly strengthen) their efforts to mobilize support. Thus, each side presents its own partial account of what constitutes a level playing in America that simultaneously refrains both from elaborating why the opposing side's account is inaccurate and from developing a completely worked out model of their understanding of the Dream.

Incomplete and ambiguous versions of the American Dream are useful for attracting the support of larger publics because they ask that individuals accept an account of the Dream without also requiring acceptance of the specific and highly controversial moral views that underlie that account. The ideas and themes of the Dream thus provide a means of brokering temporary alliances. Moreover, and more importantly, theses ideas and themes offer the potential of moving disputants toward genuine dialogue – a dialogue that does not yet seem to have occurred.

A movement toward a common and complete vision of the American Dream from both parties to the SSM debate would present an opportunity for these disputants to clarify each of their positions in relation to the other and would allow them to talk *to* each other as opposed to *past* one another. Such a movement would invite SSM disputants to a dialogue about practical policymaking and the possibilities of deeper agreement. Presumably, such a movement would

entail SSM proponents and opponents offering elaborations of what exactly constitutes a level playing field of marriage. For instance, advocates of SSM might offer a discussion about why they believe there is no existing level playing field in marriage. And opponents might explain why this is not the case. If the debate were to proceed to a discussion of what constitutes a level playing field in marriage, the two contending parties might move forward from the assertion of mutually inconsistent beliefs about marriage, sexuality, and family, toward a debate organized around commonly held ideas. Yet this has not happened – nor does the model of American public reason give us much hope that it would. By continuing to refuse to elaborate exactly what constitutes a level playing field in marriage, and yet by obliquely referring to it, the opposing parties have simply ended up re-packaging and sustaining the conflicts that animate the SSM dispute.

Conclusion

In this paper, we have discussed the role of public reason in American politics. We began by invoking Rawls's exemplar of public reason, the Supreme Court, and discussed how the high bench deploys ambiguous, incompletely theorized arguments as it adjudicates radical disputes. We then hypothesized that this same kind of reasoning might be possible in the public domain where ordinary citizens can rely on a shared yet flexible set of ideals to articulate claims in the context of deep disagreement. We argued that the American Dream supplies such a set of shared, highly flexible ideals. In the final section of this paper we focused on how participants in the real-world radical dispute over SSM rely on ambiguous, incomplete appeals to the American

Dream that mirror the sort of incompletely theorized forms of reasoning used by Supreme Court justices.

Our analysis has led us to a conclusion that is both optimistic and critical of such reasoning's power. We have demonstrated how a movement toward a common understanding of a level playing field in marriage might bring SSM disputants closer to agreement. But we have also pointed out that so far SSM disputants have refrained from offering such a common understanding of the American Dream. Thus, although public reasoning (as we understand it), particularly with regard to the American Dream, has the potential to generate some form of consensus and agreement, we also find that it is not inevitable that this occurs. Parties to the SSM dispute may continue to invoke the ideals of the American Dream in making their arguments, without articulating a common understanding of what the Dream entails. They can, thereby, sustain the dispute by continuing to talk past one another strenuously reasoning on the basis of shared ideals without getting any closer to substantive agreement.

References

Adams, James Truslow. (1931) *The Epic of America*. Boston: Little, Brown & Co.

Anderson, Benedict. (1983) *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. New York: Verso.

American Family Association. (2003-2005) "Please Help Preserve the Traditional Judeo-Christian Institution of Marriage." Available at http://www.nogaymarriage.com/default.asp; last accessed April 1, 2008.

Artz, Lee and Bren Ortega Murphy. (2000) *Cultural Hegemony in the United States*. Thousand Oaks, CA: Sage.

Bellah, Robert N. (1967) "Civil Religion in America," *Daedalus: Religion in America* 96(1): 1-21.

Bonauto, Mary L. (2003) "Civil Marriage as a Locus of Civil Rights Struggles," 30(3) *Human Rights*.

Bybee, Keith J. (2001) "The Jurisprudence of Uncertainty," 35 *Law and Society Review*. 943-56.

Cahill, Sean. (2004) *Same-Sex Marriage in the United States: Focus on the Facts*. New York: Lexington.

The Center for Public Justice. (2003) "Marriage and Homosexual Rights," October 20 *Capital Commentary*. Available at http://www.cpjustice.org/stories/storyReader$1114; last accessed April 1, 2008.

