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# Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees

Mark Strasser\*

## I. INTRODUCTION

Recently, the state of Vermont recognized civil unions, a marriage-like status that affords qualifying same-sex couples all of the rights and responsibilities of marriage. Reactions to the creation of this status have ranged across a wide spectrum. Some suggest that Vermont has not gone far enough because the state might instead have permitted same-sex couples to marry;<sup>1</sup> others suggest that the state has struck exactly the right balance by affording same-sex couples the rights and responsibilities of marriage while at the same time reserving marriage for different-sex couples;<sup>2</sup> and still others suggest that the state has taken steps which will lead to the destruction of marriage and the family.<sup>3</sup> This range of reactions was not unexpected, and any other state considering the creation of civil union status should expect an equally broad range of views among its citizens, although the percentage of citizens holding any one view would presumably vary from state to state.

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1. See, e.g., Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 135 (2000) ("Not until same-sex couples obtain the freedom to marry will what remains 'a condition of legal inferiority' be lifted from us."); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 251 (2000) ("I believe that any parallel matrimonial system of domestic partnership would, by its very existence, be separate—and therefore unequal—because it would implicitly mark same-sex couples with a badge of inferiority.").

2. See generally Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (claiming that lesbian and gay couples have finally won equal marriage rights).

3. See generally Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729 (2000) (suggesting that the recognition of civil unions may lead to the recognition of same-sex marriage, which would hurt the institution of marriage).

There is no single explanation for the vastly differing reactions to same-sex unions, although it is safe to assume that those responses are based in part on differing views regarding the nature, meaning, and purposes of marriage. These views differ radically, both within and across perspectives. Thus, not only does Vermont's recognition of same-sex unions contradict the teachings of some religions regarding permissible and impermissible relationships, but also the teachings of some religions contradict the teachings of other religions regarding that subject. Recognizing that diversity of opinion exists both within and across perspectives is important, both because it undercuts the legitimacy of the claim that the same-sex marriage issue is basically a debate between religious and secular groups, and because this diversity of opinion may affect the relevant legal analysis.

Part II of this Article discusses the legal definitions of marriage offered in the various states, suggesting that too much should not be made of statutes which preclude same-sex marriage by definition rather than merely prohibit such unions. Both definitional preclusions and statutory prohibitions are subject to constitutional scrutiny, judges' and commentators' views to the contrary notwithstanding.<sup>4</sup> Part III discusses religious views concerning the permissibility of same-sex marriage, pointing out both that there is no unanimous view on this point and that, even if there was, the implications of such a consensus would hardly be as telling as has been suggested.<sup>5</sup> Part IV discusses whether the state is justified in enacting same-sex marriage bans to protect the religious sensibilities of some, arguing that Free Exercise guarantees preclude the state from maintaining a same-sex marriage ban without a showing of probable harm, even if such a recognition would offend some religious sensibilities.<sup>6</sup> The Article concludes by suggesting that the fact that some religions recognize same-sex marriage provides yet another ground upon which to establish that states cannot meet their burden in justifying same-sex marriage bans.<sup>7</sup>

## II. THE LEGAL DEFINITIONS AND PURPOSES OF MARRIAGE

A civil union is a marriage-like status that accords the rights and responsibilities of marriage to qualifying same-sex couples. An analysis of that status can be offered only after certain related issues are considered. First, do same-sex couples meet the legal definition of

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4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V.

marriage and, if not, what implications does this have? Second, could the legal functions and purposes of marriage be served even if both parties are of the same sex and, if so, what implications does this have?

### A. *The Legal Definition of Marriage*

Currently, no state permits same-sex couples to marry, although the statutes establishing that prohibition vary significantly. Some statutes define marriage as a union between a man and a woman,<sup>8</sup> others specify that only a marriage between a man and a woman will be valid,<sup>9</sup> while others specify that same-sex marriages are prohibited.<sup>10</sup> Consider the Minnesota Statute that reads, “[m]arriage, so far as its validity in law is concerned, is a civil contract between a man and a woman . . .”<sup>11</sup> or the Georgia Statute that reads, “[m]arriages between persons of the same sex are prohibited in this state.”<sup>12</sup> While both states refuse to permit same-sex marriages to be celebrated locally, it is not at all clear that either state claims that such unions are precluded by definition rather than simply prohibited by law.

The Georgia and Minnesota statutes might be contrasted with the Louisiana Statute, which reads, “[m]arriage is a legal relationship

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8. LA. CIV. CODE ANN. art. 86 (West 1999).

9. *See, e.g.*, HAW. REV. STAT. ANN. § 572-1 (Michie 1999) (“In order to make valid the marriage contract, which shall be only between a man and a woman . . .”); IND. CODE § 31-11-1-1(a) (1999) (“Only a female may marry a male. Only a male may marry a female.”); MINN. STAT. ANN. § 517.01 (West 1990 & Supp. 2001) (“Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman . . .”); WASH. REV. CODE ANN. § 26.04.010 (West Supp. 2001) (“Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.”).

10. GA. CODE ANN. § 19-3-3.1(a) (1997).

11. MINN. STAT. ANN. § 517.01 (West 1990 & Supp. 2001).

12. GA. CODE ANN. § 19-3-3.1(a); *see also* ALA. CODE § 30-1-19(b) (Lexis through 2001 legislation) (“A marriage contracted between individuals of the same sex is invalid in this state.”); ARIZ. REV. STAT. ANN. § 25-101(c) (West 2000) (“Marriage between persons of the same sex is void and prohibited.”); ARK. CODE ANN. § 9-11-109 (Michie 1998) (“A marriage between persons of the same sex is void.”); HAW. REV. STAT. ANN. § 572-1 (“A marriage between persons of the same sex is void.”); KY. REV. STAT. ANN. § 402.020(1) (Michie 1999) (“Marriage is prohibited and void: . . . [b]etween members of the same sex.”); ME. REV. STAT. ANN. tit. 19A, § 701(5) (West 1998) (“Persons of the same sex may not contract marriage.”); MICH. COMP. LAWS ANN. § 551.1 (West. Supp. 2001) (“A marriage contracted between individuals of the same sex is invalid in this state.”); MINN. STAT. ANN. § 517.03(a) (West Supp. 2001) (“The following marriages are prohibited: . . . a marriage between persons of the same sex.”); MONT. CODE ANN. § 40-1-401(1) (1999) (“The following marriages are prohibited: . . . a marriage between persons of the same sex.”); S.C. CODE ANN. § 20-1-15 (Law. Co-op 2001) (“A marriage between persons of the same sex is void ab initio and against the public policy of this State.”); UTAH CODE ANN. § 30-1-2 (2001) (“The following marriages are prohibited and declared void: . . . between persons of the same sex.”); VA. CODE ANN. § 20-45.2 (Michie 2000) (“A marriage between persons of the same sex is prohibited.”).

between a man and a woman that is created by civil contract.”<sup>13</sup> Rather than declare that certain individuals are prohibited from marrying or, perhaps, that they will be unable to enter into a valid marital contract, the Louisiana Statute provides a definition of marriage which by its very terms makes same-sex couples ineligible.<sup>14</sup>

At least one question raised by these different ways of precluding same-sex marriages is whether a legislature’s enactment of one statute rather than another would have different legal ramifications.<sup>15</sup> For example, it might be thought that a definition rather than a mere prohibition somehow represents the nature of things and thus is immune from constitutional attack. The courts have indeed offered this nature-of-things argument. Thus, when upholding the denial of a marriage license to two women in *Jones v. Hallahan*,<sup>16</sup> the Kentucky Court of Appeals suggested that the “appellants [were] prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.”<sup>17</sup> Here, the court implied that Kentucky *could not* have recognized a marriage of same-sex partners even if the legislature had thought it appropriate to do so,<sup>18</sup> because the “God of nature [had] made it otherwise.”<sup>19</sup> Had the Kentucky court not believed the legislature was somehow precluded from passing such a statute, the court would have admitted that the statutes of Kentucky (rather than the individuals’ sexes) prevented these

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13. LA. CIV. CODE ANN. art. 86.

14. *Id.* A separate question is how a state would treat a marriage involving a transsexual. For example, the state may define the person’s sex in terms of his or her anatomical and genetic position at birth. See *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (“At the time of birth, Christie was a male, both anatomically and genetically.”). If the person subsequently has a sex-change operation, then two individuals apparently of the same sex might nonetheless marry. See *Transsexual, Woman Marry*, ARIZ. REPUBLIC, Sept. 18, 2000, at A4, available at 2000 WL 8066040 (“A transsexual who was born a man has exchanged marital vows with a woman in a ceremony Saturday, taking advantage of a court ruling defining gender by chromosomes.”).

15. There are certain ramifications if the legislature indicates that a particular union, although prohibited, does not violate a strong public policy. See Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due*, 28 RUTGERS L.J. 313, 352-54 (1997) (discussing the difference between a marriage merely prohibited and one which is void). However, that is not important for current purposes.

16. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (before 1976, the Court of Appeals was Kentucky’s highest court).

17. *Id.* at 589.

