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COMMENT

GOD VERSUS GOVERNMENT: UNDERSTANDING STATE AUTHORITY IN THE CONTEXT OF THE SAME-SEX MARRIAGE MOVEMENT

Erik J. Krueger[†]

I. INTRODUCTION

To be sure, many Americans today think the law is whatever we say it is.¹ After all, is ours not a government by the people, and for the people?² Even so, to assume that human positive law is omnipotent is a radical ethos indeed. This Comment challenges that idea in the context of the same-sex marriage movement. Is marriage whatever we say it is?

This Comment insists that marriage, at its core, has an absolute, immutable identity—it is the holy union of a man and a woman. Nevertheless, this Comment also adopts the position that the State enjoys rightful jurisdiction over marriage. Between these competing ideas, this Comment seeks to draw out how the State can best respond to the same-sex marriage movement.

[†] *Notes & Comments Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 7. J.D. Candidate, Liberty University School of Law (2013); B.A., University of Wisconsin-Madison (2010). I dedicate this Comment to my wife, Jennifer, without whose help law school would be an impossible endeavor. A special thanks to Rev. Peter C. Bender, my brother in Christ and a true man of faith, for his valuable insights into this topic. *Sola Gratia. Sola Fide. Sola Scriptura.*

1. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 39 (1983) [hereinafter BERMAN I]. Justice Oliver Wendell Holmes famously described such a legal philosophy in this way:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

2. *E.g.*, U.S. CONST. pmb. (“We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating, *inter alia*, that government derives its power from the consent of the governed and that the people hold the right to institute government for the purpose of effecting their own happiness).

Part II describes a framework by which to understand state authority. Using Martin Luther's doctrine of the Two Kingdoms, Part II demonstrates that the State exercises jurisdiction over marriage and may modify it however the State chooses. Nevertheless, Part II goes on to argue that the State should not authorize same-sex marriage because there is neither a theological nor a jurisprudential basis for doing so, and, in particular, that the U.S. Constitution permits the states to codify marriage's male-female form.

Part III compares current American jurisprudence to the Western Legal Tradition and emphasizes that the modern American state, by permitting same-sex marriage, has abandoned a theological understanding of marriage and has abandoned the Western Legal Tradition. Part III encourages American states to respond to the same-sex marriage movement by reexamining the theological, jurisprudential, and constitutional bases justifying male-female marriage.

Part IV proposes that the best policy is one that recognizes only true marriage. In the alternative, Part IV proposes that a sound policy might recognize both marriage and some state-created institution to accommodate same-sex relationships. In either case, Part IV cautions against a policy that recognizes same-sex marriage.

II. BACKGROUND

A. *Understanding State Authority: The Two Kingdoms Doctrine.*

Same-sex marriage is a special legal conundrum. To really understand the issue demands first that certain preliminary questions be answered. For instance, what is marriage? Can marriage accommodate same-sex couples? Who has authority over marriage? Does the Church? Does the State? Do they both? Is same-sex marriage a good idea? Is it a bad idea? These questions must be answered—and answered soundly—before the State can expect anybody to take seriously its decrees about marriage. A helpful way to begin analyzing the same-sex marriage topic is to view it in terms of Martin Luther's³ doctrine of the Two Kingdoms.⁴

3. Martin Luther (1483–1546) initially pursued legal studies but instead became an Augustinian monk and, later, a theology professor. HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 39–45 (2003) [hereinafter BERMAN II]. Luther and his teachings were at the heart of the Reformation, and it is no exaggeration to say that his ninety-five theses triggered it. *Id.* at 39–40.

The Two Kingdoms Doctrine recognizes two coexisting jurisdictions, each governed by its own respective government and law.⁵ On the one hand, there is the spiritual kingdom. The spiritual kingdom encompasses Christians.⁶ Citizenship in the spiritual kingdom is a matter of faith and is voluntary.⁷ Christ, through the Church, governs the spiritual kingdom according to the Word of God.⁸ The Church's competence is over the soul, and its purpose is to preach the Gospel and to administer the sacraments to its members.⁹ The Gospel inwardly convicts the heart of its sin.¹⁰ In sum, the spiritual kingdom is a Christocracy, a community of Christians governed by Christ through the Church according to the immutable divine law.

On the other hand, there is the secular kingdom. The secular kingdom encompasses everyone, Christians and non-Christians alike.¹¹ Citizenship in the secular kingdom is by birth.¹² Rulers, through the State, govern the secular kingdom according to human positive law.¹³ The State's competence is over the physical acts of human beings, and its purpose is to preserve justice and repress anarchy through law.¹⁴ The law coerces outward obedience.¹⁵ In sum, the secular kingdom *need not* be a Christocracy,¹⁶ for it is a community of Christians and non-Christians governed by the State according to variable positive law.

The distinction between the two kingdoms is fundamental. God ordained both the Church and the State to preside over their respective

4. See generally PAUL ALTHAUS, *THE ETHICS OF MARTIN LUTHER* 43–82 (Robert C. Schultz trans., 1972). The Two Kingdoms Doctrine is analyzed in detail in Part II.A.

5. ALTHAUS, *supra* note 4, at 45–48.

6. *Id.* at 49.

7. *Id.* at 58–60.

8. *Id.* at 45–46, 58.

9. *Id.* at 46.

10. *Id.*

11. *Id.* 49.

12. *Id.*

13. *Id.* at 58–59.

14. *Id.*

15. *Id.*

16. Indeed, the U.S. Constitution guarantees that our government *will not* be a Christocracy, for “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I. Nevertheless, the First Amendment's classic language does not prohibit states from codifying marriage as an exclusive male-female union. See *infra* Part II.E.

kingdom, each for a particular purpose.¹⁷ The Church's purpose is to care for the soul, while the State's purpose is to institute order. It would be wrong to conflate these distinct functions,¹⁸ specifically because each function is grounded in different law. Whereas the Church governs according to the divine law, the State need not do the same, for God gives his law only to his people; He does not foist it upon unbelievers.¹⁹ Thus, the State enjoys creative discretion in its exercise of authority. It can institute order by monarchy or democracy, by one particular penal code or any other. It can repress anarchy whether its prince is a Christian or a scoundrel.²⁰ Doubtless, the best government will be informed by Christian ethics,²¹ and to implement foolish or unreasoned law is to forfeit God's blessing.²² Nevertheless, God is present in both good law and bad law for His own purposes. Thus, the Two Kingdoms Doctrine teaches that Christians should endure the bad law of the secular kingdom, even if it corrupts the country, and understand it as God's punishment for man's innate lawlessness.²³

17. It is important to grasp that not just the Church but the State, too, was ordained by God. See *Romans* 13:1 (English Standard Version) (all subsequent citations to Scripture are to the ESV) ("Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God."). God ordained the government as his agent, to carry out his justice. *Romans* 13:4. God did not ordain government to be a mere vehicle for expressing the whims of those in power. Nevertheless, Luther's Two Kingdoms Doctrine contemplates that even a tyrannical government is to be obeyed as the supreme authority in the secular kingdom. ALTHAUS, *supra* note 4, at 130. The Christian may disobey the government only insofar as it compels him to act contrary to God and his Word. *Id.* at 126. Thus, while Christians may disobey the government if it orders them to deny the truth of the gospel, *id.* at 130, Luther condemned the violent peasant revolts that occurred during his lifetime, which, inspired by the Reformation, were directed against the oppressive temporal authorities. See BERMAN II, *supra* note 3, at 55–57.

18. ALTHAUS, *supra* note 4, at 60–61.

19. *Id.* at 45. Make no mistake, however, that all are subject to condemnation by the divine law on the last day. See *John* 12:48.

20. ALTHAUS, *supra* note 4, at 112–24. One feature of the secular kingdom is that Christians and non-Christians alike make up the secular community. The Two Kingdoms Doctrine contemplates that Christians involve themselves in secular government, notwithstanding that they simultaneously are members of the spiritual kingdom. American law, like the Two Kingdoms Doctrine, recognizes that Christian involvement in government is no contradiction. See U.S. CONST. amend. I (Free Exercise Clause).

21. ALTHAUS, *supra* note 4, at 123–24.

22. *Id.* at 60.

23. *Id.* at 130.

Ultimately—and this is of critical importance to the remaining discussion—nothing constrains the scope of human positive law under the Two Kingdoms Doctrine.²⁴ In the exercise of its plenary authority here on Earth, the State may enact good or bad policy, and in turn will reap good or bad results. Various considerations like the divine law, jurisprudential tradition, and logistics may persuade the State against a foolish policy, but such considerations are not binding.

B. Does Marriage Belong to the Spiritual Kingdom or the Secular Kingdom?

The Two Kingdoms Doctrine contemplates that, whereas sacraments belong to the spiritual kingdom and are thus governed by the Church, physical actions belong to the secular kingdom and are governed by the State.²⁵ Essentially, whether marriage qualifies as a sacrament determines whether it should be preserved by the Church or regulated by the State.

A sacrament has two components: “[A] word of *divine promise* is associated with every sacrament, and anyone who receives the sacrament *must also believe* in that word of promise”²⁶ According to this definition, Scripture must promise something about every sacrament, and any person receiving the sacrament must aver a subjective belief in the truth of that promise. For example, a person partaking in Holy Baptism must believe that it unites him in the death and resurrection of Jesus Christ.²⁷ The Church administers baptism, among other sacraments, because it relates to spiritual well-being.²⁸ In contrast, Scripture also makes promises that do not hinge on subjective belief in their truth.²⁹ For example, Scripture promises

24. Christians nevertheless must resist the State when it compels them to act contrary to God’s command, for Christians are foremost citizens of the spiritual kingdom and secondarily citizens of the secular kingdom. *Matthew* 22:21 (“[R]ender to Caesar the things that are Caesar’s, and to God the things that are God’s.”); *Acts* 5:29 (“We must obey God rather than men.”). Luther’s Two Kingdoms Doctrine recognizes this primary allegiance. See ALTHAUS, *supra* note 4, at 126.

