



2010

A House Divided: Same-Sex Marriage and Dangers to Civil Rights

Lynn D. Wardle

Follow this and additional works at: http://digitalcommons.liberty.edu/lu_law_review

Recommended Citation

Wardle, Lynn D. (2010) "A House Divided: Same-Sex Marriage and Dangers to Civil Rights," *Liberty University Law Review*: Vol. 4: Iss. 3, Article 6.

Available at: http://digitalcommons.liberty.edu/lu_law_review/vol4/iss3/6

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Liberty University Law Review by an authorized administrator of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.

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).¹ 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.² 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.³ 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 "Snowmagedon" resulted in the cancellation of my flight.

1. See Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439 (2006) [hereinafter Wardle, *Federal Constitutional Protection*]; see also Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 ST. THOMAS L. REV. 137 (2004).

2. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (1st Sess. 2009).

3. See, e.g., Posting of Jacob Wolf to FRCBLOG.com, Change Watch: Chai Feldblum, Commissioner, Equal Employment Opportunity Commission, <http://www.frcblog.com/2009/11/change-watch-chai-feldblum-commissioner-equal-employment-opportunity-commission/> (Nov. 17, 2009). As of March 2, 2010, Professor Feldblum's nomination still had not been confirmed by the

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

Senate, despite approval months earlier by the Senate Health, Education, Labor and Pensions Committee, because at least one senator had placed a hold on her confirmation vote. See Posting of Thomas Peters to American Principles Project Blog, Senator Places Secret Hold on Chai Feldblum, <http://www.americanprinciplesproject.org/blogs/tags/chai-feldblum/> (Mar. 10, 2010); see also Matt Cover, *Obama’s EEOC Nominee: Society Should ‘Not Tolerate Private Beliefs’ That ‘Adversely Affect’ Homosexuals*, CNS NEWS, Jan. 18, 2010, <http://www.cnsnews.com/news/article/59965> (last visited Mar. 13, 2010). For further discussion of Professor Feldblum’s views about the priority of sexual liberty over religious liberty, see discussion *infra* Part III.

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”)⁴ are treated the same as marriage in substance, with “the same” full civil rights, benefits, and privileges as marriage,⁵ but without the *marriage* label.⁶

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).

5. See, e.g., CAL. FAM. CODE § 297 (West 2004); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2009); N.J. STAT. ANN. §§ 26A:81-1 to -13 (2009); N.J. STAT. ANN. § 37:1-28 (2009); OR. REV. STAT. ANN. § 11.106 (West 2008) (references and annotations); WASH. REV. CODE

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.⁷ 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”).⁸ 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.⁹ 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.¹⁰

Internationally, as Appendix A.2 shows, out of the 192 sovereign nations recognized by the United Nations,¹¹ only seven nations (3.6% of all nations)

§ 26.60.015 (2009); *see also* CONN. GEN. STAT. § 46b-380o (2009); VT. STAT. ANN. tit. 15, §§ 1204, 1301–06 (2002). *See generally* Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123 (2009). Vermont and Connecticut recently upgraded same-sex civil unions to same-sex marriages. *See* VT. STAT. ANN. tit. 15, § 8 (Supp. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (mandating marriage for same-sex couples); 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis) (pertaining to S. 115, 70th Sess. (Vt. 2009)).

6. Indeed, in Washington state, the legal relationship for same-sex couples created by the legislature (and approved by voters) was called by the sponsors and popularly the “everything but marriage” bill; it gave same-sex couples “everything”—every legal right of marriage—except the label of “marriage.” *See* Rachel La Corte, *Lawmakers Announce ‘Everything but Marriage’ Bill*, SEATTLE TIMES, Jan. 28, 2009, http://seattletimes.nwsourc.com/html/localnews/2008678540_apwaxgrdomesticpartnerships2ndldwritethru.html (last visited Feb. 9, 2010).

7. *See infra* Appendix A.1.

8. These states are California (arguably still allowed after *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)), New Hampshire, New Jersey, Oregon, and Washington. *See* CAL. FAM. CODE § 297 (West 2004); CONN. GEN. STAT. § 46b-380o (2009); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2009); N.J. STAT. ANN. § 37:1-28 (2009); OR. REV. STAT. ANN. § 11.106 (West 2008) (references and annotations); VT. STAT. ANN. tit. 15, § 1201 (2002).

9. *See infra* Appendix A.1 (noting that Alaska, Colorado, Hawaii, Maine, Maryland, and Wisconsin offer narrowly-tailored packages of specific rights (not equivalent to marriage) to same-sex couples).

10. *See infra* Appendix B.1 (showing states that deny legal recognition to same-sex couples).

11. United Nations, Growth in United Nations Membership, 1945-Present, <http://www.un.org/en/members/growth.shtml> (last visited Feb. 7, 2009).

allow same-sex marriage;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.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.¹⁴ At least forty-two states have passed their own “defense of marriage” policies by statute, constitutional amendment, or both.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

12. *See infra* Appendix A.2.

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

14. ALA. CONST. amend. 774; ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83; ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. 1, § 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.

15. This includes the thirty states with marriage amendments, *see supra* note 14, plus twelve additional states that have adopted statutory marriage recognition acts without any corresponding constitutional provisions. DEL. CODE ANN. tit. 13, § 101 (2009); HAW. REV. STAT. § 572-3 (1999) (structural amendment only); 750 ILL. COMP. STAT. ANN. 5/212 (West 2009); IND. CODE § 31-11-1-1 (2008); IOWA CODE § 595.2 (2002); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2010); MINN. STAT. ANN. § 517.01 (West 2006); N.H. REV. STAT. ANN. §§ 457:1, 457:3 (2009); N.C. GEN. STAT. § 51-1.2 (2009); 23 PA. CONS. STAT. ANN. § 1704 (West 2010); W. VA. CODE § 48-2-603 (2010); WYO. STAT. ANN. § 20-1-101 (2009).

statute, constitutional provision, or both.¹⁶ Forty-five American states (90%) now recognize marriage as the union between a man and a woman only,¹⁷ most by explicit statutory or constitutional provisions,¹⁸ and several others by judicial interpretation of existing statutes.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.²⁰ All but one of those thirty-seven national constitutions has been adopted since 1970.²¹ By contrast, *no* national constitution expressly protects or explicitly requires same-sex marriage.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.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

16. See Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and the Tragedy of the Commons*, 22 *BYU J. PUB. L.* 441 (2008); see also Monte Neil Stewart, *Marriage Facts*, 31 *HARV. J.L. & PUB. POL'Y* 313 (2008).