CBS News. (2008) "CBS Poll: Changing Views on Gay Marriage," June 15 *CBS News Polls*. Available at

http://www.cbsnews.com/stories/2008/06/13/opinion/polls/main4180335.shtml; last

accessed August 15, 2008.

Chauncey, George. (2004) *Why Marriage? The History Shaping Today's Debate*

Over Gay Equality. New York: Basic Books.

Citrin, Jack, Ernst Haas, Christopher Muste, and Beth Reingold. (1994) "Is American

Nationalism Changing? Implications for Foreign Policy." *International Studies Quarterly*

38(1): 1-31.

Cohen, Elizabeth F. (2004) "Contracted Out: LGBT Marriage and Citizenship,"

APD Workshop, University of Wisconsin, Madison. Available at

http://www.polisci.wisc.edu/users/coleman/apd/cohen.pdf; last accessed April 1, 2008.

[Cited with permission from author.]

Cullen, Jim. (2003) *The American Dream: A Short History of an Idea That*

Shaped a Nation. New York: Oxford.

Dobson, James, C. (2007) *Marriage Under Fire: Why We Must Win This Battle*.

Carol Stream, IL: Tyndale House.

Duncan, Richard F. (1994) "Who Wants to Stop the Church: Homosexual Rights

Legislation, Public Policy, and Religious Freedom," 69(3) *The Notre Dame*

Law Review.

Dunn, John. (1969) *The Political Thought of John Locke*. Cambridge:

Cambridge University Press.

Dupuis, Martin. (2002) *Same-Sex Marriage: Legal Mobilization, and the Politics of*

Rights. New York: Peter Lang.

Eskridge Jr., William N. (2002) *Equality Practice – Civil Unions and the Future of*

Gay Rights. New York: Routledge.

Estlund, D. (1993) "Who's Afraid of Deliberative Democracy?" *Texas Law Review* 71: 1437–
77.

Feldman, Stanley. (1988) "Structure and Consistency in Public Opinion: The Role of

Core Beliefs and Values." *American Journal of Political Science* 32(2): 416-460.

Finnis, John. (1994) "Law, Morality, and 'Sexual Orientation'," 69 *Notre Dame*

Law Review.

Fischer, William W., III (1991) "The Development of Modern American Legal Theory and the

Judicial Interpretation of the Bill of Rights," in M.J. Lacey and K. Haakonssen, eds., *A*

Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law, 1791 and 1991.

New York: Cambridge Univ. Press.

Fish, Stanley. (1997a) "Mission Impossible: Settling the Just Bounds between

Church and State," 97 *Columbia Law Review*. 2255-333.

————. (1997b) "Boutique Multiculturalism, or Why Liberals are Incapable

of Thinking about Hate Speech," 23(2) *Critical Inquiry*. 378-395.

Fowler, Robert Booth, Allen D. Hertzke, Laura R. Olson, and Kevin R. Den Dulk. (2004)

Religion and Politics in America: Faith, Culture, and Strategic Choices. Boulder, CO:

Westview.

Freeman, Samuel. (2000) "Deliberative Democracy: A Sympathetic Comment," *Philosophy and*

Public Affairs 29: 371–418.

Frohock, Fred. (1978) "The Structure of "Politics" *The American Political Science*

Review 72(3): 859-870.

—————-. (2006) *Bounded Divinities: Sacred Discourses in Pluralist*

Democracies. New York: Palgrave Macmillan.

Gerstmann, Evan. (2008) *Same-Sex Marriage and the Constitution*. 2nd ed. New York:

     Cambridge University Press.

Ghosh, Cyril. (2008) "The Politics of the American Dream: Locke and Puritan

     Thought Revisited in an Era of Open Immigration and Identity Politics," Ph.D.

     Dissertation, Syracuse University.

Goldberg-Hiller, Jonathan. (2002) *The Limits to Union: Same-Sex Marriage and*

     the Politics of Civil Rights. Ann Arbor: University of Michigan Press.

Grey, Thomas C. (1983) "Langdell's Orthodoxy," 45 *Univ. of Pittsburgh Law Rev.* 1-53.

Gutmann, Amy and Dennis Thompson. (1998) *Democracy and Disagreement*. Cambridge, MA:

     Belknap Press.

