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ARTICLE

A HOUSE DIVIDED: SAME-SEX MARRIAGE AND DANGERS TO CIVIL RIGHTS

Lynn D. Wardle

I. INTRODUCTION

Can the United States long endure as a patchwork quilt of states in which same-sex marriages are prohibited in some states while simultaneously permitted in others? Will the federal government, through congressional action or judicial rulings, impose one regime or the other on all of the people in all of the states? For example, in 2004 and 2006, resolutions proposing an amendment to the Constitution of the United States that would define marriage nationally as the union between a man and a woman were considered (and in 2006 received majority votes in both houses). However, since 2009 a bill to repeal the federal Defense of Marriage Act (with 108 co-signers) has been pending in the U.S. House of Representatives. What are the implications of the legalization of same-sex marriage for religious liberties? For example, President Obama’s nomination of distinguished law professor Chai Feldblum to serve on the Equal Employment Opportunity Commission sparked intense controversy, at least in part because of her writings that advocate giving preference to sexual liberty over religious liberty. These and related issues are the focus of this Article.

† Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University. This Article was prepared for and presented at the Third Annual Liberty University Law Review Symposium, which was held on Saturday, February 13, 2010, at the Liberty University School of Law in Lynchburg, Virginia. The valuable research assistance of Leland Faux, Victoria Anderson, and Nephi Hardman is gratefully acknowledged. I express my appreciation to Mark Tolles, II, the Symposium Editor for the Liberty University Law Review, and to the skilled staff at Liberty University for making it possible for me to present my paper via webcam when “Snowmageddon” resulted in the cancellation of my flight.


This Article consists of four main parts after this Introduction. Part II reviews the status of same-sex marriage in the United States of America and throughout the world. There is a strong movement to legalize same-sex marriage in this country and globally, but there has also been a counter-movement, a reaction against same-sex marriage, which has had a much greater impact on law and policy. In addition, extra-legal indicia of public opinion also show a general rejection of same-sex marriage in most sectors of society, although the opinion and policy-forming elites are a notable exception to that consensus.

Part III argues that the “house-divided” metaphor is aptly applicable to the situation that the United States currently faces, where some states have narrowly defined marriage as the union of a man and a woman while others have more broadly redefined marriage as the union of any two people, including those of the same gender. Like slavery, same-sex marriage is a root paradigm-defining issue. In the end, one group or the other will prevail because both realize that the other is a threat to the institution they wish to preserve or establish. Part III discusses some recent examples and incidents that reveal this conflict and the incompatibility between traditional conjugal marriage and same-sex marriage, and it highlights several examples that show how religious liberty in particular is in jeopardy.

Part IV presents some arguments for why the protection of marriage as the union of a man and a woman is a fundamental civil right and a basic human right. This Part reviews the precedents as well as the concepts that support this notion in order to draw a relationship between the protection of conjugal marriage and the protection of human dignity. The author also notes the structural significance that the protection of marriage as the union of a man and a woman has as the institution that protects the foundation (virtue) of the scaffolding of individual rights and liberties in our constitutional form of government, as well as the dangers posed by the erosion of the constitutional principle of separation of powers.

Part V presents the author’s concluding reflections and recommendations. The suggestion that dual-gender marital families and same-sex unions can casually coexist within the institution of marriage over

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any significant period of time, or that such arrangements are good for society, is dubious at best. Same-sex marriage, like slavery, is an aggressively transforming social influence, and it does not shrink voluntarily. Thus, the clash of marriage systems is unavoidable. Efforts should be taken now to reduce the casualties of that conflict and to prevent further erosion of the institution of marriage, of the society it anchors, and of the fundamental rights embodied in the institution of marriage.

II. A NATIONAL AND GLOBAL ISSUE

A. The Status of the Movement To Legalize Same-Sex Marriage and Civil Unions in the United States of America and the World

The past decade has seen the coming-of-age of a global movement to legalize same-sex marriage and marriage-equivalent same-sex civil unions. These two legal movements are functionally equivalent. Same-sex marriage is marriage—period. It is fully marriage in both substance and in label. Same-sex civil unions (occasionally—as in California, Nevada and Washington state—denominated “domestic partnerships”) are treated the same as marriage in substance, with “the same” full civil rights, benefits, and privileges as marriage, but without the marriage label.

4. The term “civil unions” is commonly understood to mean domestic relationships of same-sex couples that have all of the same legal rights and benefits as traditional marriage, and that is how the term is used in this Article. See OXFORD ENGLISH DICTIONARY, Civil Union, Draft Additions June 2008, available at http://dictionary.oed.com/ (search for “civil” in word search; then scroll down to “civil union,” “civil marriage,” and “civil partnership”) (linking “civil union” to “civil marriage” and “civil partnership,” thus combining the idea of a secular (non-religious) marriage with “a legally recognized relationship similar to but distinct from marriage, available in certain jurisdictions to homosexual couples who are prohibited from marrying . . . .”). The term “domestic partnership” is commonly used to refer to a legal relationship with few or limited couple-rights, but it also is occasionally used as another term for full marriage-equivalent relationships (full “civil unions”) (as in California and Washington state); thus, “domestic partnership” encompasses a wide range of legally recognized non-marital (usually same-sex) relationships. See OXFORD ENGLISH DICTIONARY, Domestic Partner, Draft Revision Sept. 2007, available at http://dictionary.oed.com/ (search for “domestic” in word search; then scroll down to “domestic partner”) (defining “domestic partner” as, inter alia, “a person officially registered as such, and so entitled to (some of) the same legal rights or employee benefits as a spouse”); see also CAL. FAM. CODE § 297 (West 2004); WASH. REV. CODE § 26.60.015 (2009).

As Appendix A.1 shows, same-sex marriage is now legal in the United States in five states (ten percent of the states) and the District of Columbia. In five other states (another ten percent of the states), statutes have been adopted creating new legal domestic status relationships for same-sex couples that are equivalent to marriage but are called something else (usually “civil unions”). Six additional states (twelve percent of the states) have extended some specific, limited relational rights and benefits to same-sex couples (often called “domestic partner” or “reciprocal beneficiary” benefits or registries), but they do not provide marriage-equivalent legal status or benefits based upon these limited rights. In summary, same-sex couples are allowed to marry in one-tenth of the states and also in the twenty-seventh largest city, Washington, D.C. They may register for marriage-equivalent rights and status in another one-eighth of the country. However, marriage-equivalent legal status or legal couple marital benefits are not extended to same-gender couples in over three-fourths of the states.

Internationally, as Appendix A.2 shows, out of the 192 sovereign nations recognized by the United Nations, only seven nations (3.6% of all nations)
allow same-sex marriage;\textsuperscript{12} one of those nations plus twelve additional nations (another 6.2\%) provide legal benefits to same-sex couples that are largely equivalent to the legal benefits provided to married couples.\textsuperscript{13} In summary, nearly ten percent (9.8\%) of all sovereign nations (mostly western European nations or former colonies) provide same-sex couples with marital or marriage-equivalent legal status.

B. The Response: The Status of the Prohibition of Same-Sex Marriage and Civil Unions in the United States of America and the World

Rejection of same-sex marriage and marriage-equivalent unions reflects a much stronger and broader grassroots movement in America and internationally than the movement to legalize same-sex marriage or equivalent civil unions. As Appendix B.1 shows, thirty states (sixty percent of all American states) have passed constitutional amendments protecting marriage as the union of husband and wife in the past twelve years, including nineteen state constitutional amendments that also prohibit the legal recognition of marriage-equivalent same-sex civil unions.\textsuperscript{14} At least forty-two states have passed their own “defense of marriage” policies by statute, constitutional amendment, or both.\textsuperscript{15} Over forty American states have explicitly and unequivocally rejected both same-sex marriage and any marriage-like legal status or marital benefits for same-sex couples by

\textsuperscript{12} See infra Appendix A.2.

\textsuperscript{13} Another seven nations (3.6\% of nations) provide some limited benefits to same-sex couples. See infra Appendix A.2.

\textsuperscript{14} ALA. CONST. amend. 774; ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83; ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. I, § 7.5 (Proposition 8); COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27 (Amendment 2); GA. CONST. art. I, § 4, para. 1; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. § 263-A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

statute, constitutional provision, or both.\textsuperscript{16} Forty-five American states (90\%) now recognize marriage as the union between a man and a woman only,\textsuperscript{17} most by explicit statutory or constitutional provisions,\textsuperscript{18} and several others by judicial interpretation of existing statutes.\textsuperscript{19}

As Appendix B.2 shows, legal rejection of same-sex marriage is the prevailing rule and growing trend of constitutional marriage law globally as well. Thirty-seven nations (nineteen percent of the 192 sovereign nations recognized by the United Nations) have constitutional provisions that define marriage as the union of a man and a woman.\textsuperscript{20} All but one of those thirty-seven national constitutions has been adopted since 1970.\textsuperscript{21} By contrast, no national constitution expressly protects or explicitly requires same-sex marriage.\textsuperscript{22} Additionally, same-sex marriage is prohibited by statute, common law, or binding legal custom in many other nations that do not explicitly forbid same-sex marriage in their constitutions.\textsuperscript{23}

The overwhelming global rejection of same-sex unions is well-grounded. For over sixty years, explicit constitutional protection of male-female marital families has been considered one of the foundations necessary for the nurturing and protection of human rights. For example, the Universal

\begin{footnotes}
\footnote{17. The only states that do not bar same-sex marriage by positive law or judicial decision are Massachusetts, Connecticut, Iowa, Vermont, Maine, and New Mexico. For developments since May 2009, see infra Appendices A.1, A.2, B.1, and B.2.}
\footnote{18. See supra notes 14-15 and accompanying text. Additionally, some states have other statutory or judicial language that appears to recognize marriage as the union of husband and wife. Some of the rejection of same-sex marriage may be due to the anti-democratic tactics, such as litigation to judicially compel legalization of same-sex marriage, employed by advocates of same-sex marriage. See generally Gerald N. Rosenberg, \textit{Saul Alinsky and the Litigation Campaign To Win the Right to Same-Sex Marriage}, 42 J. MARSHALL L. REV. 643 (2009).}
\footnote{19. See, e.g., Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Chambers v. Ormiston, 935 A.2d 956 (R.l. 2007).}
\footnote{20. See infra Appendix B.2 (identifying constitutional provisions recognizing marriage as the union between a man and a woman).}
\footnote{21. Japan, whose constitution was adopted in 1946, is the other nation with a constitutional provision limiting marriage to male-female couples.}
\footnote{23. See generally Wardle, supra note 16, at 443-46.}
\end{footnotes}
Declaration of Human Rights recognizes that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”\textsuperscript{24} Similar statements about the foundational importance and specially-protected role of families are found in dozens of other international conventions, compacts, and instruments.\textsuperscript{25}

C. Other Indicia of Public Rejection of Same-Sex Marriage

In addition to the status of the law, there are many other indicia of strong and predominant popular opposition to legalizing same-sex marriage both in the United States and globally. To begin, there was much publicity surrounding the legalization of same-sex marriage in the first six months of 2009 in Iowa (by judicial decree),\textsuperscript{26} and in Vermont, New Hampshire, and Maine (by legislation). However, New England is the most liberal region of the country, so the legalization of same-sex marriage in three New England states by legislation shortly after the Obama campaign’s electoral sweep in 2008 was not surprising. It was expected to happen sooner or later. All three of these New England states already had laws that provided significant legal status and benefits to same-sex couples.\textsuperscript{27} By legalizing same-sex marriage, these states only expanded their prior pro-same-sex-couple policies. They did not suddenly “cross the aisle” from being states that were pro-traditional-marriage to states that are now pro-same-sex-marriage.