18. *Id.*

19. *Scott v. State*, 39 Ga. 321, 326 (1869). In *Scott*, the court explained that the state’s antimiscegenation statute was not unconstitutional because it merely regulated social status and that moral and social equality did not and *could not* exist between the races because God had made things otherwise. *Id.*

individuals from marrying. Then the court would have engaged in the relevant constitutional analysis to determine whether that exclusion was permissible in light of state and federal constitutional guarantees.<sup>20</sup>

Perhaps this sort of mistake was understandable in the 1970's, because *Baehr v. Lewin*<sup>21</sup> had not yet been decided. In *Baehr*, a plurality of the Hawaii Supreme Court suggested that the state's marital statute prohibiting same-sex partners from marrying was subject to constitutional scrutiny, and explicitly recognized that the definitional argument advanced in *Jones v. Hallahan* was "circular and unpersuasive."<sup>22</sup> Indeed, had Hawaii not changed its state constitution by referendum in 1998,<sup>23</sup> it seems likely that Hawaii would now recognize same-sex marriages.<sup>24</sup> The same might be said of Alaska.<sup>25</sup>

Surprisingly, an analysis similar to the Kentucky Court of Appeals' was offered in another jurisdiction in 1995, even after the *Baehr* decision had been handed down. In his concurring and dissenting opinion in *Dean v. District of Columbia*,<sup>26</sup> Judge Terry suggested,

But if two people are incapable of being married because they are members of the same sex and marriage requires two persons of opposite sexes, . . . then I do not see how it makes any difference that the District of Columbia, or any agency of its government, discriminates against these two appellants by refusing to allow them to enter into a legal status which the sameness of their gender prevents them from entering in the first place.<sup>27</sup>

The Kentucky Supreme Court, Judge Terry, and various commentators fail to appreciate that the plaintiffs would have been able

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20. See *Hallahan*, 501 S.W.2d at 589-90.

21. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

22. *Id.* at 61.

23. See Philip L. Bartlett II, *Recent Legislation, Same-Sex Marriage*, 36 HARV. J. ON LEGIS. 581, 581 (1999) ("On November 3, 1998, Hawaii voters overwhelmingly passed a referendum amending the state's constitution to give the legislature the power to reserve marriage to opposite-sex couples.").

24. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1965 (1997) ("We can confidently predict that Hawaii will recognize same-sex marriages . . .").

25. See Johnson, *supra* note 2, at 27 ("I believe the Alaska Supreme Court would have affirmed [a lower court decision requiring the state to permit same-sex couples to marry] if given a chance, but the Alaska Legislature made sure the court was never given that chance.").

26. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

27. *Id.* at 361 (Terry, J., concurring in part and dissenting in part); see also *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364, at \*3 (D.C. Super. Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995) ("[I]t is the definition of marriage itself, not the 'sexual orientation' of the plaintiffs herein, which stands as a bar to their obtaining a marriage license.").

to marry, sameness of their sexes notwithstanding, had the respective legislative bodies amended the relevant statutes.<sup>28</sup> The sameness of the parties' sexes, like the ages of minors, or particular individuals' relations of affinity or consanguinity, was only a bar to marriage because the relevant statutes had made it a bar. A separate question involves whether or not the particular limitations are justified,<sup>29</sup> but that will not be answered by simply pointing out that a prohibitory definition is included within the statute.

Some courts have understood that even if marriage was universally recognized as being defined as the union of a man and a woman<sup>30</sup> it would not preclude a legislature from changing the legal definition of marriage and permitting same-sex couples to marry. In *Littleton v. Prange*,<sup>31</sup> a Texas appellate court noted, "Marriage is tightly defined in the United States: 'a legal union between one man and one woman.'"<sup>32</sup> Here, the court was not claiming that a state could not recognize same-sex marriages. On the contrary, the court recognized that a state could afford legal status to same-sex marriages, although it cautioned that "even if one state were to recognize same-sex marriage, it would not need to be recognized in any other state, and probably would not be."<sup>33</sup> While interstate recognition is a separate issue requiring its own analysis,<sup>34</sup> the *Littleton* court at least implicitly understood that definitions could not be used to immunize legislative decisions.

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28. See, e.g., David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 87 (2000). "The institution of marriage, by definition, is a sexual community that involves a man and a woman. Marriage is created by the committed union of a male and a female, a union that is unique and potentially procreative. This is a matter not only of history but of principle." *Id.*; see also *infra* notes 89-91 and accompanying text (discussing other views of why marriage must be between different-sex couples).

29. See *infra* notes 161-69 and accompanying text (discussing the substantial threat test to determine whether polygamy prohibitions pass constitutional muster).

30. Same-sex couples can now marry in Holland. See *Dutch Legalize Marriage for Same-Sex Couples*, GLOBE & MAIL (Toronto, Can.), Dec. 20, 2000, at A15 ("The Dutch Senate approved a law yesterday legalizing homosexual marriages and allowing same-sex couples to adopt children, in the world's most comprehensive legal recognition of gay rights.") Those who offer the definitional approach will presumably say that they do not recognize such unions as marriages and thus no counter example has been offered to their definition, although even they would have to admit that their definition is controversial.

31. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

32. *Id.* at 226.

33. *Id.*

34. Arguably, states would be constitutionally required to recognize certain same-sex marriages, e.g., those that were validly celebrated in a sister state domicile where the parties are still domiciled. See generally Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339-83 (1998) (discussing these and related issues).

*B. The Nature and Purposes of Marriage from a Legal Perspective*

Merely because marital statutes incorporating definitions are not immune from constitutional scrutiny does not mean that they are impermissible. Rather, they must be examined in light of the implicated state and individual interests to see whether they pass constitutional muster. Thus, the claim in this Article is not that all marital regulations are arbitrary and should be rejected. As the Court recognized in *Zablocki v. Redhail*,<sup>35</sup> “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”<sup>36</sup> Rather, this Article claims merely that each marital regulation should be examined to determine whether “it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>37</sup>

Marriage involves such an important right that marital prohibitions must be examined closely. As the United States Supreme Court has recognized, the freedom to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>38</sup> Marriage is “a coming together for better or for worse, . . . intimate to the degree of being sacred.”<sup>39</sup> It occupies a “basic position . . . in this society’s hierarchy of values,”<sup>40</sup> and is an “association for as noble a purpose as any involved in [the Court’s] prior decisions.”<sup>41</sup>

Marriage also serves a variety of societal and individual purposes. Marriage provides a setting in which children might be produced and raised and, given the gay baby boom,<sup>42</sup> this is an important reason to recognize same-sex unions. Marriage also provides stability for adults, making them both happier and more productive,<sup>43</sup> which is good both

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35. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

36. *Id.* at 386.

37. *Id.* at 388.

38. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

39. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

40. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

41. *Griswold*, 381 U.S. at 486.

42. Chuck Colbert, Editorial, *Prophetic, Unsettling Times*, NAT’L CATH. REP., Jan. 5, 2001, at 19, available at 2001 WL 8697127 (discussing “the Catholic lesbian and gay baby boom”).

43. Betsy Hart Scripps, *Both Sexes Thrive in Marriage*, DESERET NEWS (Salt Lake City), Oct. 6, 2000, at A17, available at 2000 WL 26968286.

So, an extensive survey of the data on marriage shows that married people, in general, are significantly healthier, both physically and mentally, than their non-married peers: They are far more affluent, even when living on only one income; women are safer, and men, even from backgrounds at “high-risk” for violence, are far less likely to commit crime; they report more satisfying sex lives than their single



for society and for the individuals involved. Thus, if recognizing same-sex marriages would promote societal and individual interests, the state must have important interests that would be undermined by recognizing same-sex unions in order for such a refusal to be justified.

### III. THE RELIGIOUS VIEW OF MARRIAGE

Same-sex marriage opponents suggest that the state has important interests which will be protected by reserving marriage for different-sex couples. One interest that is playing an important role in these debates, either implicitly or explicitly, is the claimed interest in upholding religious values in general and in upholding the religious view of marriage in particular.

When discussing the religious view of marriage, two different issues must be addressed: (1) Is it true that marriage from a religious perspective precludes same-sex unions, and (2) were that so, what implications for the law would flow from that common religious understanding of which marriages are forbidden? Views to the contrary notwithstanding, (1) there is no universal religious view on the nature of marriage even if one focuses solely on whether same-sex marriages are permissible, and (2) even were this claimed consensus to exist,<sup>44</sup> it would not have the implications that are claimed by same-sex marriage opponents.<sup>45</sup>

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peers, even those who are cohabiting; and overall they are significantly happier than folks in any other kind of relationship "arrangement."

*Id.*

44. See Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 599-600 (1999) (arguing that religion presents a clear negative view of same-sex marriage).

45. See Steven A. Delchin, Comment, *Scalia 18:22: Thou Shall Not Lie with the Academic and Law School Elite; It Is an Abomination—Romer v. Evans and America's Culture War*, 47 CASE W. RES. L. REV. 207, 243 (1996) (stating that "other divisive policy issues—most notably, the ban on same-sex marriages—are grounded primarily on traditional religious morality"); cf. Stephen L. Carter, *"Defending" Marriage: A Modest Proposal*, 41 HOW. L.J. 215, 226 (1998).

I would say that what's really important for defenders of traditional marriage (and here when I say traditional, I am excluding same-sex marriage) is to be crystal-clear about why marriage is worth defending. Why do I say that? Because of the alarming casualness I have mentioned. That is to say, one has to have a plan for overcoming the casualness which is the greatest threat to marriage. I believe that abandoning state control of marriage and turning it over to religions and other private institutions could be a step toward recovering this solemn and sacred nature of marriage.

*Id.* Professor Carter seems not to have considered that allowing religions to control marriage might mean that same-sex marriages would thereby be recognized.