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.

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, *Saul Alinsky and the Litigation Campaign To Win the Right to Same-Sex Marriage*, 42 *J. MARSHALL L. REV.* 643 (2009).

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.I. 2007).

20. See *infra* Appendix B.2 (identifying constitutional provisions recognizing marriage as the union between a man and a woman).

21. Japan, whose constitution was adopted in 1946, is the other nation with a constitutional provision limiting marriage to male-female couples.

22. However, by judicial interpretation of equality provisions, not marriage provisions, Canadian and South African courts have required legal recognition of same-sex marriage. See *Harrison v. Canada*, [2005] 290 N.B.R.2d 70 (Can.); *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) (S. Afr.) (judgment decided on Jan. 12, 2005, and delivered on Dec. 1, 2005).

23. See generally Wardle, *supra* note 16, at 443-46.

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.”²⁴ Similar statements about the foundational importance and specially-protected role of families are found in dozens of other international conventions, compacts, and instruments.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),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.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.²⁸ So the legalization of same-sex marriage

24. Universal Declaration of Human Rights art. 16(3), G.A. Res. 217A U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); *see infra* Appendix C. *See generally* Don Browning, *The Meaning of Family in the Universal Declaration of Human Rights*, in 1 *THE FAMILY IN THE NEW MILLENNIUM* 38 (A. Scott Loveless & Thomas B. Holman eds., 2007); Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 *NOTRE DAME L. REV.* 1153 (1998).

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.

26. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

27. *ME. REV. STAT. ANN.* tit. 22, §§ 2710, 2843 (Supp. 2009); *N.H. REV. STAT. ANN.* § 457:1-a (Supp. 2009); *VT. STAT. ANN.* tit. 15, § 1204 (2002); *see also* *ME. REV. STAT. ANN.* tit. 18-A, §§ 2-102, 5-309 (Supp. 2009) (repealed effective Jan. 1, 2011).

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

wp-dyn/content/article/2009/08/27/AR2009082701977.html; The Vermont Legislature Legislative Directory: Representatives 2009-2010 Legislative Session, <http://www.leg.state.vt.us/lms/legdir/alpha.asp?Body=H> (last visited May 14, 2010) (listing Vermont state representatives, a majority of whom are Democrats, and their party affiliations); The Vermont Legislature Legislative Directory: Senators 2009-2010 Legislative Session, <http://www.leg.state.vt.us/lms/legdir/alpha.asp?Body=S> (last visited May 14, 2010) (listing Vermont state senators, a majority of whom are democrats, and their party affiliation). For Maine, see Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 5, 2009, <http://www.nytimes.com/2009/11/05/us/politics/05maine.html> (describing Maine’s Democratic governor); Maine Senate Homepage, Welcome to the 124th Maine Senate, <http://www.maine.gov/legis/senate/welcome1231.htm#124> (last visited May 14, 2010) (showing that a majority of Maine senators are Democrats); Maine House of Representatives, Representatives, <http://www.maine.gov/legis/house/rebs.htm> (last visited May 14, 2010) (showing that a majority of Maine representatives are Democrats). For New Hampshire, see Rasmussen Reports, *2010 New Hampshire Governor: Lynch Still Solidly Ahead*, Jan. 14, 2010, http://www.rasmussenreports.com/public_content/politics/elections2/election_2010/election_2010_governor_elections/new_hampshire/2010_new_hampshire_governor_lynch_still_solidly_ahead (describing New Hampshire’s governor as a Democrat); State of New Hampshire House of Representatives, NH House Roster Downloads, <http://www.gencourt.state.nh.us/house/members/rosterdownloads.html> (follow “Members(Excel 2003).xls” hyperlink; then open file) (last visited May 13, 2010) (identifying a majority of New Hampshire senators and representatives as Democrats).

29. Doug Ireland, *NH Gay Marriage Law Challenged*, EAGLE-TRIBUNE (North Andover, Mass.), Nov. 15, 2009, http://www.eagletribune.com/punewsnh/local_story_318195206.html.

30. ME. CONST. art. IV, pt. 3, §§ 17-18.

to put the matter on the ballot).³¹ 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.³²

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.³³ 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 insure unanimous approval, in apparent violation of the rules.³⁴ 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.

31. *NATION & WORLD: Maine: Gay Marriage Law Added to Ballot*, CHI. TRIB., Sept. 3, 2009, at C18.

32. Goodnough, *supra* note 28.

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 marriage³⁵ and same-sex civil union bills³⁶ 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.³⁷ 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*.³⁸ 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.³⁹ 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.”⁴⁰ 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. . . .”⁴¹ The

35. David Abel, *Vermont Legalizes Same-Sex Marriage; 11th-Hour Change of Heart Ends Veto*, BOSTON GLOBE, April 8, 2009, at Metro 1.

36. Cy Ryan, *Senate Overrides Governor’s Veto of Domestic Partners Bill*, LAS VEGAS SUN, May 30, 2009, <http://www.lasvegassun.com/news/2009/may/30/senate-overrides-governors-veto-domestic-partners/>.

37. Abel, *supra* note 35.

38. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

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.”).

40. Jason Clayworth & Thomas Beaumont, *Iowa Poll: Iowans Evenly Divided on Gay Marriage Ban*, DES MOINES REG., Sept. 21, 2009, <http://www.desmoinesregister.com/article/20090921/news10/>.

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).

46. *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 U.S. Dist. LEXIS 1441 (N.D. Cal. Jan. 8, 2010).

47. Jesse McKinley, *Backers of Gay Marriage Rethink California Push*, N.Y. TIMES, July 27, 2009, at A11, available at http://www.nytimes.com/2009/07/27/us/27gay.html?_r=1 (Marc Solomon of Equality California stating, “if you look at the poll numbers since November, they really haven’t moved at all”). See generally API Equality-LA, *Latino, Black, Asian LGBT Groups and Pro-Marriage Supporters Issue Call for Public Education Campaign To Regain Marriage Equality in California*, July 13, 2009, <http://www.preparesprevail.com/index.html> (last visited May 13, 2010) (“Popular support for marriage equality for same-sex couples has not changed since the last election.”); Queerty, *I Group Just Decided To Wait Until 2012 To Repeal Prop 8; Another Just Decided 2010 Sounds Good*, Aug. 12, 2009, <http://www.queerty.com/1-group-just-decided-to-wait-until-2012-to-repeal-prop-8-another-just-decided-2010-sounds-good-20090812/> (last visited May 13, 2010). The same-sex marriage advocacy organizations, which collected signatures in an effort to repeal Proposition 8, failed to collect enough signatures for the proposal to be

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.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.”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.’”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.”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.⁵²

put on the ballot in 2010. See Maura Dolan, *Prop 8 Repeal Not on Ballot; Opponents of Ban on Same-Sex Marriage Are Unable To Collect Enough Signatures*, L.A. TIMES, Apr. 13, 2010, at AA5.