In the three New England states that legalized same-sex marriage, the Democratic Party controls both houses of the legislature, and in two states the governor is also a Democrat.\textsuperscript{28} So the legalization of same-sex marriage


\textsuperscript{25} See Wardle, Federal Constitutional Protection, supra note 1, app. II at 483 (listing thirty-five international treaties, charters, conventions, and instruments acknowledging the importance of families and/or marriage, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child); see also infra Appendix C.

\textsuperscript{26} Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).


\textsuperscript{28} For Vermont, see Ben Pershing, Republican Governor Won’t Seek Reelection in Democratic Vermont, WASH. POST, Aug. 28, 2009, available at http://www.washingtonpost.com/
may tell more about internal Democratic party priorities than general American marriage policy values.

The legalization of same-sex marriage in Vermont, Maine, and New Hampshire occurred by legislative vote. Current and subsequent legislatures in those states can repeal same-sex marriage just as easily as it was enacted. If Democrats lose control in the next election in any of these states, same-sex marriage could be overturned as suddenly as it was created. Indeed, efforts are already afoot to repeal same-sex marriage in New Hampshire.29 (Obviously, many grass-roots Democrats do not support same-sex marriage, but it is clear that party activists who do favor same-sex marriage presently control the party in New England.)

There are several indications that the legislative legalization of same-sex marriage in New England was in disregard of the will of the people. The most obvious example is Maine. The Maine Constitution allows a “people’s veto” of legislation if enough signatures are gathered within ninety days of adjournment of the legislative session.30 A citizens group submitted over 100,000 signatures on petitions calling for a “people’s veto” of the law legalizing same-sex marriage (nearly twice as many as the 55,000 required

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to put the matter on the ballot). As a result, Maine’s same-sex marriage legislation came before Maine voters before it actually became law. Despite the fact that supporters of gay marriage who opposed the “people’s veto” significantly outspent the opponents of same-sex marriage, Maine voters passed the “people’s veto” of same-sex marriage by a vote of nearly fifty-three percent to forty-seven percent—a decisive political statement and rebuff of the legislature.

Similarly, the enactment of same-sex marriage involved some dirty politics in New Hampshire. There, the state House and Senate passed different bills, so they went before a conference committee. Senate Rules require senators from both parties to be on that committee, which must unanimously approve any compromise bill. When the sole Republican senator on the committee opposed the same-sex marriage bill, the Democratic Senate President removed her and replaced her with a Democrat to ensure unanimous approval, in apparent violation of the rules. Thus, legalizing same-sex marriage may not have represented the will of the people but the will of back-room political power-brokers.

The value of resolving the issue by constitutional amendment (as thirty states have done) is obvious. However, New England state constitutions are famously anti-populist. They were written by people who distrusted democracy, who feared “mob rule,” and who favored control by a governing political establishment. Thus, passage of constitutional amendments banning same-sex marriage anywhere in New England is unlikely in the near future. Voters in New Hampshire and Vermont will not be able to do what voters in more than sixty percent of American states have done—cast their ballots to decide whether to protect marriage by a constitutional amendment and end the politics.

33. State of New Hampshire Senate, Rules of the Senate 19, 28, available at http://www.gencourt.state.nh.us/senate/senateclerk/2009%20-%202010%20Rules.html (setting forth the 2009-2010 senate rules requiring unanimous voting during joint conferences between the New Hampshire Senate and House of Representatives and requiring all conference committees to include senators from both parties).
34. See Tom Fahey, Compromise Gay-Marriage Accord Reached, UNION LEADER (N.H.), May 31, 2009, at 4 (describing the New Hampshire Senate President’s replacement of the sole Republican senator on the compromise committee); Tom Fahey, No Go on Marriage Question, UNION LEADER (N.H.), May 28, 2009, at 1 (listing the New Hampshire state senators who originally constituted the compromise committee and their party affiliations).
In Vermont and Nevada, the Republican governors vetoed the same-sex marriage and same-sex civil union bills enacted by their respective legislatures. However, in both states, the governors’ vetoes were overturned and the bills became law—by a single vote. If just one vote had changed in each legislature, same-sex marriage would not be legal in Vermont nor civil unions in Nevada. This underscores how crucial a single vote can be in America’s democratic system. The Vermont legislator, who initially voted against same-sex marriage but later switched his vote to override the governor’s veto, indicated that he changed his vote in response to letters from his constituents, who favored same-sex marriage by a slight margin. This also highlights how important it is for concerned, responsible citizens to communicate appropriately with their elected public officials.

In April of 2009, the Iowa Supreme Court unanimously forced same-sex marriage on its citizens in Varnum v. Brien. This decision is a stunning example of judicial elitism and disregard for the separation of power. It also shows why it is necessary to adopt state marriage amendments protecting marriage—to prevent judges from illegitimately mandating same-sex marriage. Public opinion polling immediately following the Varnum decision showed that Iowans opposed same-sex marriage by nearly a two-to-one ratio. A Des Moines Register poll conducted September 14, 2009, nearly six months later, stated that: “The poll shows that 26 percent of Iowans favor April’s unanimous court ruling legalizing same-sex marriage, 43 percent oppose it and 31 percent don’t care much or are not sure.” The same poll showed that if Iowans could vote on a constitutional amendment to ban same-sex marriage, “forty-one percent say they would vote for a ban, and 40 percent say they would vote to continue gay marriage. . . .”

37. Abel, supra note 35.
39. See Kyle Smith, Gay Marriage’s Earned Victory?, N.Y. POST, Apr. 12, 2009, at 20 (mentioning poll showing statewide support for gay marriage in Iowa at only thirty-six percent); see also Thomas Beaumont, King: Ruling May Prompt Governor Run, DES MOINES REG., Apr. 7, 2009, at 5A (“Roughly 60 percent of Iowans said in a Register poll last year that marriage should be defined as between a man and a woman.”).
41. Id.
report further noted: “The most intensity about the issue shows up among opponents. The percentage of Iowans who say they strongly oppose gay marriage (35 percent) is nearly double the percentage who say they strongly favor it (18 percent).”42

A voter backlash in Iowa is likely in 2010. Iowa also has anti-populist constitutional amendment rules,43 but Iowans are provided the opportunity to vote on whether to call a constitutional convention once per decade.44 2010 is the next year for Iowans to vote on whether to call such a convention.45 Thus, same-sex marriage may not be a “settled” issue in Iowa quite yet.

Likewise, there are clear signs that the public still opposes same-sex marriage on the west coast. After much blustering and threatening and beginning to collect signatures, major same-sex marriage organizations in California announced that they will not seek a proposed amendment in 2010 to overturn Proposition 8, which banned same-sex marriage and is currently being challenged in federal district court.46 The reason given by the spokesman for Equality California was that public opinion had not changed in the year after the people of California decisively voted for Proposition 8 and against same-sex marriage.47

42. Id.
43. IOWA CONST. art. X, §§ 1, 3.
44. IOWA CONST. art. X, § 3.
45. Id. It is not clear whether advocates of overturning same-sex marriage in Iowa will try to use the constitutional amendment process. Same-Sex Marriage in Iowa (Iowa Public Television broadcast Feb. 12, 2010), available at http://www.iptv.org/iowapress/episode.cfm/3723 (last visited Mar. 15, 2010) (Iowa Family Policy Board Chairman Danny Carroll stating that the proposed convention is a diversion, and that instead, he will focus on the state’s elections for the next legislature).
So there has been little change in public opinion against same-sex marriage in America. None of the states that legalized same-sex marriage in 2009 were among the thirty states that previously adopted constitutional amendments banning same-sex marriage. Same-sex marriage is still forbidden in over forty states, by constitutional amendment in nearly two-thirds of the states. Polls show that Americans still consistently oppose legalizing same-sex marriage.\textsuperscript{48}

Public opinion polling experts underscore that there is no massive trend supporting the legalization of same-sex marriage. In a paper prepared for presentation at the 2009 American Political Science Association annual meeting, Gregory B. Lewis and Charles W. Gossett noted: “A slender but stable majority has labeled homosexual sex ‘morally wrong’ in polls throughout the past quarter-century. In 22 Gallup polls since 1977, the percentage saying homosexual relations should be illegal has fluctuated around 45\% rather than trending strongly downward.”\textsuperscript{49} They further explained: “Opposition to same-sex marriage is strong and reasonably stable—55\% to 65\% oppose it and only 30\% to 35\% favor it. Brewer and Wilcox conclude that ‘from the early 1990s to the present . . . , there is no sign of a dramatic trend toward greater support.’”\textsuperscript{50} In addition, they acknowledged that “every statewide vote but one on same-sex marriage has come down in favor of prohibition, usually by substantial margins.”\textsuperscript{51} Likewise, a December 2009 survey reported by Angus Reid found that forty-six percent of Americans oppose same-sex marriage compared to forty-three percent who favor it.\textsuperscript{52}


\textsuperscript{50} Id. (citations omitted).

\textsuperscript{51} Id. at 1.