25. See *supra* Part II.A.

26. MARTIN LUTHER, *The Pagan Servitude of the Church*, in SELECTIONS FROM HIS WRITINGS 326 (John Dillenberger ed., 1962) (emphasis added).

27. *Mark* 16:16 (“Whoever believes and is baptized will be saved, but whoever does not believe will be condemned.” (emphasis added)). This passage exhibits both elements of a sacrament: a divine promise of salvation conditioned on subjective belief in that promise.

28. *Id.*; see also PETER C. BENDER, LUTHERAN CATECHESIS: CATECHUMEN EDITION 33 (2d ed. 2008).

29. *Matthew* 5:45 (“[God] makes his sun rise on the evil and on the good, and sends rain on the just and on the unjust.”).

that hard work generates profit, but laziness tends to poverty.³⁰ These promises relate to physical realities that depend only on action, not belief, and so are not sacraments. Marriage is one of these physical realities.

Scripture does make certain promises about marriage.³¹ Nevertheless, these promises do not relate to salvation, and they do not depend on subjective belief to take effect. Instead, marriage *ipso facto* blesses the participants, i.e., the very act confers a benefit upon husband and wife. This is true because God makes marriage available to all men and women, whether Christian or not.³² For these reasons, Martin Luther denied that marriage is a true sacrament.³³ Though the Two Kingdoms Doctrine maintains that God created and ordered marriage as a union of a man and a woman,³⁴ it nevertheless places marriage—a physical, non-spiritual act—within the State’s competence.³⁵

The above conclusion has tremendous implications in the context of the same-sex marriage debate. The logical periphery of the Two Kingdoms Doctrine is that the State has authority to regulate marriage, authority even to reconfigure marriage to accommodate same-sex relationships. Certainly, Luther did not foresee this contortion of State power. Yet, perhaps he would concur in the result, for it remains true that God works in both kingdoms

30. *Proverbs* 14:23.

31. *Proverbs* 18:22 (“He who finds a wife finds a good thing and obtains favor from the LORD.”).

32. ALTHAUS, *supra* note 4, at 88.

33. The denominations within Christianity differ on this point. For example, the Catholic Church maintains that Christ elevated the covenant of marriage between baptized Christians to the dignity of a sacrament. *Catechism of the Catholic Church: The Sacrament of Matrimony*, THE VATICAN, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a7.htm (last visited Apr. 22, 2013). Conversely, the Lutheran Church traditionally teaches that marriage is an institution of great importance but is something less than a sacrament because “a word of divine promise is associated with every sacrament, and anyone who receives the sacrament *must also believe in that word of promise*, for it is impossible that the [symbolism] should in itself be the sacrament.” LUTHER, *supra* note 26, at 326 (emphasis added). In other words, the Lutheran Church teaches that marriage is a gift from God to all mankind, Christian or not, and so the Church cannot claim competence over marriage as though it were a covenant reserved only for Christians. *Id.* This perhaps subtle distinction has remarkable implications in terms of understanding the State’s authority over marriage. These implications are discussed in detail in Part II.B.

34. ALTHAUS, *supra* note 4, at 88–89.

35. *Id.* at 89.

for His own good and gracious purposes.³⁶ Sometimes, humankind must endure bad law as judgment for its innate lawlessness.³⁷

In any event, the Two Kingdoms Doctrine recognizes that the State *may* validly expand the institution of marriage to accommodate same-sex couples, and this is something that Christians must honestly confront. Still, there are unavoidable reasons why the State *should not* do so. For instance, same-sex marriage is theological sacrilege³⁸ and jurisprudential folly.³⁹ Furthermore, American states in particular *need not* reconfigure marriage at all; the U.S. Constitution permits states to codify marriage's historically understood male-female form.⁴⁰ It is to these persuasive points that this Comment now turns.

C. *There Is No Theological Basis for Same-Sex Marriage.*⁴¹

1. Marriage Is the Holy Union of a Man and a Woman.

Marriage is an absolute; it has a core identity.⁴² That identity emanates from the divine law, which dictates that marriage is the holy union of a man and a woman.⁴³ Marriage's origin in the divine law is significant for three reasons: (1) marriage was created first in time by the Creator, not by the State, and thus is a particular arrangement no matter how the State may attempt to reconfigure it; (2) marriage has a symbolic essence in that it is an

36. *Id.* at 45.

37. *Id.* at 130.

38. *See infra* Part II.C.

39. *See infra* Part II.D.

40. *See infra* Part II.E.

41. The theological significance of marriage is relevant for obvious reasons—if marriage were a pure construct of human positive law, nothing would justify the effort expended drafting this Comment. But, for an explanation why *American states* may take account of marriage's theological significance without violating the Establishment Clause, *see infra* Part II.E.2.

42. *See generally* *Genesis* 1–2 (describing that God created Adam and Eve, male and female, and that he brought them together to become one flesh); accord Richard C. Eyer, *What is Marriage?*, THE LUTHERAN CHURCH—MISSOURI SYNOD, 1 (June/July 2003), <http://www.lcms.org/page.aspx?pid=729> (enter the search terms “What is Marriage?” in the search box, click the Docs tab, and download the first pdf) (stating that marriage is not whatever we choose to make it but is what God has made it to be).

43. *See, e.g.,* *Genesis* 1–2; GEOFFREY W. BROMILEY, *GOD AND MARRIAGE* 1 (1980); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman . . . is as old as the book of Genesis.”).

image of God's intra-Trinitarian relationship; and (3) marriage represents Christ's relationship with the Church.

Marriage dates back to Creation, to the beginning of the human race.⁴⁴ Indeed, marriage has existed on Earth from virtually the beginning of time.⁴⁵ After God created man and woman, He brought them together and instituted the marital union: "Therefore a man shall leave his father and his mother and hold fast to his *wife*, and they shall become one flesh."⁴⁶ God therefore configured marriage as the union of a man and a woman from the beginning.⁴⁷ This definition predates the State, society, economy, politics, and all other institutions created by human positive law.⁴⁸ Marriage is thus not in the first instance a creature of the State. Indeed, well before marriage took on any civil character in law, it first existed independently as a God-ordained union between a man and a woman.

Because of its divine origin, marriage has extraordinary, symbolic significance.⁴⁹ For example, marriage is an image of God's intra-Trinitarian relationship, i.e., the relationship between Father, Son, and Holy Spirit.⁵⁰

44. BROMILEY, *supra* note 43, at 1.

45. As is further discussed below, marriage is but an image of God's intra-Trinitarian relationship with himself. Thus, when considered from this perspective, marriage is an eternal relationship that exists outside of time as we know it.

46. *Genesis* 2:24 (emphasis added). Some scholars dispute whether God created husband and wife in contradistinction to male and female. *E.g.*, BROMILEY, *supra* note 43, at 1. Nevertheless, the English Standard Version (ESV) of the Bible uses the term "wife" as early as *Genesis* 2:24. This is significant because the ESV

is an 'essentially literal' translation that seeks as far as possible to capture the precise wording of the original text and the personal style of each Bible writer. As such, its emphasis is on 'word-for-word' correspondence, at the same time taking into account differences of grammar, syntax, and idiom between current literary English and the original languages.

THE HOLY BIBLE, at vii (English Standard Version 2001). "[E]ach word and phrase in the ESV has been carefully weighed against the original Hebrew, Aramaic, and Greek, to ensure the fullest accuracy and clarity and to avoid under-translating or overlooking any nuance of the original text." *Id.*

47. *Genesis* 2.

48. BROMILEY, *supra* note 43, at 1.

49. Eyer, *supra* note 42, at 2 ("Martin Luther wrote that marriage is an outward and spiritual sign of the greatest[,] holiest, and noblest thing that has ever existed or ever will exist: the union of the divine and human natures in Christ.").

50. See generally *Genesis* 1–2 (indicating a connection between the Trinity, i.e., three deities in one, and human marriage, i.e., two bodies becoming one flesh). See also 1 *Corinthians* 11:3.

When God created man, He said, “Let *us* make man in *our* image, after *our* likeness.’ . . . So God created man in his own image, in the image of God he created him; male and female he created them.”⁵¹ This pronoun usage indicates that human beings are associated with God’s own tripartite being and that God conferred high ranking and dignity to the male-female sexual distinction.⁵² The male-female unity in marriage is also an image of God: just as the Trinity consists of three persons in one, marriage consists of two persons who become one flesh.⁵³ Furthermore, both the intra-Trinitarian relationship and the male-female marital relationship are capable of producing life: just as God created the heavens and the earth from the void,⁵⁴ male-female marriage can create life from the union of just two bodies. Thus, God blessed the marriage of Adam and Eve and commissioned them to create just as he had created, telling them to “[b]e fruitful and multiply and fill the earth”⁵⁵ Lastly, God ordered marriage according to the intra-Trinitarian relationship. Thus, it is written that God is the head of Christ, Christ is the head of man, and a husband is the head of his wife.⁵⁶

Yet another significant dynamic of marriage is that it symbolizes Christ’s relationship with the Church.⁵⁷ Marriage demands that a husband love his wife just as Christ loved and gave Himself up for the Church.⁵⁸ Just as Christ gave His body so that the Church might be holy and without blemish,⁵⁹ a husband is to love his wife in the same sacrificial manner, nourishing her as though she were his own body.⁶⁰ Likewise, just as Christ submits to the Father,⁶¹ and the Church submits to Christ,⁶² marriage calls a

51. *Genesis* 1:26–27 (emphasis added).

52. BROMILEY, *supra* note 43, at 2.

53. *Genesis* 2:24.

54. *Genesis* 1:2.

55. *Genesis* 1:28.

56. *1 Corinthians* 11:3.