48. CNN Poll: *Generations Disagree on Same-Sex Marriage*, CNN, May 4, 2009, <http://www.cnn.com/2009/US/05/04/samesex.marriage.poll/index.html> (showing that fifty-four percent of Americans oppose recognizing same-sex marriages as valid marriages, while forty-four percent favor recognizing them).

49. Gregory B. Lewis & Charles W. Gossett, *Why Did Californians Pass Proposition 8?*, at 5, <http://www.alliancealert.org/2009/2009092401.pdf> (last visited Feb. 9, 2010) (prepared for presentation at the 2009 American Political Science Association annual meeting, which was held in Toronto).

50. *Id.* (citations omitted).

51. *Id.* at 1.

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.”⁵³ 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.⁵⁴ 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.”⁵⁵ 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.⁵⁶ (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

53. Robert McCartney, *Same-Sex Marriage: Exploring the Racial Divide*, WASH. POST, Sept. 20, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/19/AR2009091902376.html> (last visited May 13, 2010). The article notes that the poll revealed that voters in the city supported same-sex marriage by fifty-four percent to thirty-four percent. *Id.*; see also Tim Craig & Jennifer Agiesta, *Majorities Polled in D.C. Back Gay Marriage, Medical Marijuana*, WASH. POST, Feb. 7, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/06/AR2010020602300.html?sid=ST2010020603419> (last visited May 13, 2010).

54. *D.C. Poll*, WASH. POST, Jan. 31, 2010, http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_013110.html (last visited May 13, 2010) (poll of 1,135 D.C. adult residents, which was conducted January 24-28, 2010 by telephone).

55. *Id.*

56. *Local Digest: The District: Hearing Next Month on Gay Marriage Plan*, WASH. POST, Jan. 9, 2010, at B6 (describing the District’s first two rejections of the petition to place the issue on the ballot); *Local Digest: The District: Same-Sex Ruling Upheld by Judge*, WASH. POST, Feb. 20, 2010, at B6 (reviewing the third rejection of the ballot petition); see also Posting of Tim Craig to D.C. Wire, Elections and Ethics Board Rules Against Referendum on Same-Sex Marriage . . . Again, http://voices.washingtonpost.com/dc/2010/02/elections_and_ethics_board_rul.html?hpid=sec-metro (Feb. 4, 2010, 13:21 EST) (last visited May 13, 2010); Posting of Chuck Donovan to The Foundry, Consensus for Marriage Vote in DC, <http://blog.heritage.org/2010/02/10/consensus-for-marriage-vote-in-dc/> (Feb. 10, 2010, 5:00 PM) (last visited May 13, 2010).

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.

59. See Thomas Beaumont, *Branstad: Have Patience on Banning Gay Marriage*, DES MOINES REG., Feb. 11, 2010, at B6; see also KCCI-TV, *Lawmakers Try To Force Same-Sex Marriage Vote*, Feb. 9, 2010, <http://www.kcci.com/news/22509533/detail.html> (last visited May 13, 2010) (“Lawmakers have failed Monday in an effort to begin the process of amending the Iowa Constitution to ban same-sex marriage. . . . The house voted down the measure . . .”).

60. Norma Love, *Opponents of Gay Marriage Hope for Repeal in N.H.; Chances Could Improve After November Vote*, BOSTON GLOBE, Jan. 20, 2010, at Metro 3; see also Beth Lamontagne Hall, *Marriage Fight Goes to the Polls*, UNION LEADER (N.H.), Feb. 10, 2010, <http://www.unionleader.com/article.aspx?headline=Marriage+fight+goes+to+the+polls&articleId=15baf43d-18f8-46b1-abb6-49295bcc5204> (last visited May 13, 2010) (describing bills introduced in New Hampshire’s legislature to constitutionally define marriage as the union of a man and a woman and to repeal the state law recognizing same-sex marriages, as well as the petition drive (warrants) for votes on the issue in an estimated 125 towns).

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.⁶⁶ 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.

For example, a January 2009 Pew Forum report cited a 2006 European Commission study which stated that fifty-one percent of the people in the progressive European Union opposed same-sex marriage, while only forty-four percent of the people in the United States favored it.⁶⁷ In only eight of

explicitly forbid the recognition of same-sex marriages solemnized in other states); *see also* Advocate.com, *Md. Gay Marriage Ban Dies in Committee*, Feb. 3, 2010, http://www.advocate.com/News/Daily_News/2010/02/03/Maryland_Gay_Marriage_Ban_Dies_in_Committee/ (last visited May 13, 2010) (Maryland house judiciary committee rejects bill to ban and deny recognition of same-sex marriages); Joel McCord, *Same-Sex Marriage Debate Heats Up* (WYPR 88.1 FM radio broadcast Jan. 29, 2010), *available at* <http://www.publicbroadcasting.net/wypr/news.newsmain/article/0/13/1605889/Top.Stories/Same-Sex.Marriage.Debate.Heats.Up> (last visited May 13, 2010) (reporting that Democrat state delegate introduced a bill because the legalization of same-sex marriage in the District of Columbia posed the threat of back-door importation into Maryland).

62. Alison Knezevich, *GOP's Gay-Marriage Ban Fails in House*, CHARLESTON GAZETTE (W.V.), Feb. 24, 2010, at 3A, *available at* <http://www.wvgazette.com/News/201002230661> (last visited May 13, 2010).