\textsuperscript{52} Angus Reid Global Monitor, Americans Split on Same-Sex Marriage, Dec. 18, 2009, http://www.angus-reid.com/polls/view/americans_split_on_same_sex_marriage/ (last visited May 13, 2010) (showing that forty-six percent of Americans oppose same-sex marriage, while forty-three percent favor it, and ten percent are not sure whether they favor or oppose it).
Late in 2009, the District of Columbia City Council voted to legalize same-sex marriage, beginning a process that is not yet completed. Again, the action appears to have been rammed through by politicians ignoring the will of a significant part of the people. “A poll conducted in May for same-sex marriage supporters found that whites in the District back same-sex marriage by more than 8 to 1, while blacks were against it 48 percent to 34 percent.” In a follow-up poll in January 2010, opposition to same-sex marriage among black Americans had risen to fifty-one percent compared to thirty-seven percent in favor, while white citizens supported same-sex marriage by eighty-three percent compared to twelve percent against it. Fifty-nine percent of D.C. residents, including seventy percent of black Americans in the District, favored putting the issue on the ballot so that “voters could vote yes or no on a referendum on same-sex marriage.”

When citizens’ petitions requesting the matter be put on the ballot were presented to the District of Columbia’s Board of Elections and Ethics, the Board rejected the petitions (three separate times) with the curious bootstrap argument that it would be in violation of the city’s anti-discrimination law to allow voters to vote for such a discriminatory rule as male-female marriage. (In other words, the Board believes that D.C.’s general sexual orientation non-discrimination law requires allowance of same-sex marriage, that the law also forbids allowing voters to vote on


55. Id.

whether to legalize same-sex marriage, and that such a general non-discrimination law cannot be amended—all of which are bizarre legal arguments and plainly erroneous legal interpretations.)

Another indicator of continuing public sentiment opposed to legalization of same-sex marriage in the United States is the continuing effort to enact constitutional protections for conjugal marriage. As noted earlier, thirty states already have adopted amendments to their state constitutions in order to explicitly define the institution of legal marriage as the union of a man and a woman.57 Those thirty states can be described as the “low hanging fruit” in the sense that the people in most of those states tend to be conservative on most social issues; thus, getting popular support for the passage of a constitutional amendment embodying their inherently conservative common vision of marriage was not surprising.58 The remaining twenty states that do not have a marriage amendment either are not inherently conservative states or have existing political power structures that are controlled by persons or political groups who have strongly pro-same-sex-marriage positions. Yet even in those remaining states, there are continued efforts to enact constitutional amendments to protect civil marriage as a conjugal (male-female) institution. Since the beginning of 2010, efforts to enact state marriage amendments or bills have been launched in many of these states, including Iowa,59 New Hampshire,60 Maryland,61 West Virginia,62 Illinois,63 Indiana,64 and Rhode Island.65

57. See supra note 14 and accompanying text; see infra Appendix B.1.

58. However, not all states that have adopted constitutional marriage amendments are generally considered to be conservative. For example, California, Hawaii, Minnesota, and Wisconsin are generally considered liberal states, but they have adopted state constitutional marriage amendments by popular vote.


61. Annie Linskey, Same-Sex Marriage Supporters Shift Tactics; Lobbying, Fundraising Target Md. Opponents, Balt. Sun, Jan. 28, 2010, at 1A (describing a proposed Maryland bill to
Internationally, the failure of popular majorities to adopt same-sex marriage or marriage-equivalents in any nation outside of the narrow band of Western Europe is telling evidence that most of the people in the overwhelming majority of the nations of the world oppose the legalization of same-sex marriage. The movement to legalize same-sex marriage is a “thin” movement composed of certain social classes and opposed by the “thick” body of most members of most bodies politic. The survey data confirms that assessment.


63. See Dave McKinney, Ban Gay Marriages, GOP Gov Hopeful Says; Brady Also Wants Amendment for Term Limits, CH. SUN TIMES, Feb. 11, 2010, at 29.


66. See infra Appendix B.2; see also infra Appendix C.

the twenty-eight countries surveyed (including those in the EU) did a majority favor the legalization of same-sex marriage, while fewer than one-third of the citizens surveyed expressed support for legalizing same-sex marriage in most of the European nations (fifteen) that were surveyed.68 In August 2009, Angus Reid reported that polls in Poland showed that only fourteen percent of Poles surveyed favored same-sex marriage, while seventy-five percent opposed it.69 In Portugal, it was a closer split: 49.5% of the Portuguese surveyed in a January 2010 report opposed same-sex marriage, while 45.5% supported the legalization of same-sex marriage.70

Outside of Europe, opposition to same-sex marriage is even stronger. For example, in all fifty-seven nations comprising the inter-governmental Organization of the Islamic Conference, as well as in many other nations where Muslims are a significant minority, opposition to same-sex marriage is overwhelming. Same-sex marriage is not allowed in any of the nearly five dozen Muslim nations, which comprise nearly one-third of the nations on the earth;71 furthermore, acceptance of same-sex marriage in these countries is highly unlikely in the foreseeable future.72

Elsewhere outside of Europe and North America, opposition to same-sex marriage is strong as well. In January 2010, Angus Reid reported that polls in Argentina show that only thirty-five percent of Argentines surveyed favored same-sex marriage, while sixty percent opposed it.73 Likewise, in an April 2009 Angus Reid report, less than one-third of Chileans favored legalizing same-sex marriage, and sixty-five percent opposed it.74 A 2008

68. Id.
A June 2008 report from Angus Reid suggested that seventy percent of Jamaicans would oppose same-sex marriage. This does not mention the peoples and nations of Central Asia, East Asia, Africa, the Pacific regions, Central America, and most of South America. Opposition to same-sex marriage is generally adamant in nations in these global regions as well.

III. A HOUSE DIVIDED: THE INCOMPATIBILITY OF CONJUGAL MARRIAGE AND SAME-SEX MARRIAGE

The “house-divided” metaphor, which is derived from the Bible and was made popular by President Lincoln, is aptly applicable to the situation that the United States now faces with some of its states defining marriage as the union of a man and a woman, while others are defining marriage broadly as the union of any two people, including those of the same gender.

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78. Matthew 12:25 (King James) (“And Jesus knew their thoughts, and said unto them, ‘Every . . . house divided against itself shall not stand.’”); Mark 3:25 (King James) (“And if a house be divided against itself, that house cannot stand.”); Luke 11:17 (King James) (“But he, knowing their thoughts, said unto them, ‘ . . . [A] house divided against a house falleth.’”).

The metaphor also applies within many states themselves as citizens and government employees in different political subdivisions are applying different policies within the same state. For example, a state that permits same-sex marriage may or may not have policies that also attempt to accommodate the rights of officials who conscientiously object to same-sex marriage.  

Both conservative and liberal legal scholars have predicted that the legalizaion of same-sex marriage will lead to clashes between the civil liberties of those who advocate or enter same-sex marriage and those who do not support same-sex marriage. Perhaps the most poignant examples of such civil liberties conflicts and potential realignments involve legal claims by members of the LGBT communities against religious organizations, employees, as well as individual members of religious faiths that oppose same-sex marriage. For example, religious institutions in the United States that refuse to recognize same-sex marriage may face significant potential civil liability and litigation risk under employment antidiscrimination laws, fair housing laws, and public accommodation laws. They may also risk loss of government privileges and benefits including tax-exempt status, exclusion from eligibility for social service contracts, exclusion from government facilities and grounds, and exclusion from solemnizing marriages. Moreover, they may face potential civil and criminal liability for violating “hate crimes” and “hate speech” laws.

But churches and their agents and agencies are not the only ones at risk. Private individuals, who for reasons of faith or conscience do not wish to facilitate or endorse same-sex marriages, risk exclusion from eligibility for employment (by non-hiring and firing) in civil service positions that involve licensure or the solemnization of marriage. In addition, individuals may face alleged civil rights violations and penalties as well.

80. For further discussion of the conflicts regarding the rights of conscience of persons licensing or performing same-sex marriage, see generally Lynn D. Wardle, Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions, 12 J.L. & FAM. STUD. 315 (2010).


82. Severino, supra note 81, at 972-79.

83. Id. at 970-72.

84. Id. at 977-79.
In fact, harassment and persecution directed against religious groups, clergy, and persons of faith opposed to same-sex unions have been increasing in jurisdictions where same-sex marriage or civil unions are or are becoming legal, both in the United States and in other nations.  

A. The Intensifying Conflict Between Same-Sex Marriage and the Civil Liberties of Those Who Do Not Support Same-Sex Marriage

While this dilemma is global (at least in North America and Europe), this paper focuses on civil liberties conflicts in the United States only. A few examples illustrate the dilemma. After Californian voters passed a constitutional amendment banning same-sex marriage (identified as “Proposition 8” on the ballot), supporters of Proposition 8 were vilified and harassed. Mormons, in particular, were singled out and widely blamed by homosexual activists for the passage of the amendment; names and addresses of Mormons and others who donated to efforts supporting the passage of Proposition 8 were published on the internet, resulting in a

85. For a global review, see Wardle, supra note 80.
86. For a discussion of these and related incidents of religious intolerance in the United States, see Wardle, supra note 80.
87. See generally Thomas M. Messner, The Price of Prop 8, BACKGROUNDER No. 2328 (Heritage Found., Washington, D.C.), Oct. 22, 2009, available at http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf (last visited Feb. 12, 2010). “[E]xpressions of support for Prop 8 have generated a range of hostilities and harms that includes harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence, at least one death threat, and gross expressions of anti-religious bigotry.” Id. at 1. Messner provides a listing of incidents and examples under the following categories: donor disclosure; vandalism and sign theft; harassment, hostility, and slurs (which were particularly targeted at Mormons); violence and threats of violence; targeting of businesses and specific employees; and religious attacks. Id. at 2-13.
88. Id. at 7-9; see also Peggy Fletcher Stack & Jessica Ravitz, Thousands in Salt Lake City Protest LDS Stance on Same-Sex Marriage, SALT LAKE TRIB., Nov. 7, 2008, http://www.sltrib.com/ci_10929992 (last visited May 13, 2010) (reporting that LDS leaders are disturbed that the church and its members are targeted for exercising democratic rights); Janet I. Tu, Mormon Church Targeted for Prop. 8 Support, SEATTLE TIMES, Nov. 10, 2008, at B1, available at http://seattletimes.nwsource.com/html/localnews/2008371441_protest10m.html (last visited May 13, 2010) (describing how the LDS church has been targeted by homosexual activists and blamed for passage of Proposition 8); Utah, Sundance Film Festival, Targeted for Boycott To Punish Mormons’ Work on Proposition 8, ASSOCIATED PRESS, Nov. 7, 2008, available at http://www.foxnews.com/story/0,2933,449024,00.html (last visited May 13, 2010).
89. See Lawrence Jones, Judge Refuses Anonymity to Prop. 8 Donors, CHRISTIAN POST, Jan. 30, 2009, http://www.christianpost.com/article/20090130/judge-refuses-anonymity-to-prop-8-donors/index.html (last visited May 13, 2010) (noting court’s denial of request to prevent further disclosure of names of donors); Artie Oheda, Proposition 8 Protest Targets Mormon Church:
spate of violent threats against, attacks upon, and intrusions upon selected Mormons,90 their places of worship,91 their communities,92 their
and in numerous other vindictive acts of harassment and intimidation by homosexual activists attempting to punish and “pay back” that religious community for its prominent role in overturning the court ruling that had previously legalized same-sex marriage.  