57. See generally *Ephesians* 5 (connecting the “one flesh” language of *Genesis* 2:24 to Christ’s relationship with the Church). Saint Paul calls this connection a profound mystery. *Id.*

58. *Ephesians* 5:25.

59. *Ephesians* 5:27.

60. *Ephesians* 5:28–33.

61. See *Luke* 22:42 (“Father, if you are willing, remove this cup from me. Nevertheless, not my will, but yours, be done.”); see also *1 Corinthians* 11:3.

62. *Ephesians* 5:22–24.

wife to accept her husband's love and to submit to him.⁶³ Additionally, like Christ's relationship with the Church, the marriage bond is indissoluble. Thus, just as Christ promises that no one can snatch believers from out of His hand,⁶⁴ so also God commands us not to commit adultery.⁶⁵ Indeed, "What therefore God has joined together, let not man separate."⁶⁶

2. The Divine Law Condemns Same-Sex Relationships.

Just as clearly as the divine law institutes male-female marriage, it condemns same-sex relationships. A few passages suffice to illustrate the point: "You shall not lie with a male as with a woman; it is an abomination."⁶⁷ "[T]heir women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error."⁶⁸

The problem with same-sex relationships is not that they are worse than any other type of sin. Indeed, "[A]ll have sinned and fall short of the glory of God[.]"⁶⁹ Rather, the problem is that same-sex relationships are a lifestyle choice that embeds a pattern of sin, perpetuating it in the sinner's life. Owing to this embedded sin nature, marriage reformers today attempt to normalize same-sex relationships. The divine law predicts this. Thus, it is written, "Though they know God's righteous decree that those who practice such things deserve to die [as do all sinners], *they not only do them but give approval to those who practice [homosexuality]*."⁷⁰ It is one thing to try to normalize same-sex relationships; it is another thing entirely to do so by expanding the God-ordained institution of marriage to encompass the very thing that God prohibits.

63. *Id.*

64. *John* 10:28.

65. *Exodus* 20:14. The prohibition against adultery is one of the Ten Commandments. *Id.*

66. *Matthew* 19:6.

67. *Leviticus* 18:22.

68. *Romans* 1:26–27; *see also Leviticus* 20:13; *1 Corinthians* 6:9–10; *1 Timothy* 1:8–11.

69. *Romans* 3:23.

70. *Romans* 1:32 (emphasis added).

3. Summary

The foregoing discussion is intended to illustrate this basic point: marriage is so connected to God that it approaches being (but ultimately is not) a sacrament. Its particular male-female configuration emanates from the divine law and is an allegory of God's own being.⁷¹ Same-sex "marriage," then, is a contradiction in terms. When today's marriage reformers demand same-sex marriage, they overlook the important theological significance of marriage; they ultimately ask the State to ignore marriage's core identity. That is a terribly profound request. It is wholly presumptuous, facile, and it begs a strong cultural backlash.

D. There Is No Jurisprudential Basis for Same-Sex Marriage in Western Law.

Western jurisprudence has always presupposed the existence of a transcendental body of law to which human law should conform.⁷² This is especially true regarding marriage. Indeed, the preeminent Western legal corpora—Roman civil law, the early Catholic Church's canon law, English common and civil law, and classic American jurisprudence—prove that Western civilization has for centuries understood marriage to derive from the divine law. Since at least the sixth century, this Western Legal Tradition⁷³ has invariably recognized that marriage is the union of a man and a woman.⁷⁴

71. LUTHER, *supra* note 26, at 328.

72. BERMAN I, *supra* note 1, at 45 ("[T]he Western legal tradition has always been dependent . . . on belief in the existence of a body of law beyond the law of the highest political authority, once called divine law, then natural law, and recently human rights . . .").

73. This Comment uses the term "Western Legal Tradition" to capture the historical jurisprudential traditions that ultimately contributed to American law. The first of these traditions dates back at least to the Roman emperor Justinian in the sixth century A.D. However, the Western Legal Tradition likely dates back even further than that if one takes into account the extent to which the divine law and, correspondingly, Israeli law have shaped American jurisprudence. Each of the preeminent Western legal corpora, and their connection to American law, is discussed in detail in Part II.D.

74. To say this another way, the Western Legal Tradition has never *de jure* approved a homosexual relationship as a valid form of marriage. Certainly, however, homosexual relationships have *de facto* existed throughout history. Some authors suggest that the bare existence of homosexual relationships is evidence that Western society has long recognized same-sex marriage in law. *E.g.*, WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 17–27 (1996). That conclusion is plainly wrong. *See infra* Part II.D.

1. Roman Civil Law

Even though the Romans worshipped many deities, they still derived an understanding of marriage from the divine law.⁷⁵ Roman law assumed certain basic relationships and added further conditions.⁷⁶ Thus, Roman law recognized marriage as “*the union of a man and a woman*” for purposes of procreation and rearing of children.⁷⁷ While the civil law could tack onto marriage extra, artificial conditions of validity,⁷⁸ it did not alter marriage’s basic male-female configuration.

Justinian⁷⁹ codified the Roman marriage law in his *Digest*, a collection of the entire Roman civil law and Imperial jurisprudence.⁸⁰ The *Digest* contained the opinions of Roman jurists concerning legal propositions relating to property, wills, contracts, torts, criminal law, and constitutional law.⁸¹ The *Digest* summarized marriage as “*the union between a man and a woman in a life long consortium.*”⁸² Justinian’s *Digest* shaped the Western Legal Tradition⁸³ and later influenced the development of English common law and American civil law.⁸⁴

2. The Early Catholic Church’s Canon Law

In A.D. 1075, Pope Gregory VII declared that the Church was legally supreme and politically independent of the governing secular authorities.⁸⁵ Because of the gravity of this declaration, the Church searched frantically for legal authority to support the notion of papal supremacy.⁸⁶ The result

75. GÖRAND LIND, COMMON LAW MARRIAGE 33 (2008).

76. PHILLIP LYNDON REYNOLDS, MARRIAGE IN THE WESTERN CHURCH 41 (1994).

77. *Id.* at 7–8 (emphasis added); accord LIND, *supra* note 75, at 32–33.

78. REYNOLDS, *supra* note 76, at 41.

79. Flavius Petrus Sabgatius Justinianus (Justinian) (483–565) was a Roman emperor. He compiled all Roman law into one coherent body, the *Corpus Juris Civilis* (of which the *Digest* is a component), which is often referred to by scholars as the greatest legal product of Roman law. Amir A. Kakan, *Evolution of American Law, from its Roman Origin to the Present*, ORANGE COUNTY LAW., Feb. 2006, at 31, 37.

80. *Id.*

81. BERMAN I, *supra* note 1, at 128.

82. Kakan, *supra* note 79, at 43 (emphasis added).

83. *Id.* at 37. For instance, the Roman law provided Europe much of its legal vocabulary. BERMAN I, *supra* note 1, at 123.

84. Kakan, *supra* note 79, at 38–39; see also Part II.D.3.

85. BERMAN I, *supra* note 1, at 87.

86. *Id.* at 95.

was a virtual explosion of canon law during the eleventh and twelfth centuries.⁸⁷ This canon law, besides governing the Church's internal workings, was the first major contribution to Western law (after the rediscovery of Justinian's *Digest*). For example, the Church's canon law implemented general councils to serve as legislative bodies and an ecclesiastical court system to resolve disputes.⁸⁸ At the time, even the Holy Roman Emperor did not have access to such sophisticated legal institutions.⁸⁹ In the wake of this so-called Papal Revolution, the Roman Catholic Church became the first modern State.⁹⁰

The Church's canon law contributed to Western law in other significant ways. For the Church to develop its own rules and internal laws, it reasoned inductively from particular passages in the Bible and in Justinian's *Digest*.⁹¹ This scholastic method, as it came to be called, involved summarizing the historical, authoritative texts, synthesizing their general principles, and reconciling them for any internal contradictions⁹²—much like judges do today by practicing *stare decisis*, and similar to how law students learn by the case method. Ultimately, the scholastic method helped systematize law as its own science.⁹³

Perhaps the Church's most important contribution to the Western Legal Tradition was the part it played in establishing the rule of law. Because the Church coexisted independently of the State, both the Church and the State competed for jurisdiction in the political community.⁹⁴ Church law and ecclesiastical jurisdiction often conflicted with secular law and civil jurisdiction, yet both sets of law and both claims of jurisdiction could be (and were) simultaneously valid.⁹⁵ This conflict created the need for rules to resolve jurisdictional disputes. Ultimately, the need for such rules helped generate respect for the supremacy of law and created order from dissension.⁹⁶

87. *Id.* at 86, 95, 202–03.

88. *Id.* at 208.

89. Jeffrey C. Tuomala, Professor of Law, Lecture at Liberty University School of Law (Jan. 23, 2012).

90. BERMAN II, *supra* note 3, at 4.

91. BERMAN I, *supra* note 1, at 158.

92. *Id.* at 131.

93. *Id.* at 163–64.

94. BERMAN II, *supra* note 3, at 5.

95. BERMAN I, *supra* note 1, at 345–46.

96. BERMAN II, *supra* note 3, at 5.

The canon law added many new ideas and concepts to the Western Legal Tradition, but ultimately remained within that same tradition.⁹⁷ The Church moved forward by reasoning from the past; it did not discard the ancient texts or the lessons of history. The Papal Revolution, and subsequent development of canon law, initiated the Western belief that law is a corpus that is constantly changing over generations and centuries.⁹⁸ That change, however, can be reconciled and synthesized with the past,⁹⁹ because it has an internal logic and a pattern of change.¹⁰⁰ The Western Legal Tradition advances forward but does so by looking to the past.¹⁰¹

Having established the relevance of the early Catholic Church's canon law, it is now appropriate to consider that those canons treated marriage as a principal object of regulation.¹⁰² The Catholic Church treated marriage (and still does) as a sacrament,¹⁰³ and the Church's ecclesiastical courts exercised exclusive subject matter jurisdiction over all disputes involving administration of the sacraments.¹⁰⁴ Also, the canon law set out conditions for the validity of marriage¹⁰⁵ and prescribed punishment for sexual and marital offenses like homosexuality.¹⁰⁶

The canon law was a product of many legal authorities, including the divine law, the writings of the Church fathers, the decrees of church councils and popes, other sacred texts,¹⁰⁷ and the Roman law.¹⁰⁸ It ultimately yielded a detailed definition of marriage: "Marriage is a bilateral contract made freely and mutually by *one man and one woman*, by which each grants the other the right to marital intercourse exclusively against all others

97. *Id.* at 3.