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

64. Lesley Stedman Weidenbener, *Daniels' School Bill Is in Trouble—Already*, COURIER-JOURNAL (Louisville, Ky.), Jan. 21, 2010, http://pqasb.pqarchiver.com/courier_journal/access/1944270651.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Jan+21%2C+2010&author=Lesley+Stedman+Weidenbener&pub=Courier+-+Journal&edition=&startpage=n%2Fa&desc=Daniels%27+school+bill+is+in+trouble+-+already (mentioning the Indiana Senate's passage of a proposal for a state constitutional ban on same-sex marriage); *see also* Dan Carpenter, Editorial, *There! Don't You Feel Safer?*, INDIANAPOLIS STAR, Feb. 3, 2010, at A10 (describing the same events).

65. *See* Katherine Gregg, *R.I. Legislators To Take Up Annual Gay Marriage Debate*, PROVIDENCE J., Feb. 22, 2009, http://www.projo.com/news/content/same_sex_marriage_02-22-09_H2DCC7T_v26.1f6250d.html (last visited May 13, 2010); *see also* S. 2305, 2009-2010 Leg., Jan. Sess. (R.I. 2010), *available at* <http://www.rilin.state.ri.us/BillText10/SenateText10/S2305.pdf> (last visited May 13, 2010) (bill forbidding state recognition of same-sex marriages in Rhode Island).

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

67. The Pew Forum on Religion and Public Life, *Same-Sex Marriage: Redefining Marriage Around the World*, Jan. 22, 2009, <http://pewforum.org/docs/?DocID=235> (last visited May 13, 2010).

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 Argentineans 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.*

69. Angus Reid Global Monitor, *Poles Overwhelmingly Reject Same-Sex Marriage*, Aug. 5, 2009, http://www.angus-reid.com/polls/view/poles_overwhelmingly_reject_same_sex_marriage/ (last visited May 13, 2010).

70. Angus Reid Global Monitor, *Portuguese Split on Same-Sex Marriage*, Jan. 11, 2010, http://www.angus-reid.com/polls/view/portuguese_split_on_same_sex_marriage/ (last visited May 13, 2010).

71. Ibrahim B. Syed, *Same Sex Marriage and Marriage in Islam*, http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm (last visited May 13, 2010) (stating that “the definition of marriage” entails “a man and a woman” becoming a family).

72. See, e.g., Sarah A. Ramage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 CAL. W. INT'L L.J. 1, 44-46 (1996).

73. Angus Reid Global Monitor, *Most Argentines Reject Same-Sex Marriage*, Jan. 5, 2010, http://www.angus-reid.com/polls/view/most_argentines_reject_same_sex_marriage/ (last visited May 13, 2010).

74. Angus Reid Global Monitor, *Most Chileans Reject Same-Sex Marriage*, Apr. 24, 2009, http://www.angus-reid.com/polls/view/most_chileans_reject_same_sex_marriage/ (last visited May 13, 2010).

report from Brazil noted that forty-five percent of Brazilians opposed legalizing civil unions for same-sex couples, with only thirty-nine percent supporting civil unions.⁷⁵ A June 2008 report from Angus Reid suggested that seventy percent of Jamaicans would oppose same-sex marriage.⁷⁶ 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.⁷⁷

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

The “house-divided” metaphor, which is derived from the Bible⁷⁸ and was made popular by President Lincoln,⁷⁹ 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.

75. Angus Reid Global Monitor, *Many Still Oppose Same-Sex Unions in Brazil*, Apr. 10, 2008, http://www.angus-reid.com/polls/view/many_still_oppose_same_sex_unions_in_brazil/ (last visited May 13, 2010).

76. Angus Reid Global Monitor, *Jamaicans Reject Basic Rights for Homosexuals*, June 26, 2008, http://www.angus-reid.com/polls/view/jamaicans_reject_basic_rights_for_homosexuals/ (last visited May 13, 2010) (stating that seventy percent of Jamaicans opposed giving same-sex persons “the same basic rights and privileges as other people in Jamaica”).

77. See generally Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797 (2008) (reviewing the laws of Russia, Central American countries (i.e., Mexico and Nicaragua), and African countries relating to the proscription of same-sex marriage); Robin A. Warren, Comment, *Gay Marriage: Analyzing Legal Strategies for Reform in Hong Kong and the United States*, 13 PAC. RIM L. & POL’Y J. 771 (2004) (reviewing same-sex marriage policies in Hong Kong in relation to mainland China’s policies); *Tonga Rejects Convention on Discrimination Against Women* (Radio Australia radio broadcast Sept. 18, 2009), available at <http://www.radioaustralia.net.au/pacbeat/stories/200909/s2690445.htm> (reviewing Tonga’s opposition to same-sex marriages).

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.’”).

79. Abraham Lincoln, Candidate for U.S. Senator, Address at the Republican State Convention in Springfield, Illinois: A House Divided (June 16, 1858), available at <http://www.americanrhetoric.com/speeches/abrahamlincolnhousedivided.htm> (last visited May 13, 2010) (“‘A house divided against itself cannot stand.’ I believe this government cannot endure permanently half slave and half free.”).

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.⁸⁰

Both conservative and liberal legal scholars have predicted that the legalization 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.⁸¹ 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.⁸² Moreover, they may face potential civil and criminal liability for violating “hate crimes” and “hate speech” laws.⁸³

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.⁸⁴ 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).

81. Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 957-70 (2007). See generally Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 26-27 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008).

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.⁸⁵

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.⁸⁶ 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.⁸⁷ Mormons, in particular, were singled out and widely blamed by homosexual activists for the passage of the amendment,⁸⁸ names and addresses of Mormons and others who donated to efforts supporting the passage of Proposition 8 were published on the internet,⁸⁹ 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.nwsourc.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

Protesters Rally Outside of Mormon Temple in University City, NBC SAN DIEGO NEWS, Nov. 10, 2008, <http://www.nbcsandiego.com/news/local/Proposition-8-Protest-Targets-Mormon-Church.html> (last visited May 13, 2010) (stating that a “website was organized to provide details on who donated to the Prop 8”); Peggy Fletcher Stack, *For Mormons, California’s Prop 8 Battle Turns Personal*, SALT LAKE TRIB., Oct. 24, 2008 (“This week, Dante Atkins, writing on the Daily Kos, a politically liberal Web site, published a link to a list of Mormon donors and encouraged people to ‘use OpenSecrets to see if these donors have contributed to . . . shall we say . . . less than honorable causes’”); *see also* Bash Back! Olympia Trashes Mormon Church, <http://bashbacknews.wordpress.com/page/27> (Nov. 17, 2008, 3:14) (last visited May 13, 2010) (reposting from Seattle Indymedia) (“The Mormon church (just like most churches) is a cesspool of filth. It is a breeding ground for oppression of all sorts and needs to be confronted, attacked, subverted and destroyed.”); Tim Martin, *Radical Gay Activist Group Plans More Disruptions*, ASSOCIATED PRESS, Nov. 20, 2008, available at <http://www.theoutsiderview.net> (Nov. 21, 2008) (last visited May 13, 2010).