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92. See McDonald & Marelius, supra note 91, at A1 (“Some activists are using online boycott lists and other means to target individual donors to the Yes on 8 campaign, including San Diego hotel magnate Doug Manchester and Terry Caster, owner of the locally based A-1 Self-Storage chain [who donated to Prop 8].”); Utah, Sundance Film Festival, Targeted for Boycott To Punish Mormons’ Work on Proposition 8, supra note 92 (reporting urgings from some to boycott business in Mormon area).

94. Several legal challenges have been threatened or filed against supporters of Proposition 8, including the Mormon church, in order to harass supporters. See, e.g., Posting of Jessica Garrison to L.A. Now, Mormon Church Reports Spending $180,000 on Proposition 8, http://latimesblogs.latimes.com/lanow/2009/01/top-officials-w.html (Jan. 30, 2009, 5:51 PM) (noting that pro-same-sex marriage activist Fred Karger filed his first “complaint with the Fair Political Practices Commission after the election alleging that church officials had not properly disclosed their involvement”); Revoke LDS Church 501(c)(3) Status, http://lds501c3.wordpress.com/ (Oct. 29, 2008 and subsequent blog postings) (calling for revocation of the church’s tax-exempt status as a charitable religious organization); see also Hollie McKay, Tom Hanks Says Mormon Supporters of Proposition 8 ‘Un-American,’ FOXNEWS.COM, Jan. 16, 2009, http://www.foxnews.com/story/0,2933,480167,00.html (last visited May 13, 2010) (reporting that movie star Tom Hanks, who is the executive producer of a controversial television show that allegedly portrays polygamists, labeled Mormons who donated money to support the passage of Proposition 8
Mormons have also been victims of discrimination in the employment context (e.g., resignations under pressure, denial of appointments, etc.) because they supported Proposition 8. In the weeks immediately after passage of Proposition 8, several Mormons, “including the artistic director of the California Musical Theatre,” who had held his position for twenty-five years, were “targeted because of their contributions to the ballot measure, and he resigned.”

Likewise, the Mormon Director of the Los Angeles Film Festival resigned under pressure when news of his donation to the Proposition 8 campaign was made public. The discrimination as “un-American”). But see Tom Hanks Apologizes for Calling Mormon Supporters of Proposition 8 ‘Un-American,’ FOXNEWS.COM, Jan. 23, 2009, http://www.foxnews.com/story/0,2933,482266,00.html (last visited July 17, 2009) (reporting a week later that Tom Hanks apologized for his labeling of Mormons who supported Proposition 8 as “un-American”).


96. See Posting of Rachel Abramowitz to L.A. Now, L.A. Film Festival Head Resigns over Prop. 8 Donation, http://latimesblogs.latimes.com/lanow/2008/11/la-film-festiva.html (Nov. 25, 2008, 3:57 PM) (relating that Richard Raddon resigned a prestigious job after threats of boycott over his donation to Prop. 8); Alison Stateman, What Happens If You’re on Gay Rights’ Enemies List, TIME.COM, Nov. 15, 2008, http://www.time.com/time/nation/article/0,8599,1859323,00.html (last visited July 16, 2009) (“Scott Eckern, artistic director of the California Musical Theatre in Sacramento, whose $1,000 donation was listed on ElectionTrack, chose to resign from his post this week to protect the theater from public criticism.”); id. (“Karger says a ‘soft boycott’ his group had started against Bolthouse Farms—which gave $100,000 to Prop. 8—was dropped after he reached a settlement with the company. Bolthouse Farms was to give an equal amount of money to gay rights political causes.”); see also Tami Abdollah & Cara Mia DiMassa, Prop. 8 Foes Shift Attention, L.A. TIMES, Nov. 14, 2008, at A1, available at http://articles.latimes.com/2008/nov/14/local/me-boycott14 (describing boycott of a restaurant because its LDS manager had donated $100 to Proposition 8, Cinemark because of its chief executive’s contributions, a health food chain whose owner supported Proposition 8, and a car dealership); Posting of Mandy to Complaints Board, Mormon Businesses Complaints—Against Their Support of Prop 8, http://www.complaintsboard.com/complaints/mormon-businesses-c121536.html (Nov. 10, 2008).

Now do not tip, hire, or do any business with a Mormon. 10% of their income goes to the church that worked tirelessly to take the civil rights away from people. They are a Nazi organization who only what [sic] their point of view followed. I asked my waiter if he were a Mormon, when he said he was I did not tip him, telling him, I was sorry but I can not support bigotry.

Id.
persists. For example, more than fourteen months after the election, the Mayor of Oakland, California, announced that he was putting on hold the reappointment of a long-time, distinguished Mormon community leader, Lorenzo Hoopes, to the Board that oversees Oakland’s historic Paramount Theatre, because Hoopes had contributed money for the passage of Proposition 8. Mr. Hoopes had been a member of the board for three decades.97

The threats extend beyond particular religious groups being disfavored by the homosexual community. All citizens who do not wish to legalize same-sex unions, and particularly those who wish to work for the government, face serious conscience dilemmas. For example, after the Goodridge decision in Massachusetts, all Massachusetts justices of the peace had the legal duty to marry all persons who legally applied to be married, including same-sex couples, because neither the Massachusetts legislature nor the Supreme Judicial Court had authorized any exception for conscience or religious objectors; they could be sued for discrimination if they did not marry same-sex couples.98 Thus, shortly after same-sex


Weddings are not really part of a judge’s job. A judge has the authority to marry people, but generally no obligation to marry anybody . . . . There is no doubt that such a judge [who marries someone] is exercising state authority, vested in him in his capacity as a judge, but that is not conclusive; under existing marriage law a clergyman performing a wedding is also exercising state authority. I think that even for a judge, there is such a strong element of personal discretion in presiding over a wedding that it is entirely appropriate to respect his feelings of moral responsibility . . . .

Douglas Laycock, Afterword, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, supra note 81, at 189, 199, 200. Governor Romney’s action provoked substantial animosity from some vigorous opponents of same-sex marriage. See, e.g., Posting of Gregg to
marriage was legalized in Massachusetts, “at least twelve dissenting Massachusetts justices of the peace [were] forced to resign for refusing to perform same-sex marriages despite their willingness to continue solemnizing husband-wife marriages.”

Similarly, in California, during the four months during which same-sex marriages were legalized, some government employees sought to opt out of licensing or performing marriages of same-sex couples. Several county clerks attempted to make accommodations for deputy county clerks who did not wish to issue licenses to homosexual couples to marry, with mixed results. A Los Angeles Times survey of all fifty-eight counties in California revealed that twenty-three counties allowed or did not ban county employees from opting out of officiating at same-sex marriages, while employees were not allowed to opt out or there were no reported employee objections in thirty-five counties.

Some states allow at least some public employees to decline to perform same-sex marriages. For example, in Connecticut, where justices of the peace reportedly “can refuse to perform a civil union just like they can opt not to do a wedding, for whatever reason[,]” many decline to officiate or participate. Likewise, Vermont, the first state to legalize civil unions, also apparently gives its elected Justices of the Peace discretion to decide whether to perform civil unions.

In Iowa, however, after the state supreme court legalized same-sex marriage by judicial decree, there were some rumblings of discontent

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102. Id.

103. Id.
among county employees who did not wish to facilitate same-sex marriage. As a result, an official in the Iowa Department of Public Health

sent notices to Iowa’s 99 county recorders telling them they must comply with a recent Iowa Supreme Court ruling that legalizes same-sex marriage [ordering:] “All county recorders in the state of Iowa are required to comply with the Varnum decision and to issue marriage licenses to same sex couples in the same manner as licenses issued to opposite gender applicants . . . .” 104

Private citizens and businesses face similar pressures to facilitate same-sex marriage. Thus, legal actions have been taken against religious bodies, for declining to rent facilities for same-sex union ceremonies 105 and for firing a youth minister who performed a same-sex union ceremony in violation of church doctrine. 106 In New Mexico, a Christian couple who operated a marriage photography business were charged by a human rights tribunal, found guilty of violating the law, and forced to pay over $6,600 for the complainant’s attorney’s fees because they declined on grounds of religious principle to photograph the civil commitment ceremony of a lesbian couple. 107

The incidents continue to multiply. A California court order required eHarmony, an online dating service, to add homosexual matches to its main


106. Severino, supra note 81, at 337 (discussing Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002)).

site although the action conflicted with the business’s core values.\textsuperscript{108} A District of Columbia ordinance requiring the Catholic Church to provide adoption services to homosexuals has resulted in the Church declining to sign contracts with the D.C. government, resulting in reduced services by the Church to the poor within the District.\textsuperscript{109}

Expression of opposition to same-sex marriage has also resulted in retaliation. In Massachusetts, for example, a man claimed he was fired because he told his coworker that he thought same-sex marriage was wrong.\textsuperscript{110} Similarly, a Maine news reporter claimed he was fired for sending a personal email that was critical of a same-sex marriage support group’s reference to “lies” and “hate” in a statement they made regarding the state’s voter-rejected same-sex marriage law.\textsuperscript{111} Also in Maine, a school counselor who made an ad supporting the “people’s veto” of the same-sex marriage bill passed by the legislature had a complaint filed against him seeking to revoke his license.\textsuperscript{112}

Thus, in the wake of the movement to legalize same-sex marriage and marriage-equivalent unions, there have been increasing threats to, and diminution of, religious liberty, which have resulted in an enormous erosion of respect for the tolerance and protection of fundamental human rights. As one lawyer put it, “The Left is trying to create a ‘right’ that will destroy the


For three decades people of faith have watched a systematic and very effective effort waged in the courts and the media to drive them from the public square and to delegitimize their participation in politics . . . .”