98. *Id.* at 5.

99. *Id.*

100. *Id.*

101. This very idea of backward-looking, organic, ongoing, internally consistent legal development is captured by the Latin phrase *Ad Fontes*, which is Liberty University School of Law's motto and appears on its coat of arms.

102. LIND, *supra* note 75, at 89.

103. *Id.* at 92; *see supra* note 33 and accompanying text.

104. BERMAN I, *supra* note 1, at 222.

105. *Id.* at 228. Some of these conditions included that the man and woman both be baptized Christians, that they both consent to marry each other, and that they both be of suitable age to marry. *Id.*

106. *Id.* at 194.

107. *Id.* at 163.

108. LIND, *supra* note 75, at 90.

for the span of their natural life.”¹⁰⁹ The canon law recognized that the marriage contract is not invented by man but is a divine institution, fixed by God from the beginning of time.¹¹⁰

3. English Common Law and Civil Law

English law was heavily influenced by the Roman law that preceded it. English judges often borrowed from Roman law to develop their common law philosophies,¹¹¹ and English civil law often derived its legitimacy from the divine law. This was especially true regarding marriage. The writings of three of the most notable English jurists confirm this.

Bracton¹¹² relied heavily on Roman law to construct his treatise *On The Laws and Customs of England*,¹¹³ which was the first systematic statement of

109. LOUIS J. NAU, *MANUAL ON THE MARRIAGE LAWS OF THE CODE OF CANON LAW 1* (2d rev. ed. 1934) (emphasis added). Some authors argue that the Church was ambivalent about same-sex relationships. See generally ESKRIDGE, *supra* note 74, at 6, 25–27 (arguing that the Greek Orthodox and Roman Catholic Churches celebrated same-sex unions during the Middle Ages). Eskridge points out that the Church blessed both male-female procreative marriages and male-male companionate relationships. *Id.* While Eskridge admits that the precise significance of these enfraternization ceremonies is mysterious, *id.*, such ceremonies are not necessarily inconsistent with Biblical principles. After all, the Bible contains many examples of close relationships between individuals of the same sex, e.g., David and Jonathan in the book of First Samuel, Naomi and Ruth in the book of Ruth, and mentorships between the Apostles in the book of Acts. But Eskridge also argues that the modern Church is accepting of same-sex marriage. See generally *id.* at app. (citing various letters from modern churches that condone and perform same-sex marriages). Eskridge’s assertion is bold, and thoroughly false. If a single lesson can be derived from the divine law, it is that God condemns homosexuality; the Bible is unequivocal on this point. *E.g.*, *Leviticus* 18:23; *Leviticus* 20:13; *Romans* 1:26–27; *1 Corinthians* 6:9–10; *1 Timothy* 1:8–11. Such “churches” as Eskridge cites in his appendix, whether they are aberrations today or not, are committing the worst kind of sacrilege by condoning homosexuality and performing same-sex marriages. They are not true churches for Christ, for “[w]hoever says ‘I know him’ but does not keep [God’s] commandments is a liar, and the truth is not in him . . .” *1 John* 2:4.

110. NAU, *supra* note 109, at 3.

111. Kakan, *supra* note 79, at 39.

112. Henricus de Bracton lived during the reign of King Henry III of England, in the thirteenth century A.D., though the precise dates of his birth and death are uncertain. CARL GÜTERBOCK, *BRACON AND HIS RELATION TO THE ROMAN LAW* 17, 22 (Brinton Coxe trans., Fred B. Rothman & Co. 1999) (1866). He was a lawyer and served as a judge. *Id.* His major work, *On the Laws and Customs of England*, is heralded as an important legal authority in that it accurately represents the condition of the law in the thirteenth century and depicts the progress of the common law and the influence of Roman law. *Id.* at 17.

113. Kakan, *supra* note 79, at 40. Indeed, Bracton quotes from Justinian’s *Digest* about five hundred times in his treatise *On The Laws and Customs of England*. BERMAN I, *supra*

English law.¹¹⁴ In his treatise, Bracton described the *jus gentium*, i.e., the law common to all nations.¹¹⁵ It is from the *jus gentium* that we can derive a definition of marriage in Bracton's time, for Bracton wrote that "[f]rom it comes the union of man and woman, entered into by the mutual consent of both, which is called marriage."¹¹⁶ Thus, even into thirteenth-century England, it was axiomatic that marriage is the union of a man and a woman.

Coke¹¹⁷ considered the divine law to be the foundation of English common law.¹¹⁸ He also demonstrated that English civil law derived its legitimacy from a more preeminent and transcendental body of law. In his major work, *The Institutes of the Laws of England*, Coke examined a marriage statute promulgated by King Henry VIII in the sixteenth century.¹¹⁹ The statute clarified which marriages were in fact prohibited by law; namely, it prohibited marriages between family members and relatives in accordance with Leviticus chapter eighteen.¹²⁰ But the statute overruled all other court-imposed prohibitions that were not expressly prohibited by the Bible.¹²¹ Thus, one can infer from Coke's writings that the divine law was the ultimate authority governing the configuration of marriage in England into the sixteenth and seventeenth centuries.

note 1, at 123. Blackstone, too, references Justinian to substantiate the Western jurisprudential tradition that looks to the divine law as the ultimate source of authority. See 1 WILLIAM BLACKSTONE, COMMENTARIES *40.

114. J. Nelson Happy & Samuel P. Menefee, *Genesis: Scriptural Citation and the Lawyer's Bible Project*, 9 REGENT U. L. REV. 89, 99 (1997).

115. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 27 (George E. Woodbine ed., Samuel E. Thorne trans., Belknap Press 1968) (c. 1256).

116. *Id.* (emphasis added).

117. Sir Edward Coke (1552–1634) served as a member of Parliament, Solicitor General, Attorney General, and Chief Justice of the Court of the Kings Bench. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1674 (1994).

118. *Id.* at 1692. Bracton likely shared this view, for he famously stated that "[t]he king must not be under man but under God and under the law, because law makes the king." BERMAN II, *supra* note 3, at 5.

119. 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 683–84 (The Lawbook Exch., Ltd. 2002) (1817) (c. 1628).

120. *Id.* Leviticus chapter 18, while prohibiting certain male-female marriages, also flatly outlaws homosexual intimacy: "You shall not lie with a male as with a woman; it is an abomination." *Leviticus* 18:22.

121. COKE, *supra* note 119, at 683–84.

Blackstone¹²² likewise showed that English civil law derived its understanding of marriage from the divine law. Like Coke, Blackstone referenced the marriage statute passed under King Henry VIII, which declared that all marriages were valid except those prohibited by the divine law.¹²³ English positive law thus recognized marriage as the union of a man and a woman. Indeed, Blackstone qualified marriage as a legal relationship that places reciprocal duties upon “*husband and wife*.”¹²⁴ Blackstone went even further than the Two Kingdoms Doctrine by arguing that the divine law is a foundation upon which all human law depends.¹²⁵ He wrote that the divine law is *binding* over all the Earth, in all countries, and at all times.¹²⁶ Under such a legal system, with total deference to the divine law, same-sex marriage would have been impossible, a legal non sequitur.

4. Classic American Jurisprudence

The American legal system inherited the Roman law,¹²⁷ the canon law, and the English common law.¹²⁸ Just like those legal systems, America

122. Sir William Blackstone (1723–1770) was an English jurist. He served as a Member of Parliament, Solicitor General, Judge of the Court of Common Pleas, and Judge of the Kings Bench. THE BIOGRAPHICAL HISTORY OF SIR WILLIAM BLACKSTONE 25–37 (Augustus M. Kelley 1971) (c. 1782).

123. 1 BLACKSTONE, *supra* note 113, at *423.

124. *Id.* at *421 (emphasis added). While Blackstone differentiated marriage’s holy qualities from its civic character, remarking that “[t]he *holiness* of the matrimonial state is left entirely to the ecclesiastical law, the temporal courts not having jurisdiction to consider unlawful marriage as a sin,” *id.*, it is nevertheless a virtual certainty that English law in Blackstone’s time conceived marriage to be a gender-specific institution. To argue otherwise would be to attribute zero significance to Blackstone’s own gender-saturated words, viz., that marriage is a legal relationship between “husband and wife.” *Id.*

125. *Id.* at *42.

126. *Id.* However, one commentator correctly notes that, for civic society to function, society must assume that its human-made laws are valid. Society would be chaos if each citizen declared for himself, according to his own convictions, which laws were valid as to him. Instead, society must assume its legislature has determined conformity between its positive law and the divine law. If a citizen disobeys the positive law on religious grounds, he must of necessity suffer the prescribed penalty, for that is one consequence of living in society with uniform law. See 1 COOLEY’S BLACKSTONE *42 n.1 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 4th ed. 1899). Luther’s Two Kingdoms Doctrine accords with the foregoing commentary, permitting Christians to disobey human law when it conflicts with divine law but affirming the validity of that human law, and its penalties, in the secular kingdom. See ALTHAUS, *supra* note 4, at 130–31; *supra* text accompanying note 17.