90. *See* ‘Gay’ Threats Target Christians over Same-sex ‘Marriage’ Ban, WORLD NET DAILY, Nov. 5, 2008, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=80220> (last visited May 13, 2010) (“On yet another site, ‘Americablog,’ ‘scottinsf’ wrote, ‘Trust me. I’ve got a big list of names of mormons and catholics that were big supporters of Prop 8. . . . As far as mormons and catholics . . . I warn them to watch their backs.’”); *Prop 8 Supporters Harassed by Homosexual Activists*, CATH. NEWS AGENCY, Nov. 11, 2008, <http://www.catholic.org/politics/story.php?id=30497> (last visited May 13, 2010).

A Mormon police officer noted:

[S]everal of his ward members had received hate mail after their names, religious affiliation, contribution amounts, and addresses were published on a web site inciting Proposition 8 opponents to target the individuals listed. “Their houses and cars had been vandalized, their campaign support signs stolen, and opposition signs planted in their place,” Bishop wrote.

Id.; *see also* *Prop. 8 Passage Spawns Protests, Violence and Vandalism*, CHRISTIAN EXAMINER, Dec. 2008, http://www.christianexaminer.com/Articles/Articles%20Dec08/Art_Dec08_09.html (last visited May 13, 2010) (“In Fresno, a prominent pastor, who had campaigned publicly for Proposition 8, received credible death threats that also targeted the mayor, another traditional marriage supporter. The threats were deemed credible enough for the police department to assign officers to protect the men. The church was also targeted for vandalism.”); *Prop 8 Supporters File Suit After Threats*, CBN.COM, Jan. 10, 2009, <http://www.cbn.com/cbnnews/us/2009/January/Prop-8-Supporters-File-Suit-After-Threats/> (last visited May 13, 2010) (noting that since some of the donors to Proposition 8 have been harassed, threatened with boycott, and received death threats, as a result of their names being posted online, they have filed suit to protect the privacy of their donation records); Stack, *supra* note 89.

91. *See, e.g.*, Jennifer Garza, *Probe of Possible Hate Crimes, FBI Looking into Vandalism at Mormon Church’s Sites*, SACRAMENTO BEE, Nov. 15, 2008, at A3 (“Sacramento [California] church officials have stepped up security at the Mormon temple in Rancho Cordova. Ten church buildings in the region have been vandalized since the election, said Lisa West, spokeswoman for the church in the Sacramento area. “That’s more than we usually get in an entire year.”); Steve Gehrke & Jason Bergreen, *Prop. 8 Backlash? White Powder Sent to LDS Temples in Salt Lake City, L.A.*, SALT LAKE TRIB., Nov. 14, 2008 (envelopes containing white powder delivered to two

businesses,⁹³ 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.⁹⁴

LDS temples); Jeff McDonald & John Marelius, *Prop. 8 Win Energizing Gay-rights Supporters*, SAN DIEGO UNION-TRIB., Nov. 15, 2008, at A1 (“Vandalism and chants of ‘Mormon scum’ were reported at some churches. Twice in the past week, the San Diego temple has attracted street protests.”); Chelsea Phua, *Mormon Church in Orangevale Vandalized in Wake of Prop. 8 Vote*, SACRAMENTO BEE, Nov. 9, 2009, at 1B (relating that “[v]andals spray-painted the words ‘No on Prop 8’” at a Mormon church in Orangevale, California, three days after voters passed the amendment); *Prop. 8 Supporters Suffer Harassment, Assaults from Homosexual Activists*, CATH. NEWS AGENCY, Nov. 11, 2008, http://www.catholicnewsagency.com/news/prop_8_supporters_suffer_harassment_assaults_from_homosexual_activists/ (noting that police had been called out to protect a Mormon temple in Los Angeles against trespassing homosexual protesters who wrote anti-Mormon messages on its walls, and that similar protests also have taken place at a Catholic church in Los Angeles, as well as at Pastor Rick Warren’s Saddleback Church); *Vandalism Reported at More LDS Buildings*, SALT LAKE TRIB., Nov. 12, 2008 (“The windows of two more LDS ward houses have been shattered—the latest in a string of seven buildings targeted by vandals across the Wasatch Front [in central Utah] since Saturday.”).

92. See Carrie A. Moore, *Owner Says Prop. 8 Opponents Hacked into LDS Site*, DESERET NEWS ONLINE (Utah), Nov. 13, 2008, <http://www.deseretnews.com/article/1,5143,705262907,00.html> (last visited May 13, 2010) (LDS businessman’s online magazine for LDS community hacked into and replaced with lesbian images); *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) (reporting urgings from some to boycott Utah state).

93. 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.”⁹⁵ 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.⁹⁶ 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”).

95. Marcus Crowder, *Theatre Official Resigns: Eckern’s \$1,000 Donation for Prop. 8 Created Furor*, SACRAMENTO BEE, Nov. 13, 2008, at A1 (noting that Mormon 25-year employee resigns because homosexual activists threaten boycott of musical theatre); Ed Fletcher, *Nationwide Protest of Gay Marriage Ban: Battle Kept Front and Center, Sacramento Among Chorus of Voices Demanding Equality*, SACRAMENTO BEE, Nov. 16, 2009, at A1.

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 boycotts 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

97. *Donation for Prop. 8 Results in Hold on a Theater Board Appointment*, DESERET NEWS ONLINE (Utah), Jan. 28, 2010, http://findarticles.com/p/articles/mi_qn4188/is_20100128/ai_n48761994/ (last visited May 13, 2010); Phillip Matier & Andres Ross, *Prop. 8 Aid Puts Paramount Board Member on Hold*, SFGATE.COM, Jan. 20, 2010, http://articles.sfgate.com/2010-01-20/bay-area/17829599_1_mormon-temple-hoopes-susie-tompkins-buell (last visited May 13, 2010).