A. *The Lack of Religious Unanimity Regarding Same-Sex Marriage*

The claim that no religion (or country, for that matter)<sup>46</sup> recognizes same-sex unions simply is not tenable. *Some*, rather than all, religions refuse to recognize same-sex unions.<sup>47</sup> Quakers, Unitarians, Buddhists,<sup>48</sup> Reconstructionist Jews,<sup>49</sup> and Reform Jews<sup>50</sup> might all celebrate same-sex unions. Thus, when commentators suggest that the same-sex marriage debate is between those who would respect religious views and those who would not, they offer an inaccurate picture of the debate.<sup>51</sup> Thus, it cannot be claimed that a state's refusal to recognize same-sex marriage somehow supports the religious sanctity of marriage as a general matter or even that a state considering the recognition of such unions is clearly a slap in the face of anyone religious.<sup>52</sup> Rather, the most that opponents can claim is that the state position supports the religious dictates of *some*, but not all, religions.

The United States Constitution requires state neutrality with respect to the religions,<sup>53</sup> and between religion and non-religion.<sup>54</sup> Yet, a state

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46. See Stefanie Batcho, *Two Gay Couples Marry in Canada Using Legal Loophole*, AGENCE FRANCE-PRESSE, Jan. 15, 2001, available at 2001 WL 2321002 (stating that the Netherlands now recognizes same-sex marriages).

47. See Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 426 (1998) ("[T]here is no religious consensus on any one model of marriage.").

48. See MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 12 (1997) (suggesting that these groups recognize same-sex marriages).

49. *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997) (en banc) ("Plaintiff Robin Joy Shahar is a woman who has 'married' another woman in a ceremony performed by a rabbi within the Reconstructionist Movement of Judaism.").

50. Patricia Rice, *Religion: New Jewish Elementary School Fills Growing Need*, ST. LOUIS POST-DISPATCH, May 13, 2000, at 25, available at 2000 WL 3525447. "While seeking renewal, many Reform Jews continue to pride themselves on a theology that allows rabbis to adjust biblical directives. For example, this year the national Reform leadership agreed to bless same-sex marriages." *Id.*

51. See *supra* notes 44-45 and accompanying text (discussing views that offer this understanding of the debate).

52. See generally James M. Donovan, *DOMA: An Unconstitutional Establishment Of Fundamental Christianity*, 4 MICH. J. GENDER & L. 335, 350 (1997) (discussing the views of members of Congress that same-sex marriage offends religious views).

53. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (suggesting that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

54. See *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) (noting that the Court has held the Establishment Clause "to mean no official preference even for religion over nonreligion") (citing *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)); see also *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

would hardly be neutral if it refused to recognize same-sex marriage because that recognition would not be compatible with the views of *some* religions. The Court has made quite clear that the “Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”<sup>55</sup> Even if the religious sentiments of some would be offended by recognizing civil unions or same-sex marriages, that alone would not suffice to justify the state’s refusal to recognize such unions.<sup>56</sup> Indeed, a citizen could not successfully challenge the granting of benefits (and using taxes to pay for those benefits) by claiming that one’s religion would not support that use of taxes. As the Supreme Court has explained, “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”<sup>57</sup>

Courts have had some difficulty in figuring out the implications of the religious neutrality requirement in the context under discussion here. For example, in *Dean v. District of Columbia*,<sup>58</sup> the trial court suggested that the Establishment Clause was not violated merely because a law “happen[ed] to coincide with the tenets of some or all religions.”<sup>59</sup> Such a statement is unobjectionable—murder, for example, is both religiously and legally proscribed.<sup>60</sup> However, the court made clear that it was far more deferential to particular religious views than such an observation might imply, suggesting that the Establishment Clause is not violated by a same-sex marriage ban because “[n]o ‘religion’ is advanced by a refusal to . . . [recognize such unions], since said refusal

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55. *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

56. *See Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.

*Id.*

57. *United States v. Lee*, 455 U.S. 252, 260 (1982).

58. *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. June 2, 1992), *aff’d*, 653 A.2d 307 (D.C. 1995).

59. *Id.* at \*5.

60. *Id.* at \*6.

applies equally to same-sex applicants who are atheists, agnostics or believers, and no one is thereby coerced in the slightest to alter his or her convictions.”<sup>61</sup> Such a standard allows far too much. For example, it would permit public schools to have students elected to offer non-denominational prayers at football games, since all students at the school, whether atheists, agnostics or believers, might potentially be selected to give the address, and all attending the game, whether atheists, agnostics or believers, would get to hear such prayers, and no one would be coerced into altering his or her convictions. Yet, the Court has made clear that such a practice violates the Establishment Clause.<sup>62</sup>

The *Dean* trial court was willing to uphold legislative action which was “merely being motivated by religious convictions.”<sup>63</sup> The court was perfectly comfortable with the notion that the District of Columbia marriage ban might have been motivated by the belief that same-sex marriage was “morally repugnant (even if this belief were of religious origin).”<sup>64</sup> After all, as the court suggested, when one engages in the correct due process inquiry, one sees that the relevant issue is “not the fundamental nature of an abstract ‘right to marry,’ but rather, whether the Constitution confers a fundamental right upon *persons of the same sex* to marry one another.”<sup>65</sup> Because of this “correct” framing of the question, the court held that the legitimate interest in promoting religious morality sufficed to justify the ban.<sup>66</sup>

Ironically, the *Dean* trial court cited *Loving v. Virginia* to support its position.<sup>67</sup> Yet, if the *Loving* Court had examined “not the fundamental nature of an abstract ‘right to marry’ but, rather, whether the Constitution confers a fundamental right upon persons” *of different races* to marry and had, in addition, consulted the history and traditions of this country to provide an answer,<sup>68</sup> the Court would never have suggested that Virginia’s anti-miscegenation statute violated due

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61. *Id.* at \*7.

62. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (striking down such a practice as a violation of the Establishment Clause).

63. *Dean*, 1992 WL 685364, at \*5.

64. *Id.* at \*6.

65. *Id.* at \*1.

66. *See infra* notes 103-10 and accompanying text (discussing why this might not suffice as a justification even when no fundamental rights or religious practices are at issue).

67. *Dean*, 1992 WL 685364, at \*3 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

68. *See id.* at \*1.

process guarantees.<sup>69</sup> If a belief that the relationship was “morally repugnant (even if this belief were of religious origin)”<sup>70</sup> was all that was necessary to justify Virginia’s anti-miscegenation statute,<sup>71</sup> as long as the recognition of the particular union at issue was not “deeply rooted in this Nation’s history and tradition,”<sup>72</sup> then the Court would have issued a much different opinion. After all, many in Virginia at the time thought interracial marriages were morally repugnant.<sup>73</sup> Further, several states prohibited interracial marriage the year that *Loving* was decided,<sup>74</sup> and thus it would have been easy to establish that the recognition of such unions was not firmly rooted in the Nation’s history and traditions.

Certainly, the *Loving* Court did not need to discuss federal due process guarantees in order to strike down Virginia’s anti-miscegenation statute because the statute explicitly classified on the basis of race.<sup>75</sup> The *Loving* Court pointed out both that “[t]here can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race,”<sup>76</sup> and that there was “no legitimate overriding purpose independent of invidious racial discrimination which justify[ed] th[e] classification.”<sup>77</sup> Yet, as the supreme courts of Hawaii and Vermont have indicated, same-sex

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69. *Loving*, 388 U.S. at 12 (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”).

70. *See Dean*, 1992 WL 685364, at \*6.

71. *See Loving*, 388 U.S. at 3. In *Loving* the Court discussed the trial court’s suggestion that: Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

*Id.*

72. *See Dean*, 1992 WL 685364, at \*1-2 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

73. *See Mary Becker, Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 169 (1998) (“antimiscegenation statutes banned conduct traditionally seen as immoral—interracial marriage in southern states—yet in *Loving v. Virginia*, the Court nevertheless held such a statute unconstitutional”).

74. *Loving*, 388 U.S. at 6 & n.5 (listing the states outlawing interracial marriage: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia).

75. *See id.* at 4 (quoting the language of the statute: “[I]f any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be punished by confinement in the penitentiary.”).

76. *Id.* at 11.

77. *Id.*

marriage bans expressly distinguish on the basis of gender,<sup>78</sup> and it seems unlikely that a same-sex marriage ban would survive heightened constitutional scrutiny.<sup>79</sup>

Arguably, same-sex marriage bans, like bans on interracial marriage, are precluded by the Fourteenth Amendment to the United States Constitution.<sup>80</sup> However, the claim here is not based on Fourteenth Amendment guarantees. Further, the analysis in this Article is to be distinguished from other lines of argument that have been offered in the literature regarding the relationship between religious beliefs on the one hand and the imposition of legal disabilities on lesbians, gays, bisexuals and transgendered people on the other.

Some commentators and judges suggest that adverse treatment on the basis of sexual orientation is a product of religious bias,<sup>81</sup> and that laws passed because of a religious view about the alleged immorality of same-sex relations do not pass constitutional muster<sup>82</sup> unless the state has an independent and legitimate reason to have the regulation.<sup>83</sup> In

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78. See *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993) (stating that “HRS § 572-1 establishes a sex-based classification”); *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999) (“[T]he marriage statutes apply expressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex.”); see also Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935 (2000) (discussing how the Vermont Supreme Court misunderstood the test to determine when sex-based classifications trigger heightened scrutiny).