127. Kakan, *supra* note 79, at 38.

historically derived the legitimacy of its laws from the divine law. This is evident in our founding documents. Thus, the Declaration of Independence asserts that the *Laws of Nature and Laws of Nature's God* entitle the American people to break political ties with England;¹²⁹ that all men are endowed *by their Creator* with certain inalienable rights;¹³⁰ that government is instituted to secure these rights;¹³¹ and that such government derives its power from the consent of the governed.¹³² John Marshall¹³³ wrote that *general principles of law* dictate the performance of legal duties, and that the very essence of judicial duty is to say what the law is and to apply superior law when two or more laws are relevant to a particular case.¹³⁴ Joseph Story¹³⁵ once remarked, “One of the most beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law . . . There never has been a period in which the common law did not recognise Christianity as lying at its foundations.”¹³⁶ With a view to the divine law, classic American jurisprudence, like its Roman, Catholic, and English antecedents, recognized marriage as the union of a man and a woman.

In *Griswold v. Connecticut*, the Supreme Court held that marriage is an intimate relationship to the degree of being sacred.¹³⁷ That holding enabled the Court to identify in the Fourteenth Amendment a substantive privacy

128. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (internal quotation marks omitted).

129. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

130. *Id.* at para. 2.

131. *Id.*; see also *Romans* 13:3 (“For rulers are not a terror to good conduct, but to bad.”); 1 *Timothy* 1:9 (“[T]he law is not laid down for the just but for the lawless and disobedient . . .”).

132. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

133. John Marshall (1755–1835) served the United States in a variety of functions, most notably as Chief Justice of the Supreme Court. 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 283–85 (Leon Friedman & Fred. L. Israel eds., 1980). Marshall’s articulation of the Court’s power of judicial review stands as one of the most significant events in the history of the Supreme Court. *Id.* at 292.

134. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 178 (1803).

135. Joseph Story (1779–1845) served as a Justice on the United States Supreme Court. 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, *supra* note 133, at 433–35. He was the youngest nominee ever appointed to the Supreme Court and is respected as one of the great jurists of the Western world. *Id.* at 435.

136. *Ex parte E.R.G.*, 73 So. 3d 634, 652 (Ala. 2011) (Parker, J., concurring specially) (quoting JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW 20–21 (Boston, Hilliard, Gray, Little & Wilkins 1829)).

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

right to buy contraceptives.¹³⁸ In *Loving v. Virginia*, the Supreme Court checked Virginia's efforts to prohibit interracial marriage by holding that marriage is a fundamental freedom: "[T]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. . . . The freedom to marry . . . cannot be infringed by the State."¹³⁹ Similarly, the Court in *Zablocki v. Redhail*, struck down a Wisconsin law that prohibited marriage by any person defaulting on a child-support payment.¹⁴⁰ But the *Zablocki* opinion also emphasized that not every state regulation relating to marriage must be justified by compelling reasons.¹⁴¹ Rather, the State is free to impose reasonable regulations that do not significantly interfere with decisions to enter into marriage.¹⁴²

Whereas *Loving* and *Zablocki* stand for the proposition that the State cannot prevent two consenting adults from marrying, these cases do not by their "marriage-is-a-fundamental-right" language force states to permit same-sex marriages. Those cases applied only to marriage in the true sense, i.e., unions between a man and a woman. Indeed, in *Lawrence v. Texas*, Justice O'Connor even suggested in dicta that the State may legitimately preserve the traditional male-female configuration of marriage by prohibiting same-sex marriage.¹⁴³

138. *Id.* at 479–80.

139. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

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

141. *Id.* at 386.

142. *Id.*

143. Concurring that Texas's statute, which criminalized homosexual sodomy, denied equal protection of the laws and should be struck down, Justice O'Connor concluded with this proviso:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of [homosexual sodomy]—the asserted state interest [here]—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

Each of the foregoing Supreme Court excerpts is consistent with Western ideas. In *Griswold*, the Court articulated the foundational principle that marriage is a sacred institution.¹⁴⁴ In *Loving*, the Court echoed the canonical position that marriage can be freely entered into by a man and a woman.¹⁴⁵ In *Zablocki*, the Court articulated the Roman position¹⁴⁶ that the State can impose reasonable preconditions to marriage.¹⁴⁷ And in *Lawrence*, Justice O'Connor's concurrence that the State acts legitimately and within its broad discretion when it chooses to preserve the male-female configuration of marriage¹⁴⁸ comports with the Two Kingdoms Doctrine and, as explained below, with traditional American notions of state authority.¹⁴⁹

Additionally, in each of the foregoing cases the Court identified a substantive liberty interest that the Fourteenth Amendment's Due Process Clause protects. In *Griswold*, it was privacy;¹⁵⁰ in *Loving* and *Redhail*, it was the fundamental right (between men and women) to marry;¹⁵¹ and in *Lawrence*, Justice O'Connor apparently grounded her dictum in the State's traditional police power to protect the health, safety, and morals of its citizens.¹⁵² But how did the Court derive that the Fourteenth Amendment shields marital privacy, or that it secures all marriages between men and women, or that a state's police powers authorize it to forbid same-sex marriage? How did the Court justify its opinions?

In each case, the Court appealed to general principles of law to reach its conclusion. In *Griswold*, the Court must have appealed to the Biblical understanding of marriage. How else could it have determined that the institution of marriage is sacred? In *Loving* and *Redhail*, the Court looked to the word "liberty" in the Fourteenth Amendment's Due Process Clause and determined that the right to marry is implicit in the concept of ordered liberty. And in *Lawrence*, Justice O'Connor grounded her point in history

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

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

146. According to Romans chapter thirteen, the civil authorities are God's servants for good. See *Romans* 13. They are ministers of God, and their purpose is to terrorize evil. *Id.* Thus, it is the State's prerogative to impose reasonable regulations on marriage, e.g., prohibiting marriage between family members and imposing a minimum age for marriage.

147. See *Zablocki*, 434 U.S. at 386.

148. See *Lawrence*, 539 U.S. at 585.

149. See *infra* Part II.E.1.

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

151. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki*, 434 U.S. at 384.

152. For a discussion about these police powers, see *infra* Part II.E.1.

and traditions, the common law, and the Court's own precedents. This type of reasoning—from general principles of law to particular conclusions—is a signature feature of the Western Legal Tradition.¹⁵³

In sum, classic American jurisprudence has presupposed, perhaps at times without even realizing it, the existence of higher law to which human law should conform.¹⁵⁴ This jurisprudence has persisted even through the twentieth century. With a view to the divine law, the United States has continued to recognize that marriage is the union of a man and a woman. Thus, Congress passed the Defense of Marriage Act in 1996, which defined marriage as *the union of one man and one woman* for purposes of interpreting any act of Congress or any federal regulation.¹⁵⁵ The Act also exempted from the Full Faith and Credit Clause any individual state's recognition of same-sex relationships.¹⁵⁶

A handful of modern American jurists continue to look to the divine law as a basis for maintaining that marriage can only be the union of a man and a woman. Justice Peterson of the Minnesota Supreme Court declared that the configuration of marriage as a union of man and woman is as old as the book of Genesis.¹⁵⁷ Commissioner Vance of the Kentucky Court of Appeals—at the time the state's highest court—similarly remarked that marriage has always been considered as the union of a man and a woman.¹⁵⁸ Judge Skillman of the New Jersey Superior Court noted that “[o]ur leading religions view marriage as a union of men and women recognized by God.”¹⁵⁹ And Chief Judge Hill of the United States District Court for the Central District of California noted that “there has been for centuries a combination of scriptural and canonical teaching under which ‘marriage’

153. BERMAN I, *supra* note 1, at 163–64; *cf. supra* Part II.D.2.

154. Prior to World War I,

it continued to be widely believed in the West that the ultimate sources of authentic positive law are divine law, especially the Ten Commandments, natural law discovered by reason and conscience, and historical tradition expressed in sources such as Magna Carta and constitutional requirements of due process and equal protection of the laws.

BERMAN II, *supra* note 3, at 17.

155. Defense of Marriage Act, 1 U.S.C. § 7 (2000).

156. Defense of Marriage Act, 28 U.S.C. § 1738C (2000).

157. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

158. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

159. *Lewis v. Harris*, 875 A.2d 259, 269 (N.J. Super. Ct. App. Div. 2005).

between persons of the same sex was unthinkable and, by definition, impossible.¹⁶⁰

5. Summary

The preeminent legal corpora in Western history derived an understanding of marriage from the divine law. Consequently, Western jurisprudence has invariably recognized that marriage is the union of a man and a woman. Notwithstanding that the Two Kingdoms Doctrine recognizes that the State may legitimately authorize same-sex marriage, none of the foregoing civilizations ever exercised its discretion in that way. Rather, each individual legal system preserved marriage's basic male-female configuration. This Comment, however, does not posit that the Western Legal Tradition—as an accumulation of human positive law—forever binds the modern State. Indeed, the Two Kingdoms Doctrine does not require it. But the fact remains that same-sex marriage has no historical basis whatsoever in Western law. That jurisprudence should not be ignored.¹⁶¹

E. The U.S. Constitution Permits States to Codify Marriage's Male-Female Form

Notwithstanding the fact that marriage *is* the union of a man and a woman, and has historically been treated that way, same-sex marriage advocates still object. With respect to the U.S. Constitution, two common objections are that (1) the Establishment Clause prohibits the government from taking account of marriage's theological significance, and that (2) the Equal Protection Clause prohibits the government from excluding any person from marriage. This subpart makes out a *prima facie* case that American states possess traditional authority to codify marriage's male-female form, to the exclusion of same-sex couples, and that the U.S. Constitution permits this.

160. *Adams v. Howerton*, 486 F. Supp 1119, 1123 (C.D. Cal. 1980).

161. See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.” (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970))).