98. See Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. TIMES, Apr. 26, 2004, at A15, available at <http://www.nytimes.com/2004/04/26/us/obey-same-sex-marriage-law-officials-told.html> (last visited May 13, 2010) (state's chief legal counsel tells justices of the peace that they must perform same-sex marriages, and that "those who refused could be sued for discrimination"); see also Kathleen Burge, *Justices of the Peace Confront Dilemmas on Gay Marriage: Opponents Face Wedding Quandry* [sic], BOSTON GLOBE, Apr. 18, 2004, at B1 (noting that the approximately five hundred justices of the peace in Massachusetts are in a quandary, as some object to performing same-sex marriages). Interestingly, law professor Douglas Laycock disagreed with the Massachusetts governor's legal counsel:

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.”⁹⁹

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.¹⁰⁰

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[.]”¹⁰¹ many decline to officiate or participate.¹⁰² 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.¹⁰³

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

Pundit Review, *Mitt Romney, Not the Mass Supreme Judicial Court, Imposed Gay Marriage on the Citizens of Massachusetts*, <http://www.punditreview.com/2007/11/romney-violated-his-constitutional-oath-by-facilitating-same-sex-marriage-in-massachusetts> (Nov. 20, 2007, 12:19 AM); MassResistance.org, *Timeline Documents Romney's Role in Creating Same-Sex "Marriages,"* <http://www.massresistance.org/docs/marriage/romney/timeline.html> (last visited May 13, 2010).

99. See generally Severino, *supra* note 81, at 341 (citing Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16).

100. Posting of Jean Paul Renaud to Readers' Representative Journal, *California's County Clerks' Policies Vary on Same-sex Marriage*, <http://latimesblogs.latimes.com/readers/> (June 20, 2008, 5:47 PM); see also Zach Behrens, *County by County, Gay Marriage Policies Differ*, June 16, 2008, http://laist.com/2008/06/16/county_by_county_gay_marriage_polic.php (last visited May 13, 2010).

101. Noelle Frampton, *Justices of the Peace Split on Civil Unions*, CONN. POST, July 6, 2008, available at http://www.boston.com/news/local/connecticut/articles/2008/07/06/justices_of_the_peace_split_on_civil_unions/?page=2 (last visited May 13, 2010).

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 ceremonies¹⁰⁵ 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

104. Associated Press, *Official: Iowa Clerks Must Obey Marriage Ruling*, GAY & LESBIAN TIMES, Apr. 23, 2009, <http://www.gaylesbiantimes.com/?id=14493> (last visited May 13, 2010) (emphasis added).

105. Ronald J. Rychlak, *The Unintended Consequences of 'Same-Sex Marriage,'* CATH. ONLINE, May 2, 2008, http://www.catholic.org/national/national_story.php?id=27817 (last visited May 13, 2010).

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

107. Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story* (National Public Radio broadcast June 16, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91486340> (last visited May 13, 2010) (discussing Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685 (N.M. Human Rights Comm'n Apr. 9, 2008) (a New Mexico Human Rights Commission case ordering payment of a "more than \$6,600 attorneys' fee bill")); see also Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 81, at 77, 78 ("In 2008, . . . the New Mexico Human Rights Commission found discriminatory the refusal of two New Mexico photographers to take pictures of a same-sex couple's commitment ceremony. The Commission ordered the photographers to pay the complainant's attorney fees, which totaled more than \$6000.").

site although the action conflicted with the business's core values.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.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.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.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.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

108. *E-Harmony Forced To Add Gays to Main Site*, CBN.COM, Jan. 29, 2010, <http://www.cbn.com/cbnnews/us/2010/January/E-Harmony-Forced-to-Add-Homosexuals-to-Main-Site/> (last visited May 13, 2010); see also Associated Press, *eHarmony Settles Gay Discrimination Suit*, CBN.COM, Jan. 27, 2010, <http://www.cbsnews.com/stories/2010/01/27/national/main6147090.shtml> (reporting that eHarmony agreed to pay out millions of dollars to settle a lawsuit claiming its business discriminated against gays).

109. Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. MUN. REG. 46, §§ 401, 406 (2010); see also Patrick MacAnaney, *Catholic Church Abandons Social Services for Homeless*, THE RICE THRESHER (Rice Univ. student newspaper), Jan. 15, 2010, <http://media.www.ricethresher.org/media/storage/paper1290/news/2010/01/15/Opinion/Catholic.Church.Abandons.Social.Services.For.Homeless-3853577.shtml> (last visited May 13, 2010).

110. Joshua Rhett Miller, *Massachusetts Man Says He Was Fired for Telling Colleague Her Gay Marriage Is Wrong*, FOXNEWS.COM, Nov. 9, 2009, <http://www.foxnews.com/story/0,2933,572862,00.html> (last visited May 13, 2010).

111. Joshua Rhett Miller, *Reporter, Fired for Anti-Gay Marriage E-mail, Claims Wrongful Termination*, FOXNEWS.COM, Dec. 10, 2009, <http://www.foxnews.com/story/0,2933,579947,00.html> (last visited May 13, 2010).

112. *School Counselor Targeted for Supporting Maine's Pro-marriage Question 1*, CATH. NEWS AGENCY, Nov. 3, 2009, http://www.catholicnewsagency.com/news/school_counselor_targeted_for_supporting_maines_promarriage_question_1/ (last visited May 13, 2010); see also Associated Press, *Counselor Wants Gay Marriage Complaint Thrown Out*, BANGOR DAILY NEWS (Me.), Nov. 23, 2009, at B8, available at <http://www.bangordailynews.com/detail/130565.html> (last visited May 13, 2010).

Right.”¹¹³ Former University of Chicago Law Professor Dallin H. Oaks, now a leader of the Church of Jesus Christ of Latter-day Saints, notes that:

atheists and others—would intimidate persons with religious-based points of view from influencing or making the laws of the state or nation. . . . “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”¹¹⁴

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.”¹¹⁵

The *Christian Legal Society v. Martinez* case now pending before the Supreme Court of the United States exemplifies that challenge.¹¹⁶ 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.¹¹⁷ School officials not only denied this request, but they also stripped the chapter of its recognition and benefits, including student activity fee funding.¹¹⁸ On October 22, 2004, the CLS filed a lawsuit against the school officials who denied recognition to

113. Lance B. Wickman, LDS Elder, The Threatened Demise of Religion in the Public Square, Remarks at Meeting of the J. Reuben Clark Law Society (Feb. 11, 2010), *available at* <http://www.lds.org/ldsnewsroom/eng/news-releases-stories/the-threatened-demise-of-religion-in-the-public-square-talk-given-by-elder-lance-b-wickman-at-j-reuben-clark-law-society> (last visited May 13, 2010).