Hamilton, Alexander, James Madison, and John Jay. (1961) *The Federalist Papers*. New York:

     Penguin Books USA.

Heath, Michael. (2008) "Time for another referendum on gay rights,"

     March 31 *The Record*: Conservative Christian League of Maine. Available at

     http://www.cclmaine.org/artman/publish/index.shtml; last accessed

     April 1, 2008.

Henderson, M. Todd. 2007. "From Seriatim to Consensus and Back Again: A Theory of

Dissent," 2007 *Supreme Court Review*. 283-344.

Hochschild, Jennifer L. (19810 *What's Fair?: American Beliefs about Distributive*

     Justice. Cambridge, MA: Harvard University Press.

————-. (1995) *Facing up to the American Dream: Race, Class and*

     the Soul of the Nation. Princeton: Princeton University Press.

Hochschild Jennifer L. and Nathan Scovronick. (2003) *The American*

Dream and the Public Schools. New York: Oxford.

Hull, Kathleen E. (2006) *Same-Sex Marriage: The Cultural Politics of Love and Law*.

New York: Cambridge University Press.

Huntington, Samuel P. (1981) *American Politics: The Promise of Disharmony*.

Cambridge: Harvard.

Jillson, Calvin. (2004) *Pursuing the American Dream: Opportunity and*

Exclusion Over Four Centuries. Lawrence: Kansas.

Kluegel, James R. and Eliot R. Smith. (1982) "Whites' Beliefs About Blacks'

Opportunity," 47(4) *American Sociological Review*. 518-532.

LaRue, Jan. (2003) "Talking Points: Why Homosexual 'Marriage' is Wrong,"

Concerned Women for America. Available at

http://www.cwfa.org/articles/4589/LEGAL/family/index.htm; last accessed

April 1, 2008.

Lee, Patrick and Robert P. George. (1997) "What Sex Can Be: Self-Alienation,

Illusion, or One-Flesh Union," 42 *American Journal of Jurisprudence*.

Levi, Edward H. (1949) *An Introduction to Legal Reasoning*. Chicago: Univ. of Chicago Press.

Lindblom, Charles E. (1988a) "The Science of 'Muddling Through'," in C. E. Lindblom,

Democracy and Market System. Oslo: Norwegian Univ. Press. Originally published in

(1959) 19 *Public Administration Rev*. 78-88.

———. (1988b) "Still Muddling, Not Yet Through," in C. E. Lindblom, *Democracy and*

Market System. Oslo: Norwegian Univ. Press. Originally published in (1979) 39 *Public*

Administration Rev. 517-26.

Lipset, Seymour Martin. (1963) *The First New Nation: The United States in Historical*

and Comparative Perspective. New York: Basic Books.

Luker, Kristin. (1984). *Abortion and the Politics of Motherhood*. Berkeley: University of
    California Press.

Macedo, Steve. (1997) "In Defense of Liberal Public Reason: Are Slavery and Abortion Hard
    Cases?" *The American Journal of Jurisprudence* 42: 1–19.

Marshall, Gordon. (1982) *In Search of the Spirit of Capitalism: An Essay on
    Max Weber's Protestant Ethic Thesis*. London: Hutchinson.

Maveety, Nancy (1996) *Justice Sandra Day O'Connor: Strategist on the Supreme Court*. New
    York: Rowman & Littlefield.

McCloskey, Herbert, and John Zaller. (1984) *The American Ethos: Public Attitudes
    toward Capitalism and Democracy*. Cambridge: Harvard University Press.

McKissick, Drew. (2006) "Special Rights, Not Equal Rights." Available at
    http://www.drewmckissick.com/special_rights_not_equal_rights; last accessed April 1,
    2008.

Morgan, Edmund Sears. (1965) (Ed.) *Puritan Political Ideas - 1558-1794*.
    New York: Bobbs-Merrill.

Morone, James. (2003) *Hellfire Nation: The Politics of Sin in American History*.
    New Haven, CT: Yale University Press.

Nackenoff, Carol. (1994) *The Fictional Republic: Horatio Alger and American
    Political Discourse*. New York: Oxford.

 "No Special Rights." Available at http://www.nospecialrights.net/
    indiana_defense_marriage.html; last accessed April 1, 2008.