1. The Police Power

In theory, the State has plenary authority to establish order and repress anarchy; nothing perforce constrains the scope of human positive law.¹⁶² In reality, American states expressly claim much of that authority: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, *are reserved to the States* respectively, or to the people.”¹⁶³ Since 1791,¹⁶⁴ the Tenth Amendment has embodied “what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution.”¹⁶⁵

The term “police power” encompasses the State’s prerogative to restrain and regulate individual liberty, with the public interest in mind.¹⁶⁶ The State derives this police power from its very nature as the governing authority, which power is necessary to preserve justice and repress anarchy—the State’s two main functions.¹⁶⁷ The essence of the police power is the State acting by positive regulation to narrow the exercise of individual liberties¹⁶⁸ in furtherance of public order. All liberties, even those we regard as fundamental, “are subject to such reasonable [regulations] as may be deemed by the governing authority . . . essential to the *safety, health, peace, good order, and morals* of the community.”¹⁶⁹

The State’s prerogative to shape public morality is especially relevant in the context of the same-sex marriage movement. Traditionally, this police power has been exercised to set sexual standards,¹⁷⁰ proceeding on the ground that certain sexual vice is intrinsically evil, tends to corrupt others in the community, and is “apt . . . to produce physical disorder and crime, and

162. *See supra* Part II.A.

163. U.S. CONST. amend. X (emphasis added).

164. The Bill of Rights was ratified on December 15, 1791. *Id.*

165. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

166. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* iii (1904). Though Professor Freund’s treatise is more than a century old, it is a complete and comprehensive work and nothing of its caliber has been written since. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 746 n.6 (2007).

167. *See supra* Part II.A.

168. FREUND, *supra* note 166, § 8.

169. *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (emphasis added). These three police powers—to provide for the public health, safety, and morals—enjoy judicial recognition in American courts dating back to 1824. *See Gibbons v. Ogden*, 22 U.S. 1, 56, 72–73 (1824).

170. FREUND, *supra* note 166, § 187.

thus to endanger the public safety."¹⁷¹ Disorder is the key; where there is disorder, the police power is triggered. It is therefore a sufficient condition for the state to regulate sexual liberties that the sexual act violates custom¹⁷² or general standards of decency,¹⁷³ distorts the natural purpose of sex,¹⁷⁴ is antagonistic to marriage,¹⁷⁵ outrages prevailing public sentiment,¹⁷⁶ or otherwise causes public disorder. Thus, the State has regulated prostitution,¹⁷⁷ sex outside marriage,¹⁷⁸ incest,¹⁷⁹ bigamy,¹⁸⁰ and homosexuality¹⁸¹ in the past.

While this state function is highly paternalistic, it is justified by the reality that sexual acts, while wholly private, are not exempt from the police power if they bear upon the public welfare.¹⁸² The exception is where private acts or associations do not affect legal relations among other people.¹⁸³ But marriage is more than a private association. Marriage is a public act with public significance, and states have long imposed legal obligations between husband and wife.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, . . . and the acts which may constitute grounds for its dissolution.¹⁸⁴

171. *Id.*

172. *Id.* § 234.

173. *Id.*

174. *Id.*

175. *Id.* § 242.

176. *Id.* § 187.

177. *See id.* § 242.

178. *See id.* § 240.

179. *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring).

180. *Id.*

181. *Id.*

182. *See* FRUEND, *supra* note 166, §§ 455, 457.

183. *Id.* §§ 453, 457.

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

In short, the State treats marriage as a public, legally significant institution, which has “long been regarded as a virtually exclusive province of the States.”¹⁸⁵ It is a traditional state function to define the contours of marriage according to moral standards, for “[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.”¹⁸⁶

While the State is powerless to work inward conviction of the heart and bear upon morality in that way, it is fully equipped to set moral standards in law and coerce outward obedience to those standards.¹⁸⁷ Coercion, though, is not the only means by which the police power operates. Police legislation often implements non-coercive techniques that ensure compliance with the law in the first instance.¹⁸⁸ Licenses and registration are examples of such techniques.¹⁸⁹ Thus, while it is no longer lawful for American states to criminalize homosexuality as a *lifestyle*,¹⁹⁰ those same states may validly deny *marriage licenses* to same-sex couples and thereby refuse to publicly recognize an otherwise valid private relationship.¹⁹¹ This is a valid exercise of the police power.

2. The Establishment Clause

The U.S. Constitution permits states to codify marriage’s male-female form. In relevant part, the First Amendment provides only that “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .*”¹⁹² Each italicized word represents an independent reason why the Establishment Clause permits marriage to be an exclusively male-female union.

The Establishment Clause speaks only of Congress, not of state legislatures. This omission has prompted one of the Supreme Court’s own—Justice Thomas—to adopt the position that the Establishment Clause applies only against the federal government, not against the states.¹⁹³ While

185. *Zablocki*, 434 U.S. at 398 (Powell, J., concurring) (internal quotation marks omitted).

186. *Id.* at 398 (Powell, J., concurring).

187. *See supra* Part II.A.

188. FREUND, *supra* note 166, § 35.

189. *Id.*

190. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

191. FREUND, *supra* note 166, § 722.

192. U.S. CONST. amend. I (emphasis added).

193. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

the Court's modern jurisprudence rejects that position,¹⁹⁴ Justice Thomas raises another point: even if the Establishment Clause does apply against the states, it prevents only coercive government action, e.g., government-imposed observance of religious orthodoxy by force of law.¹⁹⁵ State law that does not compel citizens to *do* anything cannot violate the Establishment Clause.¹⁹⁶ Because a law codifying marriage as a male-female union does not compel citizens to observe any religious orthodoxy, much less *do* anything at all, there is no Establishment Clause violation.

Likewise, while the Establishment Clause speaks of law in the prospective sense, it is debatable whether the Clause prohibits Congress (or state legislatures) from merely codifying preexisting legal standards, standards understood by governments to be fixed from the beginning of time. It is at least arguable that the State is not making law when it codifies marriage's male-female form—it is only recognizing marriage for what it is and has always been. The Supreme Court seems to have endorsed this idea in the past.¹⁹⁷

Finally, the word “establishment” has puzzled the courts most of all. The Supreme Court has devised no fewer than four tests to gauge whether government action constitutes an establishment of religion. First, the *Lemon* test specifies that the government act must have a primarily secular purpose, must neither advance nor inhibit religion, and must not foster excessive government entanglement with religion.¹⁹⁸ Second, the Endorsement test asks whether the government subjectively purposed to endorse or disapprove of religion and whether the government policy objectively conveys a message of endorsement or disapproval.¹⁹⁹ Third, the Coercion test analyzes whether the government utilized naturally occurring social pressures to enforce religious orthodoxy.²⁰⁰ Lastly, the Traditions test

194. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that the Fourteenth Amendment makes the First Amendment applicable against the states).

195. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring).

196. *Id.* at 694 (Thomas, J., concurring).

197. E.g., *Meister v. Moore*, 96 U.S. 76, 78 (1877) (recognizing that states “regulate the mode of entering into the contract [of marriage], but *they do not confer the right.*” (emphasis added)).

198. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The Court added the word “primarily” to the *Lemon* test in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 864–65 (2005).

199. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

200. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

compares government action with previous, unbroken practices and deeply embedded traditions.²⁰¹

Under each test, it is no establishment of religion for states to codify marriage's male-female form. First, under the *Lemon* test, to codify marriage's male-female form has the primary purpose of preserving order in accordance with the state's police power to regulate public morality; such a law neither advances nor inhibits religion because any male-female pair, religious or irreligious, can enter into marriage; and the law does not excessively entangle the government with religion because, at bottom, the law merely codifies marriage's historically understood structure in a way that happens to correspond with marriage's theological identity. This is not objectionable. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."²⁰²

Second, under the Endorsement test, to codify marriage's male-female form endorses no particular religion because marriage is still accessible to religious and irreligious people alike.

Third, the Coercion test is inapposite because it is only applied in the context of public secondary and elementary schools.²⁰³

Lastly, under the Traditions test, to codify marriage's male-female form is legitimate because marriage's male-female structure is deeply embedded in the Western Legal Tradition and has dual significance, being simultaneously a holy religious union and a civil institution for ordering society. In sum, the Establishment Clause respects states's police power to codify marriage's male-female form.

3. The Equal Protection Clause

Again, the U.S. Constitution permits states to codify marriage's male-female form. In relevant part, the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal

201. *Van Orden*, 545 U.S. at 685, 688.

202. *See id.* at 690; accord FREUND, *supra* note 166, § 462. Indeed, both the Two Kingdoms Doctrine and the Free Exercise Clause allow for various moral motivations to inform the ultimate content of our laws. Even if religious principles number among such motivations, there is no First Amendment violation unless the particular law meddles with religious orthodoxies, i.e., matters of faith, salvation, and the duties we owe our Creator. Only when religiously informed positive law encroaches the Spiritual Kingdom's function is there a problem.

203. *Lee*, 505 U.S. at 592.

protection of the laws.”²⁰⁴ The Supreme Court has construed the Equal Protection Clause in the following way: state law is presumed constitutional unless the law discriminates on the basis of race, religion, or other “discrete and insular” minority.²⁰⁵ If the law discriminates on one of these bases, or if it denies a personal constitutional right, the law is presumed unconstitutional. Such laws are subject to strict scrutiny, which means that the law is valid only if necessary to accomplish a compelling state interest.²⁰⁶

A person’s sex is not one of the foregoing “suspect classifications.” Therefore, a law that makes sex-based distinctions is not subject to strict scrutiny. Rather, the Supreme Court holds that the appropriate standard for sex-based distinctions is intermediate scrutiny: the law must bear a substantial relation to an important state interest.²⁰⁷ By its own terms, this standard is easier to satisfy than strict scrutiny.