79. In *Baker*, Vermont’s refusal to accord same-sex couples the rights and benefits of marriage did not survive a test that was even weaker than heightened scrutiny. See *Baker*, 744 A.2d at 885 (suggesting that the state did not have a “reasonable and just basis” for excluding same-sex couples from the benefits and protections that flow from marriage); see also *infra* notes 170-75 and accompanying text (suggesting that a same-sex marriage ban would not survive heightened or strict scrutiny).

80. See generally Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995).

81. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting) (“A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.”); cf. DAVID A. J. RICHARDS, *WOMEN, GAYS AND THE CONSTITUTION* 397 (1998) (“[T]he justification of Colorado Amendment Two in these terms reveals quite clearly why the amendment reflects constitutionally invidious religious intolerance.”). Colorado’s Amendment Two precluded localities from offering protection against sexual orientation discrimination. *Id.* At the time, Denver, Aspen and Boulder had statutes precluding discrimination on the basis of a variety of classifications including sexual orientation. *Id.*

82. See, e.g., *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting) (“That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry.”).

83. See, e.g., *id.* (Blackmun, J., dissenting) (“The legitimacy of secular legislation depends instead on whether the State can advance some justification for the law beyond its conformity to religious doctrine.”). If there is a legitimate reason, then the statute need not be invalidated even

this Article, the claim is not that all religions are biased, especially considering that there is no uniform religious view regarding the permissibility of same-sex relations, but is merely that the willingness of some religious groups to recognize same-sex marriage has constitutional import.<sup>84</sup>

Commentators also suggest that a proper understanding of the freedom of conscience includes a freedom from moral slavery<sup>85</sup> that would protect the right to same-sex marriage.<sup>86</sup> In this Article, the claim does not involve the more robust notion of liberty of conscience that is implied in those discussions,<sup>87</sup> but the weaker notion of freedom of conscience that merely includes existing religious beliefs and practices.

### *B. The Legal Implications of Religious Consensus About Marriage*

It might be thought that *all* religions preclude same-sex couples from marrying<sup>88</sup> and merely disagree about the *justification* for prohibiting same-sex marriage. One religion might say that same-sex individuals cannot marry because they cannot produce a child through their union;<sup>89</sup> another might say that such individuals cannot form a union which would reflect “the icon of man and woman destined from the first book of revelation as partners in procreation, mutual commitment, and an

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if in fact it was motivated by religious views. *See McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (“To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.”).

84. *See infra* notes 117-20 and accompanying text (describing why religious recognition of same-sex unions has constitutional import).

85. *See, e.g.*, David A. J. Richards, *Contractualist Impartiality in the American Struggle for Justice: A Comment on Professor Allen’s “Social Contract Theory in American Case Law,”* 51 FLA. L. REV. 41, 63 (1999) (suggesting that moral slavery involves an abridgment of basic human rights which “is rationalized on inadequate grounds (the naturalization of injustice in terms of an unjust cultural stereotype of race, or gender, or gendered sexuality).”).

86. David Richards provides an extensive development of this view. *See generally* RICHARDS, *supra* note 81. Richards has been described as offering “the most sustained and thoughtful exposition of this position.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1492 (1990).

87. The point here is not to challenge Richards’s view, but merely to suggest that the argument here involves something else.

88. *See generally* Rev. Raymond C. O’Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMP. POL. & CIV. RTS. L. REV. 429 (1998) (suggesting that *the* religious perspective clearly precludes same-sex marriages).

89. *See* John Finnis, *Law, Morality and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1066 (1994) (discussing philosophical and common sense arguments regarding reproduction).

ordered pair for procreation and rearing of children;<sup>90</sup> still another might suggest that such unions are precluded because of the required complementarity of the partners;<sup>91</sup> and still others might offer additional reasons.<sup>92</sup> However, all of these religions would be presenting a united front with respect to the view that such unions should be prohibited, and the debate surrounding same-sex unions would be characterized as pitting religion against the secular state.<sup>93</sup>

Even if this unanimity existed among the religions, it is not at all clear what implications would follow. Presumably, those claiming this consensus<sup>94</sup> would not be arguing, for example, that any marriage recognized by a religion should be recognized by the state, because they would then be suggesting that polygamous unions should be recognized.<sup>95</sup> Nor would they be suggesting that any unions not recognized by *any* religion should not be recognized by the state. Were it true that no religion would recognize the marital unions of atheists,

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90. O'Brien, *supra* note 88, at 445 (describing the religious perspective offered by the Roman Catholic Church).

91. See Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 251 (1998). "The dual-gender marriage requirement . . . recognizes and celebrates the physical differences between men and women and their obvious sexual complementarity . . . [and] the equal indispensability of both genders to the institution of marriage." *Id.*

92. Of course one religion might offer several of these reasons.

93. Cf. O'Brien, *supra* note 88, at 458 (offering other examples in which, allegedly, secular society is hostile to the "religious perspective").

94. Cf. Duncan, *supra* note 91, at 241 (discussing an alleged "unanimous, international consensus on the meaning of marriage" among different states and countries).

95. See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997) ("Most Americans do not know that polygamy, and particularly polygyny, the practice of men marrying more than one woman, remains widespread in the world as a whole. Well more than half of nonindustrialized societies permit polygyny still today."); Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1298 (1998) ("The question of polygamy is not merely a historical one. Both African Christians and Moslems may currently engage in the practice."); Keith Jaasma, Note, *The Religious Freedom Restoration Act: Responding to Smith, Reconsidering Reynolds*, 16 WHITTIER L. REV. 211, 246-47 (1995) ("It has been estimated that there are some 50,000 practicing Mormon polygamists in the United States, living mostly in California, Arizona, Utah, and Idaho.").

Commentators suggest that if same-sex marriage is recognized then polygamy will be too. See, e.g., Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All?* 34 FAM. L.Q. 271, 288 (2000) ("If same sex marriage were allowed, would (constitutional) equal protection and privacy rationale soon compel the recognition of polygamous marriages? Hyperbole? Probably not."); *infra* notes 142-69 and accompanying text (discussing polygamy).



presumably a state would use this as a reason to refuse to recognize such unions.<sup>96</sup>

The point here, of course, is not to suggest that religions in fact agree on the permissibility of same-sex marriages, because that would be false.<sup>97</sup> Rather, the point is merely that even were all of the religions to agree that same-sex marriages should not be recognized, that alone would not justify the state's refusal to do so.

### C. *The Legal Implications of a Religious Moral Consensus*

The *Dean* trial court upheld the same-sex marriage ban at issue, believing it irrelevant that the prohibition might have been based upon the legislators' religious and moral beliefs.<sup>98</sup> Richard Myers claims that the "argument against recognizing same-sex 'marriages' goes well beyond a simple citation to Biblical sources," suggesting that there are "well-developed moral theories that reject treating such unions as marriages that are more than sufficient to remove any Establishment Clause arguments."<sup>99</sup> However, Myers fails to appreciate that these "theories" support rather than undermine the legal recognition of same-sex marriage when (1) they have been pruned of some of their internally inconsistent facets, and, (2) they take into account the relationship between morality and law in other areas of domestic relations law.<sup>100</sup>

Even were Myers to recognize that these theories support the legal recognition of same-sex unions, he would presumably nonetheless claim that same-sex marriage bans are constitutionally permissible, not because of these "independent" moral theories, but because he believes that religious moral arguments suffice for constitutional purposes to establish that such unions should not be recognized.<sup>101</sup> It is simply

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96. Cf. Amy Gutmann, *Religious Freedom and Civic Responsibility*, 56 WASH. & LEE L. REV. 907, 918 (1999) ("So as not to coerce any citizens into a religious marriage, governmental officials also should be able to marry couples solely in the eyes of the law.").

97. See *supra* notes 44, 48-50 and accompanying text (describing religions that recognize same-sex unions).

98. *Dean v. Dist. of Columbia*, No. 90-13892, 1992 WL 685364, at \*8 (D.C. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. Cir. 1995).

99. Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 65 (1998).

100. See Mark Strasser, *Marital Acts, Morality and the Right to Privacy*, 30 N.M. L. REV. 43 (2000); Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51 (1998). These articles address the views of Professors Bradley, Lee, George, and Finnis, although the points would also apply to the moral analysis offered by Professor David Orgon Coolidge. David Orgon Coolidge, *Same-Sex Marriage?: Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

101. See Myers, *supra* note 99, at 63-64.

unclear whether religious moral views, especially the moral views of some rather than all religions, will, without more, suffice to justify legislation as a general matter, much less justify the legislation at issue here.<sup>102</sup>

In *Bowers v. Hardwick*,<sup>103</sup> the Court implied that the presumed<sup>104</sup> religious moral views<sup>105</sup> of the Georgia populace sufficed to provide a rational basis for the state's statute *criminalizing* sodomy.<sup>106</sup> However, in *Romer v. Evans*,<sup>107</sup> that same Court presumed<sup>108</sup> "rational" disapproval of sodomy did not suffice to justify the imposition of *civil* penalties against lesbians, gays, and bisexuals, prompting some commentators to suggest that *Romer* effectively overruled *Bowers*.<sup>109</sup> Justice Scalia argued in his *Romer* dissent that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."<sup>110</sup> While Scalia's argument did not win the day in *Romer*, a separate question is whether his analysis and implicit ordering are correct. If (1) *Romer* merely involved laws disfavoring same-sex conduct, (2) such laws are more constitutionally palatable than laws making same-sex conduct criminal, and (3) laws disfavoring same-sex conduct are nonetheless unconstitutional, then *Romer* would seem to significantly undermine the *Bowers* holding. Thus, the question at hand is whether the contrapositive of Justice Scalia's position is true—because states are constitutionally prohibited from enacting laws "merely disfavoring" same-sex relations, the states are also prohibited from making adult same-sex consensual conduct

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102. A separate question is whether even if sufficing as a general matter, it should suffice when the interest in something as fundamental as the right to marry is at issue. *See supra* notes 78-80 and accompanying text (suggesting that Fourteenth Amendment guarantees are implicated by same-sex marriage bans); *infra* notes 165-75 and accompanying text (suggesting that First Amendment guarantees are implicated by such bans).

103. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

104. *See id.* at 196 (discussing the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable").

105. *See id.* (Burger, C.J., concurring) ("Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.").

106. *See id.* at 188-89.

107. *Romer v. Evans*, 517 U.S. 620 (1996).

108. "Presumed" rather than "actual" seems especially appropriate to emphasize here, since Colorado had been one of the first states to repeal its sodomy law. *See id.* at 645 (Scalia, J., dissenting).

109. *See* RICHARDS, *supra* note 81, at 414-415; Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 374 (1997) ("To the extent its logic holds, *Romer* is inconsistent with *Hardwick* and implicitly overrules it.").

110. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

criminal. If Justice Scalia's analysis is correct, then *Bowers* has been effectively overruled.

The analysis offered in this Article is not dependent upon whether or not *Bowers* has been implicitly overruled. Even if sodomy may be or in fact has been criminalized in a particular state, this would not prevent that state from recognizing same-sex unions. Most states that have sodomy statutes do not distinguish between same-sex and different-sex sodomy<sup>111</sup> and, further, do not distinguish between marital and non-marital sodomy.<sup>112</sup> Nonetheless, the statutes have been read as including an implicit marital exception.<sup>113</sup> Indeed, some courts have

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111. See Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 390 n.114 (2000) (explaining that in thirteen states the sodomy statutes do not distinguish between same-sex and different-sex relations, whereas in five states only same-sex sodomitical relations are prohibited).

112. See, e.g., ALA. CODE § 13A-6-65(a) (1994) ("A person commits the crime of sexual misconduct if: . . . He or she engages in deviate sexual intercourse with another person under circumstances other than those covered by [sections dealing with forcible sodomy or sodomy with a minor]."); ARIZ. REV. STAT. ANN. § 13-1411 (West 2001), *repealed by* 2001 Ariz. Legis. Serv. 382 (West) ("A person who knowingly and without force commits the infamous crime against nature with an adult is guilty of a class 3 misdemeanor."); IDAHO CODE § 18-6605 (Michie 1997) ("Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."); LA. REV. STAT. ANN. § 14:89 (West 1986) ("Crime against nature is: . . . The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in [certain rape statutes]."); MASS. GEN. LAWS ANN. ch. 272 § 34 (West 1992) ("Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years."); MICH. COMP. LAWS ANN. § 750.158 (West 1991) ("Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years . . ."); MINN. STAT. ANN. § 609.293(5) (West 1987), *recognized as unconstitutional by In re Proposed Petition to Recall Hatch*, 628 N.W.2d 125 (2001) ("Whoever . . . voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both."); MISS. CODE ANN. § 97-29-59 (2000) ("Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."); N.C. GEN. STAT. § 14-177 (1999) ("If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon."); UTAH CODE ANN. § 76-5-403(1) (1999) ("A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant."); VA. CODE ANN. § 18.2-361(A) (Michie 1996) ("If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony . . .").

113. See Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753,

read *Griswold v. Connecticut*<sup>114</sup> to require such an exception.<sup>115</sup> Were same-sex unions recognized, the sodomy statutes would presumably be read to incorporate an implicit exception for those same-sex couples.<sup>116</sup> Otherwise, the whole line of privacy cases following *Griswold* would seem to be in jeopardy.

Suppose that there were a religious consensus about the impermissibility of sodomy. That would hardly establish that individuals who commit sodomy should not be allowed to marry or that they should not be allowed to remain married. The protection of marital sodomy notwithstanding, the condemnation of such practices by at least some religions suggests that the use of the sodomy argument is a specious attempt to justify the existence of same-sex marriage bans.

#### IV. STATE REGULATION OF RELIGIOUS CONDUCT

That some religions sanctify same-sex unions establishes that there is no religious unanimity with respect to whether such unions should be celebrated. Yet, there is another aspect of this willingness to recognize such unions that has not been given adequate attention, namely, that the religious significance of marriage has constitutional import and that this is a reason that same-sex marriages should be legally recognized.

##### A. *The Constitutional Implications of the Religious Import of Marriage*

The United States Supreme Court has recognized the religious significance of marriage.<sup>117</sup> Indeed, the Court explained why the

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760 (2000) (“[E]ven those states that have sodomy laws have created exceptions for married couples either through their legislatures or their courts.”).

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

115. See *Cotner v. Henry*, 394 F.2d 873, 875-76 (7th Cir. 1968).

Under *Griswold* Indiana courts could not interpret the statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy. The Indiana courts might, however, construe the statute as being inapplicable to married couples or as outlawing such physical relations between married couples only when accomplished by force.

Under the latter interpretation, the protection of the *Griswold* rule would not be available to Cotner if there was a showing that Cotner employed force.

*Id.*; *State v. Elliot*, 551 P.2d 1352, 1352 (N.M. 1976) (suggesting that *Griswold* protects consensual marital but not consensual non-marital sodomy); *People v. Mehr*, 383 N.Y.S.2d 798, 799 (1976) (finding *Griswold* protects consensual marital sodomy); *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980) (“[T]he right of privacy is inapplicable to the private unnatural copulation between unmarried adults.”).

116. See Strasser, *supra* note 113, at 761.

117. See *Stanley v. Illinois*, 405 U.S. 645, 663 (1972) (Burger, C.J., dissenting) (discussing the “religious or quasi-religious connotations that marriage has”).

interest in marriage is fundamental in *Turner v. Safley*.<sup>118</sup> The Court noted that “many religions recognize marriage as having spiritual significance; for some . . . therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”<sup>119</sup>

The *Turner* Court did not suggest that marriage would have religious significance only if a duty to marry had been imposed by that religion, and *Turner* makes clear that the state would be remiss for imposing unnecessary burdens on marriage even without an explicit religious duty to tie a marital knot.<sup>120</sup> One would not have understood this aspect of Supreme Court right-to-marry jurisprudence from reading the Eleventh Circuit decision of *Shahar v. Bowers*.<sup>121</sup> In *Shahar*, the court upheld the State Attorney General’s rescinding a job offer to Robin Shahar because she had married her same-sex partner in a religious ceremony.<sup>122</sup> The court downplayed the importance of Shahar’s having married her partner in such a ceremony<sup>123</sup> because her religion did not impose a *duty* upon her to marry.<sup>124</sup> One can imagine the reactions were a court to try to justify a job offer rescission by pointing out that (1) a member of a different-sex couple had married someone of whom the public did not

118. *Turner v. Safley*, 482 U.S. 78 (1987).

119. *Id.* at 96.

120. The *Turner* Court struck down the prison’s limitation on the prisoners’ right to marry. *See id.* at 81 (concluding that “the marriage restriction cannot be sustained”). The Court did so notwithstanding the traditional deference to the prison authorities’ decisions on prison matters. *See id.* (acknowledging the “lesser standard of scrutiny [which] is appropriate in determining the validity of prison rules”).

121. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

122. *Id.* at 1099.

123. *See id.* at 1118 (Tjoflat, J., specially concurring).

The record establishes that homosexual “marriages” are recognized by a part of the Reconstructionist movement of the Jewish faith. In addition, the record shows that Shahar and her partner are life-long Jews and that they have been active in a Jewish congregation which ministers to homosexuals and recognizes homosexual “marriages.” Shahar’s wedding ceremony was performed by a rabbi and was otherwise quite similar to a traditional Jewish wedding between a man and a woman. These facts establish that Shahar’s wedding ceremony was an exercise of her religion: she participated in a “wedding” ceremony that was in accord with her sincere religious beliefs.

*Id.* (Tjoflat, J., specially concurring).

124. *See id.* at 1099. “Given especially that Plaintiff’s religion requires a woman neither to ‘marry’ another female—even in the case of lesbian couples—nor to marry at all, considerable doubt also exists that she has a constitutionally protected federal right to be ‘married’ to another woman to engage in her religion.” *Id.*

approve,<sup>125</sup> and (2) the person's religion (Reconstructionist Judaism, Catholicism or whatever) did not impose a duty on her to marry.<sup>126</sup>

The point in this Article should not be misunderstood. The claim is not that Shahar was being penalized *because*<sup>127</sup> she was engaging in a practice promoted by her religion.<sup>128</sup> The same result presumably would have occurred were Shahar and her partner to have taken part in a ceremony that was not religiously endorsed. Further, the claim is not that the result would have been different had there been a religiously imposed duty to marry. Even were there such a duty, this would not

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125. *See id.* at 1108. "Shahar argues that he may not justify his decision by reference to perceived public hostility to her 'marriage.' We have held otherwise about the significance of public perception when law enforcement is involved." *Id.*

126. A separate question involves how central a religious practice is. However, the Court has suggested that it is unwilling to be the arbiter of that issue. *See Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886-87 (1990).

It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?

*Id.*; *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988).

Seeing the Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands are "central" or "indispensable" to which religions, and by implication which are "dispensable" or "peripheral," and would then decide which government programs are "compelling" enough to justify "infringement of those practices." We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. Unless a "showing of 'centrality,'" is nothing but an assertion of centrality, the dissent thus offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

*Id.* (citations omitted).