114. Dallin H. Oaks, Religious Freedom, Devotional Address at Brigham Young University-Idaho (Oct. 14, 2009), *available at* <http://www.believeallthings.com/tag/religious-liberty/> (last visited May 13, 2010) (quoting Hugh Hewitt, A MORMON IN THE WHITE HOUSE? 242-43 (2007)).

115. *Id.*

116. *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 319 F. App’x 645 (9th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3340 (U.S. Dec. 7, 2009) (No. 08-1371).

117. *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *2 (N.D. Cal. Apr. 17, 2006).

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.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.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.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."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.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.¹²⁴ The Supreme Court heard oral arguments in the case on April 19, 2010.

The *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.¹²⁵ This case has been aptly described as

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).

120. *Christian Legal Soc'y*, 2006 WL 997217, at *5-24.

121. *Id.*

122. Christian Legal Society, *Christian Legal Society v. Martinez (UC Hastings)*, <http://www.clsnet.org/center/litigation/christian-legal-society-v-martinez-uc-hastings> (last visited May 13, 2010).

123. *Id.*; see also *Christian Legal Soc'y*, 2006 WL 997217.

124. Christian Legal Society, *supra* note 122. The panel included formerly "conservative" Chief Judge Alex Kozinski, Judge Proctor Hug, Jr., and Judge Carlos T. Bea. See also *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 319 F. App'x 645 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3340 (U.S. Dec. 7, 2009) (No. 08-1371).

125. *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 U.S. Dist. LEXIS 1441 (N.D. Cal. Jan. 8, 2010); see also William N. Eskridge, Jr. & Darren Spedale, *Who Will Win the Gay Marriage Trial?: A Roadmap to the Routes to Victory for Both Sides*, SLATE, Jan. 29, 2010, <http://www.slate.com/id/2242957/> (last visited May 13, 2010).

“a show trial in a kangaroo court.”¹²⁶ 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.”¹²⁷ 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.¹²⁸ 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.¹²⁹ 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.”¹³⁰

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

126. Maggie Gallagher, *California Voters Face Show Trial in Kangaroo Court*, TOWNHALL.COM, Jan. 6, 2010, http://townhall.com/columnists/MaggieGallagher/2010/01/06/california_voters_face_show_trial_in_kangaroo_court (last visited May 13, 2010).

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

128. Maura Dolan & Carol J. Williams, *Jerry Brown Again Says Prop. 8 Should Be Struck Down*, L.A. TIMES, June 13, 2009, at 13, *available at* <http://articles.latimes.com/2009/jun/13/local/me-gay-marriage13> (last visited May 13, 2010).

129. *See, e.g., id.*

130. Jamshid Askar, *Gay Marriage Battle Endangering Religious Voices, LDS Leader Says*, DESERET NEWS (Utah), Feb. 12, 2010, at B2, *available at* <http://www.deseretnews.com/article/700008993/Gay-marriage-battle-endangering-religious-voices-LDS-leader-says.html> (last visited May 13, 2010) (quoting LDS Elder Lance B. Wickman).

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

131. See, e.g., Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 81, at 123, 123-56; Theodore B. Olson, *The Conservative Case for Gay Marriage: Why Same-Sex Marriage Is an American Value*, NEWSWEEK, Jan. 18, 2010, at 48, available at <http://www.newsweek.com/id/229957> (last visited May 13, 2010).

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.

138. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

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

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.

142. *See generally* Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1000-14 (2007) (reviewing evidence showing that homosexual attraction is not immutable).

color of their skin but by the content of their character.”¹⁴³ 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.¹⁴⁴ 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.”¹⁴⁵ 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.”¹⁴⁶ 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.¹⁴⁷ Dual-gender marriage has provided a clear boundary for distinguishing marriage from other intimate relationships¹⁴⁸ and has protected the investment of those entering the marital family institution by controlling the rules for entry into and exit from that institution.¹⁴⁹ In addition, dual-gender marriage has provided familiarity,

143. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in Martin Luther King, Jr., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 101, 104 (James Melvin Washington ed., 1992).

144. Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. 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.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.¹⁵¹ Finally, for millennia, dual-gender marriage has received government recognition and support to strengthen the institution.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).¹⁵³

150. *Id.*

151. *Id.* at 533-34.

152. *Id.* at 534.

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.

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:

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.

. . . .

[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.

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

Id. at 980, 982; *see also id.* at 987, 990, 996-97, 1003 (Cordy, J., dissenting). Justice Cordy acknowledges:

More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built.

.....
It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute [at issue in *Goodridge*] continues to serve this important State purpose.

Id. at 996-97 (citation omitted).

154. *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Justice Harlan states:

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.

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).

155. *See generally* Wardle, *supra* note 153, at 221-26. Much of the material in this subsection is discussed within that chapter.

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).

159. Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES, Jan. 28, 2010, at A17, available at <http://www.nytimes.com/2010/01/29/us/29sfmetro.html> (acknowledging that "many successful gay marriages share an open secret"—multiple sexual partners).

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.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.¹⁶³ The study also found that homosexual men with steady partners engage in more risky sexual behaviors than homosexuals without steady partners;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.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.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."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

162. Maria Xiridou et al., *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.12.aspx (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.

163. *Id.*

164. *Id.*

165. *Id.*

166. Paul Van de Ven et al., *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).

167. MARSHALL KIRK & HUNTER MADSEN, *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, *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.¹⁶⁸ 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.”¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹

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.¹⁷²

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.¹⁷³ If you want to see real gender wars and extremely hostile

168. DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 252 (1984); *see also* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 319-37 (Robert P. Cabaj & Terry S. Stein eds., 1996) (summarizing McWhirter and Mattison’s work).

169. Harold N. Miller, *Making Sense (Trying To!) of Varying Statistics on Gay Monogamy*, www.unav.es/civil/nsd/nosindebate/miller.pdf; *see also* Traditional Values Coalition, *Special Report: Statistics on the Homosexual Lifestyle*, http://www.traditionalvalues.org/pdf_files/statistics_on_homosexual_lifestyle.pdf (last visited May 13, 2010).

170. ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308-09 (1978).

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.

173. *See generally* Wardle, *supra* note 153, at 207-26.