The greatest perils to individual liberty today are the threats to and the growing denial of religious liberty, and the greatest growth in those threats has resulted from the legalization of same-sex marriage. “A second threat to religious freedom is from those who perceive it to be in conflict with the newly alleged ‘civil right’ of same-gender couples to enjoy the privileges of marriage.”

The Christian Legal Society v. Martinez case now pending before the Supreme Court of the United States exemplifies that challenge. In September 2004, the Christian Legal Society (CLS) student chapter at Hastings Law School applied to school officials to exempt the group and other religious student organizations from portions of the university’s nondiscrimination policy, which would force the chapter to allow persons who hold beliefs and engage in conduct contrary to the CLS Statement of Faith, which includes a prohibition against extramarital sex, to join as voting members and to run for officer positions. School officials not only denied this request, but they also stripped the chapter of its recognition and benefits, including student activity fee funding. On October 22, 2004, the CLS filed a lawsuit against the school officials who denied recognition to

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115. Id.


118. Id. at *3.
the group because the chapter requires its officers and voting members to adhere to the CLS Statement of Faith and moral standard requirements.\textsuperscript{119} CLS alleged that the University of California-Hastings’ exclusion of its chapter violates, among other constitutional rights, CLS’ right of expressive association and its right to be free from viewpoint discrimination.\textsuperscript{120} CLS argued that it was a violation of the right of expressive association to force a religious student organization to accept officers and voting members who hold beliefs and engage in conduct in opposition to the group’s shared viewpoints, thereby inhibiting the group’s ability to define and express its message.\textsuperscript{121} CLS also argued that it was a “violation of the right to be free from viewpoint discrimination to impose the above requirement on a religious student organization while permitting every other recognized student organization on campus to limit its officers and voting membership to persons who agree with the group’s shared viewpoints.”\textsuperscript{122}

Both parties submitted motions for summary judgment, and in April 2006 the district court ruled for the defendants, which included law school officials and “Hastings Outlaw,” a recognized student organization.\textsuperscript{123} CLS appealed this ruling, and in March 2009, a panel of the Ninth Circuit Court of Appeals affirmed the district court’s ruling against CLS in an unpublished, one-paragraph decision.\textsuperscript{124} The Supreme Court heard oral arguments in the case on April 19, 2010.

The \textit{Perry v. Schwarzenegger} lawsuit, which is simultaneously pending now in a federal district court in California, threatens to judicially dismiss and override the right of persons opposed to same-sex marriage to participate in the political process.\textsuperscript{125} This case has been aptly described as

\begin{itemize}
\item \textsuperscript{119} Id. at *4; see also Press Release, Alliance Defense Fund, Christian Club Sues UC Hastings over Membership Policy (Oct. 22, 2004), available at http://www.adfmedia.org/News/PRDetail/833 (stating the date that CLS filed the lawsuit).
\item \textsuperscript{120} Christian Legal Soc’y, 2006 WL 997217, at *5-24.
\item \textsuperscript{121} Id.
\item \textsuperscript{123} Id.; see also \textit{Christian Legal Soc’y}, 2006 WL 997217.
\item \textsuperscript{124} Christian Legal Society, \textit{supra} note 122. The panel included formerly “conservative” Chief Judge Alex Kozinski, Judge Proctor Hug, Jr., and Judge Carlos T. Bea. \textit{See also} Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane, 319 F. App’x 645 (9th Cir. 2009), \textit{cert. granted}, 78 U.S.L.W. 3340 (U.S. Dec. 7, 2009) (No. 08-1371).
\end{itemize}
“a show trial in a kangaroo court.”

In this suit, plaintiffs seek to cancel the votes of more than fifty-two percent of the California voters who approved Proposition 8, which amended the Constitution of California to read: “Only marriage between a man and a woman is valid or recognized in California.” Denial of franchise because of one’s beliefs about same-sex marriage is a drastic manifestation of the conflict between same-sex marriage and religious liberty. In this litigation, the interests of the people of California, who passed the resulting state constitutional amendment, are not being defended by either the Attorney General or the Governor, whose jobs are to see that the laws are faithfully protected and defended. Those politicians have refused to defend the marriage amendment because they favor same-sex marriage. Thus, the voters (including voters of faith) have already been stripped of their civil rights by the refusal of state officials to defend the law because of their personal policy preferences.

One experienced attorney who has followed this issue for a long time to protect the interests of his client, a church, stated of the plaintiff’s complaint:

“[T]hey essentially claim that the voters, from whom all authority in a democracy flows, may not consider religious views and values when deciding these alleged social and cultural civil rights.

“These are serious allegations and represent an arrow directly at the heart not only of traditional marriage but at the place of religion and religious views in the political dialogue of this country.”

So the beat goes on. Support for same-sex marriage now trumps the civil rights of persons who defend marriage as the union between a man and a


127. CAL. CONST. art. I, § 7.5 (Proposition 8); see also Eskridge & Spedale, supra note 125.


129. See, e.g., id.

woman (particularly including those of religious faith) to have their votes counted and to have the laws they pass faithfully defended by the public officials elected and paid to so defend.

B. The Weak Rationale for Subordinating Religious Liberty

The basic idea underlying the legal claims against persons of faith who do not wish to facilitate LGBT persons at all times and in all places or situations is quite simple. Just as persons who oppose interracial marriage are not allowed to discriminate on that basis in their “public” life (including their activities involving hiring, firing, employment, housing, offering market services and public accommodations, education, or government-regulated activities), so also persons who oppose same-sex marriage should not be allowed to discriminate on that basis in their “public” life.131 Both groups of persons are called “bigots,” and while the law will not punish them for their bigoted beliefs, neither should the law allow them to discriminate against and hurt others by acting upon their bigoted beliefs.

Professor Chai Feldblum, a fine legal scholar and active lesbian rights advocate, wrote that it will be appropriate to “burden[] belief by regulating conduct” in order to protect the liberties of gays and lesbians.132 She acknowledges that “those who advocate for LGBT equality have downplayed the impact of such laws on some people’s religious beliefs . . . .”133 Thus, she advocates: “Protecting one group’s [sexual] identity liberty may, at times, require that we burden others’ belief liberties.”134 She further explains:

[F]or all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried straight couples and all gay couples, this is a point where I believe an inevitable choice between liberties must come into play. In making that choice, I believe society should come down on the side of protecting the identity liberty of

132. Feldblum, supra note 131, at 142.
133. Id. at 125. Feldblum adds: “[A]nd, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.” Id.
134. Id. at 156.
LGBT people. Once an individual chooses to enter the stream of economic commerce by opening a commercial establishment, I believe it is legitimate to require that they play by certain rules. . . . Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect the ability of LGBT people to live in the world.135

Except for persons in leadership positions of churches and religiously-affiliated organizations, Professor Feldblum advocates that religious liberty must give way to sexual identity liberty.136

Professor Feldblum’s justification for subordinating religious liberty to sexual identity liberty is a sophisticated variation of the justification for affirmative action for racial minorities—reverse racial discrimination to overcome the effects of past racial discrimination. She argues that because religious liberty has allowed discrimination and subordination of sexual identity liberty for so many decades and centuries, and because we now, so belatedly, realize how crucially important sexual identity liberty is to homosexuals, bisexuals, and transgendered persons, subordination of religious liberty to sexual identity liberty is necessary to finally allow sexual identity liberty to blossom fully, and to facilitate its practitioners’ full participation in our democratic republic.137

However, this analysis fails for two reasons. First, there is an explicit and unequivocal commitment in the Constitution’s text to reject racial discrimination, but there is not any clear constitutional text or consensus to give preferential protection to same-sex relations. Thus, as Judge Smith of the New York Court of Appeals wrote in Hernandez v. Robles,138 in rejecting the Loving analogy:

[T]he historical background of Loving is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. This country fought a civil war to eliminate racism’s worst manifestation, slavery, and passed three

135. Id. at 153 (footnotes omitted).
136. Id. at 155.
137. Id. at 149-55.
constitutional amendments to eliminate that curse and its vestiges. 139

Americans fought the costliest, bloodiest war in our history to establish the principle of racial equality, and it is expressed in three Civil War Amendments. 140 The constitutional liberty to be free from racial discrimination is textually and historically undeniable and is supported by a constitutional consensus. By contrast, no text or history shows anything establishing the alleged sexual identity liberty, and as Appendix B.1 shows, the clear constitutional consensus in the United States unquestionably rejects such a claim. 141

Second, racial discrimination involves an immutable biological condition; sexual identity liberty is different. 142 Dr. Martin Luther King, Jr., knew the difference and expressed it in his famous “I Have a Dream” speech in Washington, D.C. when he said: “I have a dream my four little children will one day live in a nation where they will not be judged by the

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139. Id. at 8. The majority also noted:
   It is true that there has been serious injustice in the treatment of homosexuals also, a wrong that has been widely recognized only in the relatively recent past, and one our Legislature tried to address when it enacted the Sexual Orientation Non-Discrimination Act four years ago. But the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

Id. (citation omitted).

140. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); U.S. CONST. amend. XIV, § 1:
   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

141. See infra Appendix B.1.

color of their skin but by the content of their character.” Sexual behavior always has implicated serious concerns of morality, and distinctions on the basis of sexual morality are profoundly different than discrimination on the basis of race or color.

C. The Incompatibility of Dual-Gender Marriage and Same-Sex Marriage Regimes

The incidents described above provide proof of the incompatibility of traditional marriage (dual-gender legal unions) and same-sex marriage. But why? What is the reason for this incompatibility? The answer has to do with irreconcilable visions of the boundaries, meaning, and purposes of legal marriage.