In the same way that a person’s sex is not a suspect classification, neither is a person’s sexual orientation. But while sex-based distinctions must satisfy intermediate scrutiny, distinctions made on the basis of sexual orientation need not. In an Equal Protection context, the Supreme Court has yet to designate sexual orientation as a protected class. This means that, generally speaking, state law that treats heterosexuals differently than homosexuals is presumed constitutional.²⁰⁸

Applying the foregoing analytical structure, a State does not deny equal protection of the laws when it codifies marriage’s male-female form. Codifying marriage as an exclusively male-female union does not discriminate on the basis of race, religion, or other suspect classification. It does not deny any person their constitutional right to marry, if we proceed from the historical understanding that marriage by definition is a special relationship between a man and a woman. Reasoning further, under such a marriage law, men enjoy the same right to marry as women do; there is no

204. U.S. CONST. amend. XIV.

205. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

206. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

207. *Id.* at 440–41.

208. *Compare Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that the government cannot draft law out of hate for homosexuals or any other class of human beings), and *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that moral disapproval of homosexual sodomy is no legitimate ground to prohibit that activity), with discussion *supra* pp. 255–56 and sources cited therein (showing that the State traditionally regulates private acts that tend to cause disorder and that marriage, being a public act affecting legal relations, is of special significance to the State).

sex-based distinction. Thus, neither strict scrutiny nor intermediate scrutiny applies, and the law is presumed constitutional.

Even assuming *arguendo* that strict scrutiny applies when a state codifies marriage as an exclusively male-female union, valid reasons remain to uphold such a law. That is, the State arguably has a compelling interest in defining marriage as between a man and a woman: its police power to establish order, to protect sexual norms, and to maintain the Western jurisprudential treatment of marriage. Of course, codifying marriage's male-female form is necessary to accomplish that interest. Thus, such a law satisfies even strict scrutiny.

4. Summary

The U.S. Constitution permits states to codify marriage's male-female form. While individual states may recognize extra liberties in their own constitutions, any state that copies the Federal Bill of Rights has a constitutional basis to reserve marriage for men and women and to exclude same-sex couples. In sum, the State in theory has plenary authority to establish order. The State in practice has traditionally exercised its police power to regulate marriage. And American states in particular are not constrained by the Establishment Clause or the Equal Protection Clause from codifying marriage's male-female form. This is powerful evidence that, in the United States, preserving marriage to the exclusion of same-sex couples is constitutional.

III. PROBLEM

A. *Pure Legal Positivism Characterizes Modern American Jurisprudence.*

Beginning in the twentieth century, contemporary legal systems began to abandon the Western Legal Tradition.²⁰⁹ Today, modern American jurisprudence favors legal positivism—the philosophy that the people's

209. BERMAN I, *supra* note 1, at 197. In the twentieth century, “the Christian foundations of Western law have been almost totally rejected.” *Id.*; see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69–80 (1938) (stating that law “does not exist without some definite authority behind it” and repudiating “the assumption that there is a transcendental body of law outside of any particular State but obligatory within it”).

original will to create any law is absolute and unlimited.²¹⁰ The principal case evidencing this jurisprudential shift is *Erie Railroad Co. v. Tompkins*.²¹¹

In *Erie*, the Court reconsidered its holding in *Swift v. Tyson*, where it had previously determined that federal courts exercising diversity jurisdiction need not, in matters of general jurisprudence, apply the unwritten common law of the State but could exercise independent judgment as to what the common law of the state is or should be.²¹² Thus, the critical issue in *Erie* was whether the *Swift* doctrine was still valid: could federal courts really disregard a state common law rule that touched matters of “general commercial law?”²¹³

The Supreme Court said no.²¹⁴ The *Erie* Court held,

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.²¹⁵

The import of this holding is twofold. First, the Court essentially held that there is no such legally binding thing as a general, universal principle of law. Thus, the Court said that the *Swift* rule, being grounded on the assumption that there is a transcendental body of law, is a fallacy.²¹⁶ Second, the Court openly embraced a jurisprudence of pure legal positivism. It said that state law exists “by the authority of that State *without regard to what it may have been in England or anywhere else*.”²¹⁷ The Court continued: “The authority and *only authority* is the State, and if that be so, the voice adopted

210. The modern trend of legal positivism is evident in the context of the same-sex marriage movement, as state legislatures and courts increasingly abrogate marriage’s male-female configuration. See *infra* Part III.B and the authorities cited therein.

211. *Erie R.R. Co.*, 304 U.S. 64; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (stating that *general principles of law* dictate the performance of legal duties, and that the law provides a remedy when such a duty has been violated).

212. *Erie R.R. Co.*, 304 U.S. at 71.

213. *Id.*

214. *Id.* at 78.

215. *Id.*

216. *Id.* at 79.

217. *Id.* (emphasis added).

by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."²¹⁸

The brand of legal positivism forged in *Erie* probably facilitated the notion that American states, as omnipotent sovereigns, could discard the male-female configuration of marriage. Since *Erie*, American lawmaking approaches the outer limits contemplated by the Two Kingdoms Doctrine—neither the theological nor the jurisprudential bases against same-sex marriage presently constrain the State's exercise of discretion, despite their extraordinarily persuasive weight. Ultimately, this modern American jurisprudence abrogates the male-female configuration of marriage completely.

B. Modern American Jurisprudence Rejects the Theological and Jurisprudential Bases Against Same-Sex Marriage.

The Western Legal Tradition, for a period approaching two millennia, invariably held that marriage is a sacred union of a man and a woman.²¹⁹ The same-sex marriage movement, when compared against the span of the Western Legal Tradition, is an incredibly recent phenomenon. The movement to grant same-sex marriage the sanction of law effectively began in 1969.²²⁰ By 1972, the Supreme Court potentially strengthened that movement by holding that marriage is “but an association of *two individuals* each with a separate intellectual and emotional makeup.”²²¹ Regardless, 1993 was the first time in American legal history that a court suggested that marriage need not necessarily be a union between a man and a woman.²²² Now, some courts reduce marriage to nothing more than “an intimate and lasting *human* relationship.”²²³ At the time this Comment went to print in early 2013, nine states and the District of Columbia expressly authorized same-sex marriage.²²⁴

218. *Id.* (emphasis added) (internal quotation marks omitted).

219. *See supra* Part II.D.

220. ESKRIDGE, *supra* note 74, at 44; Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 *Geo. L.J.* 2103, 2104 n.1 (2008).

221. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

222. *See Baehr v. Lewin*, 74 Haw. 645 (1993); ESKRIDGE, *supra* note 74, at 5.

223. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999) (emphasis added).

224. *See Lynn D. Wardle, A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 *LIBERTY U. L. REV.* 537, 585 (2010). As of March 3, 2010, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont permitted same-sex marriage. *Id.* In 2011, the New York legislature legalized same-sex marriage, becoming the

Four of these states, plus the District of Columbia, explicitly redefine marriage by statute: Connecticut redefines marriage to mean “the legal union of two persons.”²²⁵ The District of Columbia redefines marriage as “the legally recognized union of 2 persons.”²²⁶ New Hampshire redefines marriage as “the legally recognized union of 2 people.”²²⁷ The New York legislature, in 2011, determined that “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”²²⁸ New York law further stipulates that “[n]o government treatment . . . relating to marriage, whether deriving from . . . *common law* or *any other source of law*, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.”²²⁹ Vermont redefines marriage as “the legally recognized union of two people.”²³⁰

Iowa and Massachusetts redefine marriage not by statute but by judicial fiat.²³¹ In *Varnum v. Brien*, the Iowa Supreme Court endeavored to protect constitutional rights, “even when [such] rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.”²³² Thus, the court held that marriage “must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”²³³ In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court acknowledged that the United States adopted the common law of England, which construed civil marriage as

sixth state to recognize such unions. See N.Y. DOM. REL. LAW § 10-a (McKinney 2011). Maine, Maryland, and Washington state all legalized same-sex marriage in 2012. See *infra* notes 243–46.

225. CONN. GEN. STAT. § 46b-20(4) (2009).

226. D.C. CODE § 46-401(a) (2010).

227. N.H. REV. STAT. ANN. § 457:1-a (2009).

228. N.Y. DOM. REL. LAW § 10-a(1) (McKinney 2011).

229. N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2011) (emphasis added). This statute is particularly egregious because it expressly invalidates both the divine law doctrine of marriage and its application in the common law. The statute in effect decries the entire Western legal tradition. It aptly exemplifies the modern legal ethos, viz., that human positive law is omnipotent.

230. VT. STAT. ANN. tit. 15, § 8 (2009).

231. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

232. *Varnum*, 763 N.W.2d at 876.

233. *Id.* at 907.

“the voluntary union for life of *one man and one woman*, to the exclusion of all others.”²³⁴ Nevertheless, that court rejected the common law precedent “in light of evolving [state] constitutional standards” and construed marriage to mean “the voluntary union of two persons as spouses, to the exclusion of all others.”²³⁵

The effort to reconfigure marriage rages on in other jurisdictions. *In re Marriage Cases*²³⁶ is instructive. In that litigation, the California Supreme Court struck down a state statute that permitted only male-female marriage.²³⁷ That court reversed itself just one year later in *Strauss v. Horton*²³⁸ after citizens by initiative enacted Proposition 8, a state constitutional amendment that prohibited same-sex marriage.²³⁹ Nevertheless, a federal court in California later struck down Proposition 8, declaring that it violated the Federal Constitution’s Due Process and Equal Protection Clauses.²⁴⁰ The Ninth Circuit Court of Appeals recently upheld that decision.²⁴¹ On July 30, 2012, litigants petitioned the Supreme Court for writ of certiorari.²⁴²

Elsewhere, the movement continues. In Maine, same-sex marriage was briefly legalized in 2009, but citizens overturned the law by referendum.²⁴³ Same-sex marriage advocates initiated legislation and forced another referendum in November 2012, when citizens reversed their position and voted to approve same-sex marriage.²⁴⁴ In February 2012, Washington state legalized same-sex marriage.²⁴⁵ In March 2012, Maryland also legalized

234. *Goodridge*, 798 N.E.2d at 969 (emphasis added) (internal quotation marks omitted).