Owen, J. Judd. (2001) *Religion and the Demise of Liberal Rationalism: The*

Foundational Crisis of the Separation of Church and State. Chicago: University of

Chicago.

Peretti, Terri Jennings (1999) *In Defense of a Political Court*. Princeton: Princeton Univ. Press.

The Pew Forum on Religious and Public Life. (2008) "An Overview of the Same-

Sex Marriage Debate." Available at http://pewforum.org/docs/?DocID=288; last accessed

April 1, 2008.

The Pew Research Center. (2008) "Gay Marriage is Back on the Radar for Republicans,

Evangelicals." Available at http://pewresearch.org/pubs/868/gay-marriage; last accessed

August 15, 2008.

Pinello, Daniel R. (2006) *America's Struggle for Same-Sex Marriage*. New York:

Cambridge University Press.

Poggi, Gianfranco. (1983) *Calvinism and the Capitalist Spirit: Max Weber's Protestant Ethic*.

Amherst, MA: University of Massachusetts Press.

Public Agenda. (2008) "Gay Rights: Overview." Available at

http://www.publicagenda.org/issues/overview.cfm?issue_type=gay_rights;

last accessed April 1, 2008.

Quinnipiac University. (2008) "American Voters Oppose Same-Sex Marriage Quinnipiac

University National Poll Finds, But They Don't Want Government To Ban It." July 17.

Available at http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194; last accessed

August 15, 2008.

Rawls, John. (2005) *Political Liberalism*. Expanded edition. New York: Columbia University

Press.

Rimmerman, Craig A. & Clyde Wilcox. Ed. (2007) The Politics of Same-Sex Marriage.

Chicago: University of Chicago Press.

Russell, Eric. (2008) "League fighting gay rights in Maine," April 10 *Bangor Daily*

    News. Available at http://www.bangordailynews.com/news/t/

    news.aspx?articleid=162817&zoneid=5; last accessed April 15, 2008.

Samuelson, Robert. (1997) *The Good Life and its Discontents: The*

    American Dream in the Age of Entitlement: 1945-1995.

    New York: Random House.

Savage, Dan. (2006) "Same-Sex Marriage Wins by Losing," July 30

    The New York Times.

Scott, Janny and David Leonhardt. (2005) "Shadowy Lines that still Divide,"

    15 May *The New York Times*.

Schildkraut, Deborah J. (2007) "Defining American Identity in the Twenty-First Century:

    How Much "There" is There?" *The Journal of Politics* 69(3): 597-615.

Shklar, Judith. (1991) *American Citizenship – The Quest for Inclusion; The*

    Tanner Lecture on Human Values. Cambridge, MA: Harvard University Press.

Singer, Joseph William (1988) "Legal Realism Now," 76 *California Law Rev.* 465-544.

Smith, Rogers. (1997) *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*.

    New Haven: Yale University Press.

Strasser, Mark. (2004) "Lawrence, Same-Sex Marriage and the Constitution:

    What Is Protected and Why?," 38 *New England Law Review*. 667-81.

Sunstein, Cass R. (1996) *Legal Reasoning and Political Conflict*. New York: Oxford Univ.

    Press.

———. (1999) *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge:

Harvard University Press.

Tawney, R.H. (1926) *Religion and the Rise of Capitalism: A Historical Study*. New York:

Harcourt, Brace & Co.

Tebbel, John W. (1963) *From Rags to Riches: Horatio Alger, Jr., and The*

American Dream. New York: Macmillan.

Wasserstrom, Richard A. (1961) *The Judicial Decision: Toward a Theory of Legal Justification*.

Stanford: Stanford Univ. Press.

Weber, Max. (2002) *The Protestant Ethic and the Spirit of Capitalism*, trans. by

Peter Baehr and Gordon C. Wells. New York: Penguin.

Wechsler, Herbert. (1959) "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law*

Rev. 1-35.

Wilcox, Clyde and Carin Larso. (2006) *Onward Christian Soldiers?: The Religious Right in*

American Politics. Boulder, CO: Westview.

Wildmon, Don. (2004) "Consequences of same-sex 'marriage' will be

far-reaching," *American Family Association Journal*. Available at

http://www.afajournal.org/2004/april/404don.asp; last accessed April 1, 2008.