In order to prevent the chaos of anarchy and a social “tragedy of the commons,” there needs to be some notion of what marriage is, some definition of the boundaries of the institution. Societies create institutions that embody such boundaries and definitions in order to stabilize society. “Formal institutions are codified rules and informal institutions are unwritten rules and norms. Both formal and informal institutions play important roles in governing the commons.” Social expectations about marriage and the legal definition and regulation of marriage are classic examples of how society and government use what Elinor Ostrom called the “design principles [of] long-enduring institutions.” Dual-gender marriage has for centuries, even millennia, defined the nature of and been essential to the purposes (especially the procreative and child-rearing purposes) of the institution. Dual-gender marriage has provided a clear boundary for distinguishing marriage from other intimate relationships and has protected the investment of those entering the marital family institution by controlling the rules for entry into and exit from that institution. In addition, dual-gender marriage has provided familiarity,

144. Brigham Daniels, Emerging Commons and Tragic Institutions, 37 ENVT. L. 515, 521-22 (2007).
145. Id. at 528 (footnote omitted).
146. Id. at 531 (alteration in original) (internal quotation marks omitted) (citing Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 90-102 (1990)).
147. Id. at 532-34 (summarizing eight principles of stable institutions in society).
148. Id. at 533.
149. Id.
even homogeneity, across cultures and across time, and it has been a critical instrument of economic organization and profit for its members.\textsuperscript{150} Further, it has provided a “simple rule[]” to give credible commitments involved in the institution and has supplied a basis to unite the members of the family, thus lowering transaction costs and building social capital.\textsuperscript{151} Finally, for millennia, dual-gender marriage has received government recognition and support to strengthen the institution.\textsuperscript{152}

When persons wish to use a resource for a different purpose, attempt to move boundaries, and redefine the meaning and role of the institution that protects the existing shared social understanding that pervades most societies, conflicts quickly arise. These conflicts reflect differing visions and competing opportunities. When the institution at issue is as crucial to society as the institution of dual-gender marriage, the intensity of the conflicts increases.

The qualities and characteristics, as well as the purposes and uses, of the institution of marriage vary dramatically. If same-sex marriage is integrated into society, the institution of marriage will shift and transform to accommodate the purposes, qualities, and behaviors of the parties who are in the institution of marriage. What is considered “marriage” for purposes of including same-sex couples will bear little resemblance to what historically has been considered “marriage” (as limited to dual-gender unions).\textsuperscript{153}

\begin{itemize}
\item[150.] Id.
\item[151.] Id. at 533-34.
\item[152.] Id. at 534.
\item[153.] See Lynn D. Wardle, The Morality of Marriage and the Transformative Power of Inclusion, in WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 207, 226 (Lynn D. Wardle ed., 2008). The author states: Redefining marriage to include gay and lesbian couples will have a profound impact upon sexual morality in society. Sexual standards will change as homosexual relations will be instantly normalized and equated with marital relations. . . . Legalizing same-sex marriage will instantly transform the meaning of marriage, spouse, husband, wife, parent, [and] child in the law.
\item[Id.; see also] Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 980-82 (Mass. 2003) (Sosman, J., dissenting). Justice Sosman argues:
\item[The Legislature . . . may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.]
\item[. . . .]
\item[I]t is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such time as it is certain that that redefinition will not have unintended and undesirable social consequences.]
\end{itemize}
Conjugal marriage is the principal social institution designed to channel human sexual expression into responsible, socially constructive outlets.\(^{154}\) Sex between a married man and woman who are (and have been) chaste before marriage and faithful to their marriage vows during marriage is medically the safest and healthiest form of sex, psychologically the most secure and fulfilling form of sex, and emotionally the most fulfilling, enjoyable, and satisfying kind of sex.\(^{155}\) It provides the optimal setting in which children can be conceived, born, nurtured, and raised.\(^{156}\) The qualities of spousal integrity and sexual fidelity in marriage will be transformed by including same-sex couples in the institution of marriage.

Institutions like marriage in a democratic society can accommodate some “free riders” living in alternative relationships. Some modest deviation in quantity or quality from the norm of dual-gender marriage and sexual fidelity within marriage is not seriously threatening to the institution. However, when the quality or quantity of those deviations is so significant and the nature of the changes alter the very core architecture of the institutional structure, the “free-riders” no longer merely mildly burden the institution; instead, they threaten to undermine and overthrow the


Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . , but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.

\(^{155}\) Id. See generally Wardle, supra note 153, at 221-26 (describing how the “behavior norms and moral standards” of conjugal marriage and those of homosexual relationships are diametrically opposed).

\(^{156}\) Id.
institution, and with it the society that rests upon it, by redefining the core constitutive institution of marriage. The qualitative differences between the nature of dual-gender marriages and the nature of same-sex relationships and marriages are many, deep, and profound.

For example, the differences in sexual behaviors and expectations between same-sex couples and married dual-gender couples are so substantial that a profound distortion of the sexual mores associated with the institution of marriage is inevitable if same-sex couples are included in that institution. 157 Male-female marriage holds strongly and generally adheres to the standard model of complete and exclusive sexual fidelity between the spouses. 158 However, sexual non-exclusivity and sexual partners outside of the marriage characterize same-sex unions, including same-sex marriages. 159 A January 2010 New York Times article reported:

New research at San Francisco State University reveals just how common open relationships are among gay men and lesbians in the Bay Area. The Gay Couples Study has followed 556 male couples for three years—about 50 percent of those surveyed have sex outside their relationships, with the knowledge and approval of their partners. 160

The story also noted that:

None of this is news in the gay community, but few will speak publicly about it. Of the dozen people in open relationships contacted for this column, no one would agree to use his or her full name, citing privacy concerns. They also worried that discussing the subject could undermine the legal fight for same-sex marriage. 161

157. See id. at 220-26 (discussing the sexual morality of same-sex couples in committed relationships).

158. Lynn D. Wardle, Parental Infidelity and the No-Harm Rule in Custody Litigation, 52 CATH. U. L. REV. 81, 90-97 (2002) (reviewing the University of Chicago’s National Opinion Research Council’s statistics finding that about twelve percent of married women and about twenty-one percent of married men (which equals fifteen to seventeen percent of married persons overall) have had a sexual partner other than their spouse while married).


160. Id. (emphasis added).

161. Id. (emphasis added).
This is not the first study to report on the extra-marital promiscuity of same-sex couples. For example, a landmark study by Dutch AIDS researchers, which was published in 2003 in the AIDS journal, reported on the number of partners among Amsterdam’s homosexual population.\textsuperscript{162} These researchers, who are supportive of homosexuality and come from the most homosexual-affirming nation in the world, found that eighty-six percent of new HIV/AIDS infections in homosexual men were in men who had steady partners.\textsuperscript{163} The study also found that homosexual men with steady partners engage in more risky sexual behaviors than homosexuals without steady partners;\textsuperscript{164} homosexual men without a steady partner had, on average, twenty-two casual partners per year, and homosexual men with steady partners had, on average, eight other sex partners ("casual partners") per year.\textsuperscript{165}

More than a decade ago, researchers studying the sexual behaviors of 2,583 older, sexually active, homosexual men reported that "the modal range for [the] number of male sexual partners ever was 101-500," while 10.2\% to 15.7\% had between 501 and 1,000 partners, and another 10.2\% to 15.7\% reported having had more than one thousand sexual partners in their lifetime.\textsuperscript{166} In 1989, Kirk and Madsen acknowledged that "the cheating ratio of ‘married’ gay males, given enough time, approaches 100%. . . . Many gay lovers, bowing to the inevitable, agree to an ‘open relationship,’ for which there are as many sets of ground rules as there are couples."\textsuperscript{167} Likewise, a 1984 study of 156 homosexual male couples by McWhirter and Mattison found that while seventy-three percent of the couples had an expectation of exclusive sexual fidelity when they entered into their

\textsuperscript{162} Maria Xiridou et al., \textit{The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam}, 17 AIDS 1029 (2003), available at http://journals.lww.com/aidsonline/Fulltext/2003/05020/The_contribution_of_steady_and_casual_partnerships.12aspx (last visited May 13, 2010). The purpose of the study was to assess whether the provision of certain AIDS drugs had resulted in an increase of unsafe sexual practices throughout the homosexual community in the Netherlands.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} Paul Van de Ven et al., \textit{A Comparative Demographic and Sexual Profile of Older Homosexually Active Men}, 34 J. SEX RES. 354 (1997), available at http://findarticles.com/p/articles/mi_m2372/is_n4_v34/ai_20536043 (last visited May 13, 2010).

\textsuperscript{167} Marshall Kirk & Hunter Madsen, \textit{After the Ball} 330 (1989). Likewise, Andrew Sullivan contrasts male-female marriages with same-sex relationships and explains that "there is more likely to be a greater understanding of the need for extramarital outlets between two men than between a man and a woman." Andrew Sullivan, \textit{Virtually Normal} 202 (1996).
relationships, all of the couples had made allowances for sexual activity with outside partners within at most five years from the start of their relationships. They concluded that “the single most important factor that keeps couples together past the ten-year mark is the lack of possessiveness they feel. Many couples learn very early in their relationship that ownership of each other sexually can become the greatest internal threat to their staying together.” Similarly, in their groundbreaking 1978 book reporting on homosexual behaviors, researchers Bell and Weinberg reported that forty-three percent of white male homosexuals had sex with five hundred or more partners, with twenty-eight percent having one thousand or more sex partners. Thus, it is not surprising that contemporary research (and even the New York Times) concedes that multi-partner sexual relations by same-sex couples are an “open secret” in many same-sex couple relationships.

The standard of exclusive sexual fidelity between spouses cannot survive as a social expectation for marriage if marriage is altered to include types of relationships—at least half of—whose adherents flaunt that standard. Marriage quality and the quality of marital life in societies where infidelity is accepted in marriage is profoundly different from the quality of marriages and marital life in societies in which fidelity is expected.

Society also needs a critical mass of married, two-parent families, who will raise their own children well and also serve as models for children growing up in alternative family structures. That is another reason why same-sex marriage is incompatible with dual-gender marriage, and another way in which it endangers our social system. The legalization of same-sex marriage will legitimize and normalize an alternative form of marital parenting that will subvert the effectiveness of, and eventually erode, the critical social institution of dual-gender marriage and dual-gender marital parenting.


171. James, supra note 159, at A17 (acknowledging that “many successful gay marriages share an open secret”—multiple sexual partners).