127. *See Shahar*, 114 F.3d at 1118 (Tjoflat, J., specially concurring) ("[T]here is no evidence that the religious nature of the ceremony motivated the Attorney General's decision.").

128. *See id.* at 1120 (Godbold, J., dissenting).

But the critical facts are that Shahar and her partner are lifelong adherents to Judaism and good-faith, dedicated participants in the Reconstructionist Movement; the Reconstructionist Movement is a significant movement within American Judaism; and it regards same-sex marriages as acceptable and desirable in preference to couples living together without marriage.

*Id.* (Godbold, J., dissenting).

have guaranteed that the right to marry would be respected.<sup>129</sup> Rather, the point is that the decision was rife with rationalizations which would have been rejected out of hand had they been offered in most other contexts.

Supposedly, had Shahar taken the job, there would have been a lack of “public confidence” in her ability to perform that job.<sup>130</sup> Yet, as Judge Birch pointed out in dissent, the same “reasonable concerns” would presumably have disqualified an unmarried person who was dating from working for the State Attorney General, since that person might have been presumed to be unable to enforce Georgia’s fornication law.<sup>131</sup> Indeed, there is reason to doubt the State Attorney General’s sincerity concerning public confidence in law enforcement, given his admission of a long adulterous affair in violation of Georgia law.<sup>132</sup> Further, as if to add insult to injury, the Georgia Supreme Court declared Georgia’s sodomy law unconstitutional a year after the

129. *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969) (“Thus the prohibition of plural marriage has been upheld, even though the practice is a religious duty to some.”); *see also* *Potter v. Murray City*, 585 F. Supp. 1126, 1134 (D. Utah 1984).

The landmark decision in the area of freedom of religion in connection with polygamy is *Reynolds v. United States*, 98 U.S. 145 (1879) . . . in which the Supreme Court confirmed a conviction even though the defendant believed that the practice of polygamy was his religious duty and of divine origin and he had received permission from the authorities of his church to enter into the polygamist marriages.

*Id.*

130. *See Shahar*, 114 F.3d at 1110; *see also* Cynthia J. Frost, *Shahar v. Bowers: That Girl Just Didn’t Have Good Sense!*, 17 *LAW & INEQ. J.* 57, 76-77 (1999) (“The court also determined that the Attorney General was not unreasonable to believe that Shahar’s presence on his staff could damage the Department’s credibility with the public.”).

131. *See Shahar*, 114 F.3d at 1128 (Birch, J., dissenting).

Compounding this deficiency in Bowers’ assertion that his prediction is “reasonable” is the fact that Bowers does not make the same assumption with respect to any of his other employees: He does not assume, for instance, that an unmarried employee who is openly dating an individual of the opposite sex has likely committed fornication, a criminal offense in Georgia, and thus may have a potential conflict in enforcing the fornication law.

*Id.* (Birch, J., dissenting) (footnote omitted).

132. David G. Savage, *High Court Rejects Appeal of a Lesbian Denied a Job; Law: Attorney had been Promised a Full-Time Government Position. But Offer Was Withdrawn when She Said She Planned to ‘Marry’ Another Woman*, *L.A. TIMES*, Jan. 13, 1998, at A10, available at 1998 WL 2388286 (“Georgia also has a law against adultery, and last year, Bowers admitted he has carried on a long affair with a woman who is not his wife.”); *see also* Frost, *supra* note 130, at 83-84 (“One might just as easily assume that the Attorney General would resist enforcing Georgia’s law against adultery. Michael Bowers announced during his campaign for governor that he had participated in a decade-long adulterous affair with a woman who had been a Department employee.”) (footnote omitted).

Eleventh Circuit decision was issued,<sup>133</sup> undercutting even further the reason for Shahar's firing.<sup>134</sup>

One confusing issue raised in *Shahar* involves the conditions under which religious considerations can permissibly motivate behavior by a state representative. Consider *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>135</sup> in which the Court struck down a prohibition of animal sacrifice precisely because the state was trying to restrict religious practices of the Santería.<sup>136</sup> The Court noted that the "principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."<sup>137</sup> When explaining why the statute at issue offended the "constitutional protection for free exercise of religion,"<sup>138</sup> the Supreme Court pointed to statements by council members that the practice violated Biblical teachings,<sup>139</sup> and that this religion was "a sin, 'foolishness,' 'an abomination to the Lord,' and the worship of 'demons.'"<sup>140</sup> It would not have been a surprise if Shahar's religious practices had elicited similar reactions.<sup>141</sup>

Of course, the mere fact that the practices of Santería violated the religious beliefs of the council members did not preclude the state from regulating those practices. The Court has made clear that merely because a religion has a particular practice does not entail that the state must permit that practice. For example, the Court upheld the permissibility of prohibiting polygamy, notwithstanding the former<sup>142</sup>

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133. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

134. See *Frost*, *supra* note 130, at 95 ("Now, with no sodomy law to be violated, the assumption of Shahar's law breaking could not stand."). But see *supra* notes 111-13 and accompanying text (suggesting that the sodomy argument is specious in any event).

135. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

136. *Id.* at 526-28.

137. *Id.* at 523.

138. *Id.* at 531.

139. See *id.* at 541. "Councilman Mejides indicated that he was 'totally against the sacrificing of animals' and distinguished kosher slaughter because it had a 'real purpose.' The 'Bible says we are allowed to sacrifice an animal for consumption,' he continued, 'but for any other purposes, I don't believe that the Bible allows that.'" *Id.*

140. *Id.*

141. Cf. *Mello*, *supra* note 1, at 185 (citing Heather Stephenson, *Big Crowd Rallies Against Gay Marriage*, RUTLAND HERALD, Feb. 2, 2001, at 1) (discussing those protesting outside the Vermont statehouse when the Legislature was considering the civil unions bill—"Speaker after speaker said the legislature should follow 'God's law' and refuse to allow lesbians and gay men to marry.").

142. See *Toncray v. Budge*, 95 P. 26, 37 (Idaho 1908).

[I]n the autumn of 1890, the president of the church, Wilford Woodruff, issued what has been popularly known as the 'Manifesto,' whereby the church authorities renounced the doctrine of bigamy and polygamy, and declared that it should no longer



acceptance of that practice by the Church of Latter Day Saints.<sup>143</sup> As the Court pointed out in *Reynolds v. United States*,<sup>144</sup> a religious acceptance of a wife's jumping on her deceased husband's funeral pyre would not entail that the state would have to permit that practice.<sup>145</sup> Thus, as suggested in *Bowen v. Roy*,<sup>146</sup> the Court has "long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."<sup>147</sup>

Nonetheless, it is important to remember that the Court decided many of the polygamy cases over a century ago. Arguably, the Court was not as sensitive then to some of the concerns that are currently thought important by the Court. For example, the Court in *Davis v. Beason*<sup>148</sup> made clear that it was not willing to treat the Mormon Church as it would other religious groups.<sup>149</sup> The Court explained, that while "legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."<sup>150</sup> Lest the Court's meaning be misunderstood, the Court distinguished between a religion on the one hand and a mere sect on the other.

The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.<sup>151</sup>

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be a tenet of the church or of their religious faith or doctrine, and should not be taught or practiced by it or any of its members or adherents.

*Id.*

143. One sect of Mormons has not accepted that renunciation. See *Cleveland v. United States*, 329 U.S. 14, 16 (1946) ("Petitioners are members of a Mormon sect, known as Fundamentalists. They not only believe in polygamy; unlike other Mormons, they practice it.") (footnote omitted); see also *Barlow v. Blackburn*, 798 P.2d 1360, 1361 (Ariz. Ct. App. 1990) ("Fundamentalist Mormons believe that their religion requires the practice of polygamy.").

144. *Reynolds v. United States*, 98 U.S. 145 (1878).

145. See *id.* at 166 ("[I]f a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?").

146. *Bowen v. Roy*, 476 U.S. 693 (1986).

147. *Id.* at 699.

148. *Davis v. Beason*, 133 U.S. 333 (1890), *overruled by Romer v. Evans*, 517 U.S. 620 (1996).

149. *Id.* at 341-43 (stating that bigamy and polygamy are crimes in all civilized and Christian countries and that the "exercise of religion" must be "subordinate to the criminal laws of the country").

150. *Id.* at 345.

151. *Id.* at 342.

It is quite clear that the Court would not currently dismiss religious practices so cavalierly.<sup>152</sup> As the Court suggested in *Fowler v. Rhode Island*,<sup>153</sup> “it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”<sup>154</sup> Further, it would no longer suffice, as it once did, for the Court to suggest that a practice might be prohibited because it was “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.”<sup>155</sup>

When upholding the constitutionality of polygamy prohibitions, the Court has offered a variety of reasons, some helpful and others not. For example, the *Reynolds* Court pointed out, “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>156</sup> Yet, this is hardly a reason to prevent a practice,<sup>157</sup> as there might be a variety of Asian or African practices that would be beneficial to emulate.<sup>158</sup> The *Davis* Court came closer to giving a reason when it suggested that polygamy “tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man.”<sup>159</sup> Here, the Court might have had in mind that polygamy would have a destabilizing

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152. Of course, that does not mean that the state would therefore protect minority religious practices. See Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1724 (2000) (“[T]he current Court is less separationist than in the past. This has resulted in its becoming more accommodationist toward the ‘major’ or ‘mainstream’ religions, namely the dominant Judeo-Christian faiths.”); cf. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1129 (1990) (suggesting that Court rhetoric leaves it “open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression”).

153. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

154. *Id.* at 70.

155. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).

156. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

157. See PEGGY COOPER DAVIS, *NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES* 241 (1997) (“[W]e must be wary of the cultural myopia that informed the Justices’ thinking in *Reynolds*.”).

158. See MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* 14 (1999). “[M]arital unions should not be prohibited merely because European countries do not permit them. When something as important as marriage is at issue, the justifications for a marriage ban should indicate with some specificity the harms that will thereby be prevented.” *Id.*

159. *Davis v. Beason*, 133 U.S. 333, 341 (1890), *overruled by Romer v. Evans*, 517 U.S. 620 (1996).

effect if, for example, a husband secured a second wife without the consent of his first wife.<sup>160</sup>

### B. *The Substantial Threat Principle*

When attempting to justify the permissibility of prohibiting polygamy, the *Reynolds* Court did more than merely discuss the practices of northern and western European nations; it in addition suggested that polygamy is incompatible with democracy.<sup>161</sup> That thesis has received support in the secondary literature,<sup>162</sup> and has been cited approvingly by Justice Souter in his *Hialeah* concurrence in which he suggested that *Reynold's* claim that "polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism"<sup>163</sup> is "consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct 'pose[s] some substantial threat to public safety, peace or order.'"<sup>164</sup>

The substantial threat principle is important to consider because it limits the conditions under which the state can prohibit religious practices. That principle suggests that a religious practice of recognizing same-sex marriage should be prohibited only if it can be shown to pose that level of danger to the public welfare. Further, it will not do to argue that because polygamy may be prohibited, same-sex marriages may be prohibited too, because the former may well be viewed as more harmful than the latter.<sup>165</sup> Indeed, once Vermont has

160. See *State v. Musser*, 175 P.2d 724 (Utah 1946), *vacated and remanded by* 333 U.S. 95 (1948) (discussing polygamous marriage contracted against first wife's wishes which eventually lead to divorce); see also David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 65-66 (1997) (noting a higher rate of divorce among Mormons in the late 1800's than in the general population).

161. *Reynolds*, 98 U.S. at 165-66.

Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

*Id.*

162. See, e.g., Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

163. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 569 (1993) (Souter, J., concurring in part and concurring in the judgment) (citing *Reynolds*, 98 U.S. at 166).

164. *Id.* (Souter, J., concurring in part and concurring in the judgment) (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)).

165. See *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting) ("Has the Court concluded that the perceived social harm of polygamy is a 'legitimate concern of government,'

had a few years experience with civil unions without falling apart, it will be even clearer that the state would not be endangered were same-sex marriages recognized.<sup>166</sup>

The point here is not to debate whether polygamy promotes despotism, is a substantial threat to the public welfare, or even whether it may be prohibited by the states without offending constitutional guarantees.<sup>167</sup> For purposes here, the important point is that in recent times when courts have examined the constitutionality of polygamy restrictions, they have not simply said, for example, that marriage is by definition the union of one man and one woman and thus polygamy may of course be prohibited without offending constitutional guarantees. Rather, the courts have instead closely examined the restriction to see whether it passes constitutional muster, recognizing that because the right to marry is of fundamental importance, the state must establish that its prohibition of polygamy is narrowly tailored to promote compelling state interests. Thus, a Utah federal district court held that the state had a compelling interest in prohibiting plural marriages<sup>168</sup> and, further, that the prohibition of such unions was narrowly tailored to promote that state interest.<sup>169</sup>

It is possible that a court imposing the compelling interest test might in fact find that same-sex marriage bans are constitutionally permissible. However, there is reason to doubt such a claim. For example, a Hawaii court examined that state's marital law in light of

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and the perceived social harm of homosexuality is not? . . . I strongly suspect that the answer to the last question is yes.”).

166. Cf. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1395-96 (2000).

In the wake of *Baker* and Vermont's recognition of same-sex civil unions, there will be pressure on other gay-tolerant states to offer similar benefits, either legislatively or through judicial constructions of state constitutions. This will be particularly attractive if the law survives and the state's experience with recognized same-sex unions is favorable: A modest number of lesbian and gay couples will sign up; pleasant tourists will enter and enrich the state; and God will not send the locusts upon the state, nor will the institution of marriage suffer one whit.

*Id.*

167. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) (“What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.”).

168. See *Potter v. Murray City*, 585 F. Supp. 1126, 1138 (D. Utah 1984).

169. *Id.* at 1140 (“There appear to the court to be no reasonable alternatives to the prohibition of the practice of polygamy to meet the compelling state interest found in the maintenance of the system of monogamy upon which its social order is now based.”).

this very demanding test and held that the state law failed to meet the relevant standard.<sup>170</sup> An Alaska court utilized a similar analysis.<sup>171</sup>

Commentators might point out that as of this date neither Alaska nor Hawaii recognizes same-sex marriage. Yet, that is not because the courts misapplied the relevant tests but instead because the state constitutions upon which those decisions were based were themselves changed so that the same-sex marriage prohibitions themselves became immune from state constitutional challenge.<sup>172</sup>

Consider *Baker v. State*,<sup>173</sup> in which the Vermont Supreme Court held that same-sex couples could not be deprived of the rights and obligations of marriage.<sup>174</sup> That ruling was based on a standard that is much less strict than the one described above.<sup>175</sup> These decisions at least suggest that a law banning same-sex marriage would not survive constitutional scrutiny were the analysis usually imposed for marital restrictions in fact employed.

It might seem surprising to suggest that First Amendment religious guarantees protect the right to marry a same-sex partner, since the Court seems to have limited the force of the First Amendment protections of religion. In *Employment Division, Department of Human Resources v. Smith*,<sup>176</sup> the Court suggested that “the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [only when] the Free Exercise Clause in conjunction with other constitutional protections” have been implicated.<sup>177</sup> Thus, *Smith* suggests that the Free Exercise Clause will not invalidate a neutral, generally applicable law which limits religious action unless that law also implicates other constitutional protections. Yet, a same-sex marriage ban does not only involve the Free Exercise Clause but, in addition, the right to marry<sup>178</sup> or, perhaps, the right to

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170. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

171. *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (concluding there is a fundamental right to choose a partner and remanding the case on the compelling state interest issue).

172. Stephen Buttry, *Legal Test Predicted For 416 Court Challenge Would Be First For a Same-Sex Marriage Ban Initiative 416 Text*, OMAHA WORLD-HERALD, Oct. 16, 2000, available at 2000 WL 4376128 (“Hawaii and Alaska voters essentially overruled their Supreme Courts by adopting constitutional amendments limiting marriage to a man and a woman.”).

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

174. *Id.* at 886-87.

175. *See supra* note 79 (discussing the level of scrutiny used in *Baker*).

176. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

177. *Id.* at 881.

178. *See supra* notes 38-41 and accompanying text (discussing the importance of the right to marry).

intimate association.<sup>179</sup> Indeed, it has been suggested that the *Smith* hybrid rule does much less work than some on the Court seem to think, since in many, if not most, Free Exercise cases it should not be difficult to argue that additional constitutional protections are implicated as well.<sup>180</sup>

Justice O'Connor has suggested that the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."<sup>181</sup> When one further considers that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility,"<sup>182</sup> the Free Exercise claim that same-sex marriages must be permitted is more difficult to dismiss than is generally appreciated.

### C. Vermont's Civil Union Statute

If indeed the First Amendment requires that states afford recognition to same-sex relationships, some analysis is still required to determine whether a state that recognizes civil unions has thereby met its constitutional burden. The Vermont Legislature's decision to recognize civil union status was reached only after the Vermont Supreme Court had at least implicitly suggested that it would recognize same-sex marriages if the state did not recognize some sort of status that would afford same-sex couples the rights and obligations of marriage.

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179. See *Shahar v. Bowers*, 114 F.3d 1097, 1126 (11th Cir. 1997) (Birch, J., dissenting) (discussing "Shahar's intimate association claim").

180. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment).

If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

*Id.* (Souter, J., concurring in part and concurring in the judgment); see also McConnell, *supra* note 152, at 1122 ("Why isn't *Smith* itself a 'hybrid' case? Whatever else it might accomplish, the performance of a sacred ritual like the ingestion of peyote communicates, in a rather dramatic way, the participants' faith in the tenets of the Native American Church.")

181. *City of Boerne v. Flores*, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting).

182. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in the judgment).

When creating the special civil union status, the Legislature made quite clear that civil unions were not marriages.<sup>183</sup> Notwithstanding that declaration, there was a backlash against some legislatures by voters who objected to the creation of this status.<sup>184</sup> Although it seems safe to say that there would have been an even greater backlash had the Legislature instead amended that state's marriage laws to permit same-sex couples to marry.<sup>185</sup>

Two of the candidates in the 2000 presidential election publicly endorsed the notion of same-sex unions for same-sex couples,<sup>186</sup> while at the same time suggesting that marriage should be reserved for different-sex couples. Given that those contracting civil unions have the same rights and obligations as do those contracting marriages,<sup>187</sup> an explanation is needed as to why a separate status should be created. Such an explanation would presumably have at least two components: (1) why such a status should be created at all, and (2) why a separate status should be created when the marriage laws could instead easily be modified to include same-sex couples.