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

178. These are the author's own categories, but they have been influenced by the work of others. See, e.g., Universal Declaration of Human Rights, Preamble, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) (recognizing "the inherent dignity . . . of all members of the human family"); Monte Neil Stewart, *Dworkin, Marriage, Meanings—and New Jersey: Is Democracy Possible Here?*, 4 RUTGERS J.L. & PUB. POL'Y 271, 274-80 (2007) (reviewing RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* (2006) and criticizing Dworkin's two principles of intrinsic value and personal responsibility [autonomy]); see also JOHN EEKELAAR, *FAMILY LAW AND PERSONAL LIFE* (2006); E.J. ERBELE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002).

179. See generally Vera Bergelson, *The Right To Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007) (examining the idea of consent and human dignity); David A. Hyman, *Does Technology Spell Trouble with a Capital "T"?: Human Dignity and Public Policy*, 27 HARV. J.L. & PUB. POL'Y 3, 17 (2003); Barbara Stark, *After/Words(s): 'Violations of Human Dignity' and Postmodern International Law*, 27 YALE J. INT'L L. 315 (2002) (reviewing the concept of dignity in the context of international human rights).

- (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.¹⁸¹ 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.”¹⁸² “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).

182. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 536-37 (2d ed., Washington, Taylor & Maury 1836), available

Founders of the American republic.”¹⁸³ Virtue was understood to be the indispensable prerequisite for republican (or what we today call democratic self-) government.¹⁸⁴ Benjamin Franklin stated that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”¹⁸⁵ John Adams acknowledged: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”¹⁸⁶ 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.”¹⁸⁷

Marriage and marital families were viewed as essential structures for cultivating civic or republican virtue.¹⁸⁸ 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

at <http://teachingamericanhistory.org/ratification/elliott/elliottvolume3.pdf> (last visited May 13, 2010).

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).

184. *See generally* Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 *YALE J.L. & FEMINISM* 221, 233 (2005).

185. *THE WRITINGS OF BENJAMIN FRANKLIN* 569 (Albert H. Smyth ed., 1970).

186. J. David Gowdy, *The Washington, Jefferson & Madison Institute*, *The Roots of Our Constitutional Liberty*, <http://www.liberty1.org/roots.htm> (last visited May 13, 2010).

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).

virtue.”¹⁸⁹ 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?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] [i]ndividuals learned virtue in their families, churches, and schools.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.”¹⁹²

189. See generally Anne C. Dailey, *Families and Federalism*, 143 U. PA. L. REV. 1787, 1796, 1835-51 (1995) (linking state control of family matters to the nurturing of republican virtue); Gerald J. Russello, *Liberal Ends and Republican Means*, 28 SETON HALL L. REV. 740, 755-56 (1997) (reviewing PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) (explaining that the two pillars of republican virtue were religion and family)).

190. 4 JOHN ADAMS, *THE ADAMS PAPERS: DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 123 (L.H. Butterfield et al. eds., 1962).

191. Wardle, *supra* note 184, at 251 n.160 (citing Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 946-47 (1995) (quoting George Mason, *Opposition to a Unitary Executive* (June 4, 1787), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL DEBATES* 47 (Ralph Ketcham ed., 1986))).

192. Mary Lyndon Shanley, *Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 LAW & SOC. INQUIRY 923, 926 (2002); see also NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 10 (2000).

Marriage was closely linked to the cultivating and protecting of virtue in republican theory, in symbolic as well as pragmatic ways.¹⁹³ 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.”¹⁹⁴ Thus, the Founders deliberately provided “legal supports for the family,” which were “important elements in the stability of marriage.”¹⁹⁵

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.”¹⁹⁶ 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.¹⁹⁷

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.

195. THOMAS G. WEST, VINDICATING THE FOUNDERS 176 (1997).

196. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 79 (Isaac Kramnick ed., W.W. Norton & Co. 2007) (1835).

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.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.

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.”¹⁹⁹ “These mediating structures or ‘communities’ that mediate between the individual and the state or the market need nourishing”²⁰⁰ The Founders understood that certain non-governmental 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 non-governmental “institutions—family, school, churches, neighborhood, and other local institutions, were, in fact, the *primary feeders* and *stimulators* of the general civil religion.”²⁰¹ The marital family was one of the critical institutions in which civic virtue would be generated and regenerated.

198. FRANCIS J. GRUND, *THE AMERICANS, IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS* 171 (Boston, Marsh, Capen and Lyon 1837).

199. PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 6 (1977). *See generally* PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* (Michael Novak ed., 2d ed. 1996) (exploring and reaffirming the significance of mediating structures in society).

200. Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1573 n.108 (1998); *see also* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 479 (1983) (observing that mediating structures are necessary to protect the individual from the alienating power of the state). *See generally* SEEDBEDS OF CIVIC VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

201. VETTERLI & BRYNER, *supra* note 183, at 52; *see also* LUTZ, *supra* note 183, at 83.

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.²⁰²

The marital family was the most “local” of local communities, the ultimate “little platoon,” to borrow a phrase from Edmund Burke.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.”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).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.

202. Frohnen, *supra* note 191, at 941 (footnotes omitted).

203. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 51 (Prometheus Books 1987) (1790).

204. VETTERLI & BRYNER, *supra* note 183, at 52.

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).

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 attaining 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.

207. Letter from George Washington to the Members of the New Church in Baltimore (Jan. 27, 1793), in 12 THE WRITINGS OF GEORGE WASHINGTON 201, 202 (Jared Sparks ed., Boston, American Stationers' Co. 1837).

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), Columbia (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 (art. 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)
Convention on the Prevention and Punishment of the Crime of Genocide
(1948)
European Convention for the Protection of Human Rights and Fundamental
Freedoms (1950)
United Nations Convention Relating to the Status of Refugees (1954)
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)
Hague Convention on the Civil Aspects of International Child Abduction
(1980)

* 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.

African Charter on Human and Peoples' Rights (Banjul Charter) (1981)
Declaration on the Elimination of All Forms of Intolerance and of
Discrimination Based on Religion or Belief (1981)
Convention on the Rights of the Child (1989)
African Charter on the Rights and Welfare of the Child (1990)
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)
Beijing Declaration and Platform for Action, Fourth World Conference on
Women (1995)
Proposed American Declaration on the Rights of Indigenous Peoples (1997)
Protocol to the African Charter on Human and Peoples' Rights on the
Rights of Women in Africa (2003)
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.”