172. See Wardle, supra note 158, at 100-07, 112-27.

gender discrimination, watch what happens in just one generation after significant numbers of children are raised in an environment of same-gender gay or lesbian parenting, in a social environment that denies and disregards the values of dual-gender parenting.174

Same-sex marriage and dual-gender marriage are incompatible because legalizing same-sex marriage will produce the transformation of the institution of marriage.

The major means by which this metamorphosis of the morality of marriage would occur can be called “the transformative power of inclusion.” That refers to the impact upon the morality of the institution of marriage that would follow the redefinition of marriage to include same-sex couples. Conservative advocates of same-sex marriage have long argued that legalization of same-sex marriage will positively influence the life-styles of gays and lesbians because the morality of marriage will rub off on and “tame” the behaviors of same-sex couples. . . . [Regardless of the validity of that claim,] the transformative effects of inclusion work both ways. The moral qualities and characteristics of homosexual unions and lifestyles will have [a] distorting effect upon the existing morality of marriage. That modification of the morality of marriage to make it more gay-like could seriously harm . . . society, families, and individuals.175

The transformation of marriage is not a trifling matter because the institution of marriage is the most important source of the most important moral standards in our society. As the Supreme Court noted, marriage “giv[es] character to our whole civil polity.”176 The Court declared that the institution of marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress.”177

174. See Wardle, supra note 153, at 216 (discussing the morality of gender equality fostered by dual-gender marriage).
175. Id. at 208-09.
176. Maynard v. Hill, 125 U.S. 190, 213 (1898) (quoting Noel v. Ewing, 9 Ind. 37, 46 (1857)).
177. Id. at 211. Thus, marriage “is an institution, in the maintenance of which in its purity the public is deeply interested.” Id.
IV. PROTECTION OF MARRIAGE BETWEEN A MAN AND A WOMAN IS A BASIC CIVIL RIGHT

Marriage between a man and a woman is a basic civil right, and redefinition of marriage to include same-gender couples fundamentally dilutes and destroys that basic civil right. Dual-gender marriage is an integral thread woven into the fabric of our society and our legal structure. Same-sex unions do not contribute comparably to the needs, infrastructure, and social capital of society.178

A. Human Dignity

For example, human dignity is based upon and enhanced by dual-gendered marriage and marital families.179 Human Dignity has at least three dimensions:

(1) Universal—Natural (e.g., all are brothers/sisters);

(2) Internal Confidence—Derived from morality, excellence, and adherence to high standards; and

(3) External Recognition—Respect of others.

Dual-gender marriage and marital families are the cornerstones of human dignity in all three dimensions:

(1) Conjugal (male-female) marriage is ubiquitous in history and around the world. It is a social unit that connects us with all humanity across cultures and throughout history.180

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(2) Individuals raised in stable, loving (conjugal marriage) families are most likely to have the dignity of self-respect. They have a sense of earned and deserved self-worth. They also have the dignity that comes from adherence to moral standards (including standards of sexual morality) that engender dignity.

(3) Individuals raised in stable, loving (dual-gender marital) families also are most likely to respect others. They need not feel driven to demean or subordinate others to feel valued or significant. They have acquired their sense of what anthropologists call “kinship identity” in the marital home. Children raised by same-sex partners are denied at least half of this critical self-understanding.

Marital families are not infallible or perfect. There are failures, but there are also norms and expectations that benefit society. Likewise, all family forms are not equal in qualities or consequences. Married male-female couples and conjugally married families provide the greatest protections and benefits for dignity to families, society, all individuals, and especially children. Marital families with mothers and fathers are the primary social institutions that foster the conditions in which respect for human dignity can develop and thrive. This is because the morality fostered by male-female marriage differs significantly from morality fostered by same-sex unions. Marriage is perhaps the single most important morality-shaping social institution.

B. Marriage and Virtue: The Substructure of Our Legal Superstructure and Liberties

Protection of dual-gender marriage has profound structural significance for our Constitution. If one political principle was universally accepted in the founding generation, it was the belief that a republican form of government could not exist (or long survive) unless the people were “virtuous.” The idea of virtue was central to the political thought of the

180. See generally Wardle, supra note 153, at 211-13 (describing the moral influences of marriage).
181. Id. at 212; see also id. at 216-19 (describing the elements of the morality of marriage).
Founders of the American republic.”

Virtue was understood to be the indispensable prerequisite for republican (or what we today call democratic self-) government. Benjamin Franklin stated that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”

John Adams acknowledged: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”

James Madison likewise declared: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”

Marriage and marital families were viewed as essential structures for cultivating civic or republican virtue. The Founders understood that certain non-governmental institutions—family and churches, in particular—are crucial for the development and fostering of virtue. Marital families are the first schoolrooms of republican self-government, the small republics that comprise and constitute the large political republic. In the founding era, the family was considered one of the essential “pillars of republican virtue.”

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183. RICHARD VETTERLI & GARY BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT 1-9 (rev. ed. 1996). The Founders believed virtue to be a precondition for the creation and maintenance of republican government and individual liberty; virtue and religion were present in both the public and private spheres during the Founding era. Id. at 47-84; see also DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 86-87 (1988) (observing that the Founders’ idea of virtue had a religious base, and it connected morals and prudence); Gordon S. Wood, Interests and Disinterestedness in the Making of the Constitution, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 83-87 (Richard Beeman, Stephen Botein & Edward C. Carter, II eds., 1987) (explaining that virtue was a matter of character and leadership and was deemed to be rare).


187. THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 6-9 (1985). “Studying the experiences of women in the Revolutionary era led historian Mary Beth Norton to conclude that the revolutionaries’ one unassailable assumption was that the United States could survive only if its citizens displayed virtue in both public and private life.” Id. at 8 (internal quotation marks omitted).

188. See generally Lynn D. Wardle, Lessons from the Bill of Rights About Constitutional Protection for Marriage, 38 LOY. U. CHI. L.J. 279 (2007); Wardle, supra note 184 (an extended discussion of these notions).
Thus, marriage and marital families needed to be nurtured and protected from the tyranny of the government. John Adams wrote:

The foundation of national morality must be laid in private families. . . . How is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion if, from their earliest Infancy, they learn their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers?\(^\text{190}\)

Likewise,

George Mason argued that republican government was based on an affection “for altars and firesides.” Only good men could be free; men learned how to be good in a variety of local institutions—by the firesides as well as at the altar. . . . [The Founders believed that] individuals learned virtue in their families, churches, and schools.\(^\text{191}\)

In this view, the Founders were merely reflecting widely held republican precepts. For instance, Montesquieu, the most frequently cited political writer in America during the Founding decade of 1780-89 suggested “that marriage and the form of government were mirrors of each other. Accepting Montesquieu’s perspective, American revolutionaries and their descendants understood marriage and the family to be schools of republican virtue.”\(^\text{192}\)


Marriage was closely linked to the cultivating and protecting of virtue in republican theory, in symbolic as well as pragmatic ways. Symbolically, the Founders had a clear political theory of marriage and family life as critical components of republican society and as essential to the preservation of the new republican form of government they had created. Professor Nancy Cott has observed that “[i]n the beginning of the United States, the founders had a political theory of marriage. So deeply embedded in political assumptions that it was rarely voiced as a theory, it was all the more important. It occupied the place where political theory overlapped with common sense.” Thus, the Founders deliberately provided “legal supports for the family,” which were “important elements in the stability of marriage.”

Shortly after the founding of the American Republic, the perceptive French social commentator, Alexis de Tocqueville, observed that “[t]he feeling [a citizen] entertains toward the state is analogous to that which unites him to his family.” He also declared:

There is certainly no country in the world where the tie of marriage is so much respected as in America, or where conjugal happiness is more highly or worthily appreciated. . . . [T]he American derives from his own home that love of order, which he afterward carries with him into public affairs.

Perhaps the most emphatic connection between the Constitution and family life was described by Tocqueville’s contemporary, Francis Grund, when he observed:

I consider the domestic virtue of the Americans as the principal source of all their other qualities.

No government could be established on the same principle as that of the United States, with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation.

193. COTT, supra note 192, at 9-23; see also Dailey, supra note 189, at 1871-72 (explaining that the Founders viewed family law as the primary cultivator of civic virtue).

194. COTT, supra note 192, at 9. “The republican theory of the new United States . . . g[a]ve marriage a political reason for being.” Id. at 10.


197. Id. at 248.
Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter of the Constitution in order to vary the whole form of their government.\textsuperscript{198}

These principles are the foundational blocks on which the foundation of our constitutional government and system of liberties are laid. The male-female marital family was the institutional cornerstone of the substructure of the superstructure of our Constitution and system of legal rights and liberties. The weakening and dilution of the marital family thus will alter and endanger the Constitution and our civil rights and liberties.

\textbf{C. Preventing the Concentration of Power: The Federalist Dimension of Marriage}

Marriage and the marital family are “mediating structures” that stand between the vulnerable individual and the overwhelming, alienating power of the corporate government. Mediating structures are “the value-generating and value-maintaining agencies in society.”\textsuperscript{199} “These mediating structures or ‘communities’ that mediate between the individual and the state or the market need nourishing . . . .”\textsuperscript{200} The Founders understood that certain nongovernmental institutions were essential to foster the kind of citizenship necessary to support a democratic republic. The Founders believed that religion was the source of virtue and morality, and that certain nongovernmental “institutions—family, school, churches, neighborhood, and other local institutions, were, in fact, the \textit{primary feeders} and \textit{stimulators} of the general civil religion.”\textsuperscript{201} The marital family was one of the critical institutions in which civic virtue would be generated and regenerated.

\begin{itemize}
\item \textsuperscript{198} Francis J. Grund, \textit{The Americans, in Their Moral, Social, and Political Relations} 171 (Boston, Marsh, Capen and Lyon 1837).
\item \textsuperscript{201} Vetterli & Bryner, supra note 183, at 52; see also Lutz, supra note 183, at 83.
\end{itemize}
Early Americans believed that each of us must be taught virtue in our local communities. Because they understood the bases of virtue to be primarily moral rather than political, early Americans believed that the state should promote other institutions, especially the public worship and private instruction of religion, in which virtue would be directly inculcated. In addition to promoting religion, people generally believed the main task of government was to foster and protect the multitude of associations in which proper character was formed.\footnote{202}

The marital family was the most “local” of local communities, the ultimate “little platoon,” to borrow a phrase from Edmund Burke.\footnote{203}