#### *D. Reasons to Accord Marriage-Like Rights and Obligations*

There are a number of reasons why such a status might be conferred. It might be in response to recognition by a court that equal protection guarantees require at the very least that such a status be conferred.<sup>188</sup> It might also involve recognition by a state legislature that same-sex

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183. See VT. STAT. ANN. tit. 15, § 1201(4) (Lexis Supp. 2000) (“‘Marriage’ means the legally recognized union of one man and one woman.”).

184. Elizabeth Mehren, *Campaign 2000 Voters Oust 5 Who Backed Vt. Civil Union Law Politics: Republicans All, They Fall Victim In Primary Election To A Backlash Against Same-Sex Domestic Partnerships. But Deep Divisions Remain*, L.A. TIMES, Sept. 14, 2000, at A23, available at 2000 WL 25896461 (“In a clear expression of backlash against the nation’s first same-sex domestic partnership law, five incumbent Republicans who supported Vermont’s civil union legislation were defeated Tuesday in that state’s primary.”).

185. *Compare Questions Asked In Poll*, ASSOCIATED PRESS (AP) NEWSWIREs, Jan. 24, 2000 (finding more support civil unions than support same-sex marriages), with David Gram, *Exit Poll: Slight Majority Supports Civil Unions*, ASSOCIATED PRESS (AP) NEWSWIREs, Nov. 8, 2000 (“The civil unions backlash that only sort of happened may be explained in part by an exit poll that found a narrow majority of Vermonters supporting the new law.”).

186. See Ovetta Wiggins, *Abortion, Gay Rights Are Hot Potatoes Candidates Avoid Speaking on Issues*, REC. (Northern New Jersey), Oct. 16, 2000, at A01, available at 2000 WL 15836186 (suggesting that both Nader and Gore support same-sex civil unions).

187. *But see generally* Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS. J. 1 (2000) (arguing that civil unions do not afford equal benefits in the interstate context).

188. The *Baker* decision was based on the Common Benefits Clause of the Vermont Constitution, which is the “counterpart [of] the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.” *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999).

couples have the same needs and interests as do different-sex couples, and that the state should provide a status which would help fill those needs and protect those interests.<sup>189</sup> On these kinds of analyses, the status would be afforded because of the individual needs, desires, and interests that were implicated.

Or, a much different analysis might also be offered. Such a status might be created and conferred out of a recognition that the *societal* interests served by the state's recognizing such a status for different-sex couples—providing a setting for the raising of the young; providing a method whereby the distribution of assets will be organized should the relationship end; supporting an institution whereby individuals might be happier and more productive, thereby benefiting society as a whole as well as the individuals themselves—are also served by recognizing such a status for same-sex couples.<sup>190</sup> On this kind of analysis, recognition of a marriage-like status for same-sex couples would promote the general welfare.

The recognition that similar societal interests would be served by affording legal recognition of same-sex unions at least implicitly recognizes that the same-sex couples upon whom that status might be conferred are similar in important ways to different-sex couples. Were the couples so different that the relevant interests would not be served by affording that status, then there presumably would be little reason to afford that status.

One of the reasons that there has been a partial transformation in the debate regarding lesbian/gay/bisexual/transgender rights is that the rights sought would not even be desirable were the stereotypes of lesbian/gay/bisexual/transgendered people accurate. For example, were it true that “those” people only sought anonymous sexual encounters and were not interested in having meaningful long-term relationships,<sup>191</sup>

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189. See Frost, *supra* note 130, at 73.

Despite prohibitive legislation, gay and lesbian couples continue to marry. The significance of marriage in our society can hardly be overstated. Marriage carries with it considerable recognition in social, religious, economic and political spheres of life. People marry for many reasons: to enter into a committed relationship with one another, to signify to family, friends and acquaintances the nature of the relationship, to follow the teachings of one's religion, to provide for one's spouse financially, and to care for and make decisions on behalf of one another.

*Id.*

190. See STRASSER, *supra* note 158, at 2-5 (discussing the state interests in marriage).

191. See Campbell v. Sundquist, 926 S.W.2d 250, 263 (Tenn. Ct. App. 1996) (suggesting that there is insufficient evidence to establish that same-sex relationships are short-lived and shallow); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 625 (1994) (discussing “the stereotype that gay men are ‘promiscuous’”); Marc A. Fajer, *Can Two Real Men Eat Quiche*



it would not make sense to seek the right to marry except, perhaps, as a way of achieving other goals. The same might be said of parental rights. Were lesbian/gay/bisexual/transgendered people not having and raising children and not wanting to have children to raise,<sup>192</sup> the desire to have parental rights recognized and respected would be hard to fathom except, perhaps, instrumentally.

At the same time that the presidential candidates were claiming that lesbian/gay/bisexual/transgendered individuals should have a status affording them all of the rights and obligations of marriage, they also were asserting that marriage should be reserved for different-sex couples.<sup>193</sup> The question then becomes why a “separate but equal” status should be conferred.

### *E. The Meaning of Civil Unions*

While lesbian/gay/bisexual/transgendered people are viewed as less foreign than they were once thought to be, it is clear that the creation of civil unions—a “separate but equal” status—communicates at least two additional messages. First, it suggests that same-sex relationships are not as good as different-sex relationships.<sup>194</sup> Indeed, same-sex marriage opponents do not even attempt to mask their view that society must not view same-sex unions as on a par with different-sex unions.<sup>195</sup> Second, it suggests that same-sex unions are somehow an affront to religious principles, notwithstanding that some religions recognize such unions. The very term “civil union” suggests that while the union may be recognized by the state, it certainly should not be recognized as having

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*Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 538 (1992) (discussing claim that lesbians and gays are “promiscuous, predatory, and obsessed with sex”); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 284 (1995) (discussing sweeping generalizations falsely depicting all gay men as promiscuous).

192. See STRASSER, *supra* note 48, at ch. 4 (discussing lesbian and gay adoption and raising of children).

193. See Suzanne Fields, Editorial, *Ralph Nader Is Steadfast In His Views And Idealism*, GRAND RAPIDS PRESS, Nov. 5, 2000, at D3, available at 2000 WL 29126858 (“NOW joins the Human Rights Campaign, the gay advocacy lobby, in criticizing Mr. Nader, a bachelor, for not forcefully advocating same-sex marriage, even though he does support ‘gay civil unions . . . .’”); Christopher Heredia, *Gay Community’s Reminder—Not Everyone’s for Gore*, S.F. CHRON., Nov. 3, 2000, at A3, available at 2000 WL 6495881 (discussing Gore’s support for civil unions but opposition to gay marriages).

194. See Cox, *supra* note 1, at 135 (“Not until same-sex couples obtain the freedom to marry will what remains ‘a condition of legal inferiority’ be lifted from us.”).

195. See, e.g., Duncan, *supra* note 91, at 239-40 (discussing the “radical and dangerous agenda” which seeks to “reflect the equal goodness of homosexuality and heterosexuality”).

any spiritual significance.<sup>196</sup> Indeed, the language describing the process by which these unions are recognized says a great deal, since different-sex couples' marriages are "solemnized" and same-sex couples' civil unions are "certified."<sup>197</sup>

## V. CONCLUSION

No state currently recognizes same-sex marriages, notwithstanding the state and individual interests that would be promoted by such a recognition. Some suggest that same-sex marriage is anathema to those who are religious. However, given that some religions sanctify such unions, the most that can be said is that same-sex marriage is anathema to some but not other religions.

The fact that some religions recognize such unions has much more import than merely undermining the claimed consensus view that such unions should not be permitted. In addition, a strong argument can be made that, at least for some couples, such unions must be recognized because of the Free Exercise guarantees of the Federal Constitution. Were the appropriate level of scrutiny employed to determine whether the state could justify interfering with this religious practice, the state would never be able to establish that such a ban is justified.

The creation of civil unions is important for a variety of reasons, because the recognition of such a status at the same time suggests that individuals with a same-sex orientation are not as different as they were once thought to be and that unions for same-sex couples serve many of the same state and individual interests that are served by marriage for different-sex couples. Yet, the creation of this separate status also makes clear that society believes that same-sex couples do not deserve the same status and respect as do other members of the community.

One issue is whether it is permissible for the state to impose a stigma on one group out of deference to the religious or non-religious sensibilities of another. Scholars will debate that point. A different issue is whether the state can interfere with a religious practice like marriage without a showing of the substantial harm that would likely be

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196. *Cf.* *Fisher v. Fisher*, 324 N.W.2d 582, 583-84 (Mich. Ct. App. 1982) (distinguishing between a couple's "ecclesiastical union" and their "civil union").

Greg Johnson does not seem to appreciate this. *See* Johnson, *supra* note 2, at 43 ("Civil union, on the other hand, seems to successfully capture the spiritual aspect of the relationship.").

197. Mello, *supra* note 1, at 251. "The bill also distinguished between the terminology for the rites and rituals that symbolize the two classes of unions, heterosexual and homosexual. Marriages of heterosexuals are 'solemnized.' Unions of homosexuals would be 'certified' by judges or clergy members." *Id.*

caused without such a prohibition. The state has not yet offered justifications for its same-sex marriage bans which have survived even heightened scrutiny. Thus, it is unlikely that the stricter test normally imposed for violations of Free Exercise would permit the state to maintain such a ban.

The separate status of civil unions and, even more so, the refusal to give legal recognition to same-sex relationships communicate an attitude of inequality which would be viewed as intolerable in most other contexts. One can only guess how long this double standard will remain, although if events of the last few years are any indication, it may remain for a much shorter period than would have been imaginable a mere decade ago.