Because of their distrust of the concentration of power, the Founders did not want the national government to control the generation of public or civic virtue necessary to sustain a republican form of (self-)government. Rather, applying their federalism principles of the dispersal of power, the Founders denied that control to the national government and left it to other institutions. The Constitution ensured that “the development of virtue, to a great extent, had been removed from the political realm to these other institutions of society as a separation between society and government had evolved.”\footnote{204}

The responsibility to nurture virtue, so essential to the preservation of the Constitution, was dispersed to the local states and their communities and to the non-governmental institutions—particularly to marital families and to churches (and to schools, which at the time primarily were instruments of those families and churches).\footnote{205} Consistent with federalism principles, empowering the institutions of marriage and the marital family reduced the potential for abuse of power by the national government.

\begin{footnotes}
\footnote{202}{Frohnen, supra note 191, at 941 (footnotes omitted).}
\footnote{203}{EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 51 (Prometheus Books 1987) (1790).}
\footnote{204}{VETTERLI & BRYNER, supra note 183, at 52.}
\footnote{205}{Thus, the central government was not given authority to nurture virtue; in fact, a specific provision authorizing Congress to establish institutions of higher education was even stripped from the Constitution. See generally JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 477 (Aug. 18, 1787), 639 (Sept. 14, 1787) (Ohio Univ. Press 1966) (1840).}
\end{footnotes}
V. CONCLUSION: STAND UP FOR OUR BASIC CIVIL RIGHTS OF FAITH AND FAMILY

I have just scratched the surface of this subject. Had I further space and time, I would also discuss protection of the institution of conjugal marriage as a fundamental right of association protected by the First Amendment. Implicit in the First Amendment’s explicit guarantees is a fundamental right of association that includes at the most basic level the right of marital and familial association. Ironically, even free speech is endangered by some of the zealous advocates of same-sex marriage.206

We are engaged in one of the great civil rights battles of our nation’s history. The public policy debate over legalizing same-sex marriage is the defining issue of this generation. The outcome matters greatly because marriage is the basic unit of society. Protection of marriage is a core civil right. Men and women are still different, and the union of two men or two women is still different from the union of a man and a woman. That is what this contest is about—recognition of the difference.

This Symposium occurs just a few days before our nation celebrates the birthday of George Washington, the first President of the United States and “Father” of our nation. In a letter to the Members of the New Church in Baltimore, Maryland, dated January 27, 1793, President Washington wrote:

We have abundant reason to rejoice, that, in this land, the light of truth and reason has triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart. In this enlightened age, and in this land of equal liberty, it is our boast, that a man’s religious tenets will not forfeit the protection of the laws, nor deprive him of the right of attain ing and holding the highest offices that are known in the United States.207

Today, those precious religious liberties Washington celebrated are endangered by courts and legislatures across the land. Today, anti-religious bigotry has reared its threatening head again. It is time to recognize the danger and to work to restore protection for religious liberty, recognizing its value the way Washington did. It is time for another founding of the American dream and of the American constitutional republic. As Dallin Oaks put it:

206. See supra Part III.A.

Those who seek to change the foundation of marriage should not be allowed to pretend that those who defend the ancient order are trampling on civil rights. The supporters of Proposition 8 were exercising their constitutional right to defend the institution of marriage—an institution of transcendent importance that they, along with countless others of many persuasions, feel conscientiously obliged to protect.²⁰⁸

We must use our legal talents and our time, energy, and resources to stand up for our basic civil rights. This battle to protect our faith and our families is going to be long and difficult, so this is not the time for sunshine soldiers or weekend warriors. We must get involved, persist, and endure. May we all continue to develop and more diligently use the very best professional skills in the service of this cause.

²⁰⁸. Oaks, supra note 114, at Part V.
APPENDIX A.1: THE MOVEMENT TO LEGALIZE SAME-SEX UNIONS IN THE UNITED STATES

Legal Status as of March 4, 2010

Same-Sex Marriage Recognized in Five (5) U.S. States:

Connecticut, Iowa, Massachusetts, New Hampshire, Vermont (as well as the District of Columbia)

* Same-Sex Unions Equivalent to Marriage Recognized in Five (5) U.S. States:

California, Nevada, New Jersey, Oregon, Washington

Same-Sex Union Registries & Specific, Limited Benefits in Six (6) U.S. Jurisdictions:

Alaska, Colorado, Hawaii, Maine, Maryland, Wisconsin

* = Connecticut, New Hampshire, and Vermont formerly allowed civil unions, but now they have legalized same-sex marriage. By 2010 civil unions will no longer be allowed; in some of these states, former civil unions will automatically convert into marriages.
APPENDIX A.2: THE MOVEMENT TO LEGALIZE SAME-SEX UNIONS GLOBALLY

Legal Status as of March 4, 2010

Same-Sex Marriage Recognized in Seven (7) of the 192 Nations Recognized by the United Nations:*

Belgium, Canada, The Netherlands, #Norway, #South Africa, Spain, #Sweden

Partial Recognition: Mexico (Dist. Fed. Mexico City [local recognition])

Same-Sex Unions Equivalent to Marriage Recognized in Twelve (12) Nations:

Andorra, Denmark, Finland, ^France, ^Germany, Iceland, Luxembourg, New Zealand, Slovenia, #South Africa, ^Switzerland, The United Kingdom

Same-Sex Union Registries & Specific, Limited Benefits in Seven (7) Nations:

Argentina, Columbia, Croatia, Czech Republic, ~Hungary, Israel, Portugal

Partial Recognition: Mexico (Pacto Civil de Solidaridad [national recognition])

* = Some of these countries may allow both same-sex marriages and same-sex civil unions for a period of time.

# = Country has allowed both same-sex marriage and equivalent unions at various times; however, Norway and Sweden do not allow individuals to enter into any new civil unions.

^ = Not fully equivalent to marriage, but largely comparable regarding economic interests.

~ = Recent court decision invalidated part of the law.
APPENDIX B.1: THE UNIVERSAL RESPONSE TO REJECT SAME-SEX MARRIAGE IN THE UNITED STATES

Legal Status as of January 1, 2010

Same-Sex Marriage Prohibited by State Constitutional Amendment in Thirty (30) States (60%):

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin.

Same-Sex Civil Unions Equivalent to Marriage Recognition Prohibited by State Constitutional Amendment in Nineteen (19) States (38%):

Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin.

Same-Sex Marriage Denied by Statute or Appellate Decision in Forty-four States (88%):

All states except: Connecticut, Iowa, Massachusetts, New Hampshire, New Mexico, Vermont.

Same-Sex Marriage Decisively Rejected by Citizens in All Thirty-one (31) States Where the Issue Has Been Placed on the Ballot:

The thirty states with marriage amendments plus Maine.
APPENDIX B.2: THE UNIVERSAL RESPONSE TO REJECT SAME-SEX MARRIAGE GLOBALLY

Legal Status as of January 1, 2010

Eighty-five (85) Nations Have Substantive Constitutional Provisions Protecting “Marriage.”

One Hundred Forty-five (145) Nations Have Constitutional Provisions Protecting “Family.”

One Hundred Eighty-five (185) Nations Do Not Allow Same-Sex Marriage.

One Hundred Sixty-six (166) Nations Do Not Allow Any Same-Sex Marriage-Like Unions.

Thirty-seven (37) of 192 Sovereign Nations (19%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage as the Union of a Man and a Woman:

Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Cambodia (art. 45), Cameroon (art. 16), China (art. 49), Colombia (art. 42), Cuba (art. 43), Ecuador (art. 33), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Japan (art. 24), Latvia (art. 110—Dec. 2005), Lithuania (art. 31), Malawi (art. 22), Moldova (art. 48), Montenegro (art. 71), Namibia (art. 14), Nicaragua (art. 72), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Serbia (art. 62), Somalia (art. 2.7), Suriname (art. 35), Swaziland (art. 27), Tajikistan (art. 33), Turkmenistan (art. 25), Uganda (art. 31), Ukraine (ark. 51), Venezuela (art. 77), Vietnam (art. 64); see also Mongolia (art. 16), Hong Kong Bill of Rights of 1991 (art. 19).
Examples of National Constitutional Provisions:

Article 45 of the Cambodian Constitution: “Marriage shall be conducted according to conditions determined by law based on the principle of mutual consent between one husband and one wife.” (emphasis added)

Article 42 of the Constitution of Columbia: The family “is formed . . . by the free decision of a man and woman to contract matrimony . . . .” (emphasis added)

Article 24 of the Constitution of Japan: “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.” (emphasis added)

Article 110 of the Constitution of Latvia now reads: “The State shall protect and support marriage—a union between a man and a woman . . . .” (emphasis added)
APPENDIX C: THIRTY-THREE (33) INTERNATIONAL TREATIES, CHARTERS, CONVENTIONS, AND OTHER LEGAL DOCUMENTS WITH PROVISIONS PROTECTING MARRIAGES AND/OR FAMILIES

Geneva Declaration of the Rights of the Child (1924)
American Declaration of the Rights and Duties of Man (1948)
Universal Declaration of Human Rights (1948)
European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)
Declaration of the Rights of the Child (1959)
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)
Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1965)
International Convention on the Elimination of All Forms of Racial Discrimination (1965)
International Covenant on Civil and Political Rights (1966)
International Covenant on Economic, Social and Cultural Rights (1966)
Proclamation of Teheran (1968)
American Convention on Human Rights (Pact of San José) (1969)
Declaration on Social Progress and Development (1969)
Declaration on the Rights of Mentally Retarded Persons (1971)
Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)
Declaration on the Rights of Disabled Persons (1975)
Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords) (1975)
Convention on the Elimination of All Forms of Discrimination against Women (1979)

* The information presented in Appendix C was originally researched and compiled by Scott Borrowman, J.D., 2005. The dates indicated represent the dates of approval by the respective governing bodies, not the dates the instruments entered into force.
Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
Cairo Declaration on Human Rights in Islam (1990)
Declaration on the Elimination of Violence against Women (1993)
Proposed American Declaration on the Rights of Indigenous Peoples (1997)
Declaration on the Rights of Indigenous Peoples (2007)

**Example of an International Law Provision Protecting Family and Marriage:**

Article 16(3) of the *Universal Declaration of Human Rights*, adopted in 1948, recognizes that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”