235. *Id.*

236. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

237. *Id.* at 453.

238. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

239. Errick J. Winek, Case Digest, *Digest: Strauss v. Horton*, 13 CHAP. L. REV. 475, 475 (2010).

240. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995, 1003 (N.D. Cal. 2010).

241. See *Perry v. Brown*, 671 F.3d 1052, 1052 (9th Cir. 2012).

242. See *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3109489 (July 31, 2012).

243. Glenn Adams, *Maine Poised for Second Vote on Gay Marriage*, THE HUFFINGTON POST (Jan. 26, 2012, 4:58 PM), http://www.huffingtonpost.com/2012/01/26/maine-gay-marriage_n_1234102.html.

244. Martine Powers, *Maine Votes to Legalize Same-Sex Marriage*, BOSTON.COM (Nov. 7, 2012, 2:12 AM), <http://www.boston.com/politicalintelligence/2012/11/06/gay-marriage-vote-dominates-election-day-maine/yUFpH8SAXxkrEOLOKmf5AI/story.html>.

245. Act of Feb. 13, 2012, ch. 3, sec. 1, 2012 Wash. Legis. Serv. Ch. 3 (S.S.B. 6239) (West); see also Rachel La Corte, *Washington Gay Marriage Bill Signed Into Law by Governor Chris Gregoire*,

same-sex marriage.²⁴⁶ In August 2012, a federal court in Hawaii upheld Hawaii's marriage laws against Fourteenth Amendment challenge; marriage in Hawaii is still reserved for opposite-sex couples.²⁴⁷

This surge to legalize same-sex marriage extends beyond State boundaries; the federal government is embroiled in the same-sex marriage movement as well. Recently, in a pair of cases,²⁴⁸ the United States District Court for the District of Massachusetts held that the Defense of Marriage Act violates the Equal Protection Clause and infringes on a traditional state function.²⁴⁹ Moreover, in June 2011, President Barack Obama announced that his administration would no longer defend the Act in court.²⁵⁰

The foregoing discussion brings to light three significant problems: (1) an abandonment of a theological understanding of marriage, (2) an abandonment of the Western Legal Tradition, and (3) a myopic analysis of what our Federal Constitution requires. Whereas the Two Kingdoms Doctrine contemplates that state government may validly authorize same-sex marriage, and that it may reject all persuasive authority that cautions against doing so, the same doctrine also warns that this is an exceedingly unwise decision. Indeed, foolish law bears consequences. Thus, the remaining discussion reconsiders the theological, jurisprudential, and constitutional bases for the three most common state policies that respond to the call for same-sex marriage: (A) recognize only marriage; (B) recognize marriage and some state-created institution; and (C) recognize marriage and same-sex marriage. Ultimately, Part IV proposes that the modern State should select policy (A).

THE HUFFINGTON POST (Feb. 13, 2012, 9:18 PM), http://www.huffingtonpost.com/2012/02/13/washington-gay-marriage-signed-chris-gregoire_n_1273887.html.

246. Civil Marriage Protection Act, ch. 2, sec. 1, § 2-201, 2012 Md. Laws Ch. 2 (H.B. 438); see also Sarah Breitenbach, *Maryland Gay Marriage: Governor Martin O'Malley Signs Bill Allowing Same-Sex Couples to Wed*, THE HUFFINGTON POST (Mar. 1, 2012 5:30 PM), http://www.huffingtonpost.com/2012/03/01/maryland-gay-marriage-martin-o-malley-signs-bill_n_1314352.html.

247. See *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012).

248. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

249. *Gill*, 699 F. Supp. 2d 374; *U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234.

250. Brian Bond, *LGBT Pride Month at The White House*, THE WHITEHOUSE (June 29, 2011, 8:48 PM), <http://www.whitehouse.gov/blog/2011/06/29/lgbt-pride-month-white-house>.

IV. PROPOSAL

A. *Recognize Only Marriage.*

Ideally, the modern State should recognize only marriage, as that term has been understood from the beginning of time. Theologically, this makes sense. Marriage is a God-ordained union and is an allegory to God's own Tripartite being.²⁵¹ We know this to be true, for the divine law is written on our hearts.²⁵² Our consciences confirm it.²⁵³ "He who has ears to hear, let him hear."²⁵⁴ A marriage-only policy is consistent with the Two Kingdoms Doctrine, for in fact Luther contemplated a Christian Prince when he formulated the Doctrine.²⁵⁵ True, the State functions whether the Prince is a Christian or a scoundrel, whether the government takes the form of a democracy or a totalitarian regime. But the State functions best when the governing authorities are informed by the divine law.²⁵⁶ Indeed, though the State does not stand under the Church, it ultimately does stand under God and His Word.²⁵⁷

Jurisprudentially, a marriage-only policy also makes the most sense. Indeed, since at least the sixth century, Western legal society has invariably authorized only male-female marriage.²⁵⁸ The persuasive weight of this jurisprudential tradition speaks for itself. Currently, nineteen states recognize *only* marriage.²⁵⁹ These states also prohibit marriage-equivalent same-sex unions.²⁶⁰

251. *See supra* Part II.C.1.

252. *Romans* 2:15.

253. *Id.*

254. *Mark* 4:9.

255. ALTHAUS, *supra* note 4, at 123. With respect to the United States, Christians enjoy just as much right to participate in civil government as non-Christians do. Just as the Establishment Clause prohibits the government from imposing religious orthodoxy on its citizens, the Free Exercise Clause prohibits the government from excluding Christians from lawmaking. *See* U.S. CONST. amend. I. These two Clauses interact such that all citizens may participate in government to construe marriage's form, the only limitation being that our "Princes" may not force us to believe any religious orthodoxy, or to act against the duties we owe our Creator. *See also supra* note 202 and accompanying text.

256. "Unless the LORD builds the house, those who build it labor in vain. Unless the LORD watches over the city, the watchman stays awake in vain." *Psalms* 127:1.

257. ALTHAUS, *supra* note 4, at 149–51.

258. *See supra* Part II.D.

259. Wardle, *supra* note 224, at 541.

260. *Id.*

Legally, American states may codify marriage's male-female form to the exclusion of same-sex couples. States have long retained the police power to impose certain sexual norms, and traditionally have retained sovereignty over marriage as a legal institution. Both the Establishment Clause and the Equal Protection Clause recognize this function.²⁶¹

B. Recognize Marriage and Some State-Created Institution.

As a sort of compromise, the modern State could recognize marriage and some state-created institution designed to accommodate same-sex relationships. Theologically, this policy is not entirely inconsistent with the divine law. After all, the State is vested with a great deal of discretion to determine just how to institute order within the secular kingdom.²⁶² Thus, to accommodate the demands of marriage reformers, the State might choose to recognize marriage *and* recognize some state-created institution, e.g., civil unions, domestic partnerships, reciprocal-beneficiary relationships, or something even more creative.

Jurisprudentially, this sort of policy makes some sense. Whereas same-sex relationships first began to garner legal recognition barely forty years ago,²⁶³ today, eleven states recognize marriage *and* some state-created institution for same-sex couples.²⁶⁴ Such a legal dimorphism is validated by the courts,²⁶⁵ but is less consistent with the divine law.

Whereas the Federal Constitution permits states to reserve marriage for male-female pairs, states could choose to show great deference to the spirit of the Federal Equal Protection Clause by creating a corresponding institution for same-sex couples. This arrangement, though not legally required, respects the State's compelling interest in maintaining the traditional structure of marriage and does so in a less restrictive way than

261. See *supra* Part II.E.2-3.

262. ALTHAUS, *supra* note 4, at 112-24.

263. See *supra* note 220 and the authorities cited therein.

264. Wardle, *supra* note 224, at 585.

265. See, e.g., *Lewis v. Harris*, 908 A.2d 196, 221-22 (N.J. 2006) (stating that "[w]e cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman" and holding that a permissible State response to the demand for same-sex marriage could be State-created civil unions or some *separate statutory structure* for same-sex couples); *Baker v. State*, 744 A.2d 864, 868 (Vt. 1999) (holding that, in extending legal benefits to same-sex couples, the State may do so via a domestic partnership system or some *equivalent statutory alternative*).

codifying only true marriage and nothing else. Besides showing such deference to the Federal Equal Protection Clause, states can adopt their own equal protection clauses that designate sexual orientation as a protected class; doing so could require the creation of an institution parallel to marriage or, depending on the constitutional analysis, full blown same-sex marriage.

Alternatively, it is not an uncommon proposal that the State should merely parse marriage into “religious” and “civil” subcategories in order to settle this matter once and for all.²⁶⁶ Such a proposal, however, overlooks the physical character of marriage and misses the point that all marriages are properly within the State’s jurisdiction. Therefore, to propose that “religious marriage” be distinguished from “civil marriage” is to conflate the two kingdoms and is not a legitimate solution.²⁶⁷

C. *Recognize Marriage and Same-Sex Marriage.*

The worst-case scenario would be for the modern State to authorize both marriage and same-sex marriage. Theologically, this policy turns the institution of marriage on its head. It need not be repeated here the degree to which same-sex marriage is, in view of the divine law, a non sequitur. At the same time, though, the Two Kingdoms Doctrine contemplates that the State need not do anything the divine law says.²⁶⁸ Nevertheless, foolish law bears consequences. To implement foolish law is to forfeit God’s blessing.²⁶⁹ While nothing forces the State to consult the divine law, there is correspondingly nothing to stop society from tearing itself apart in response to bad law.²⁷⁰ Perhaps the best warning against a purely positivist

266. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (arguing that “religious marriage” is to be judged under religious doctrines while “civil marriage” must be judged under constitutional standards of equal protection); Schuman, *supra* note 218, at 2106 (proposing that the State separate the institutions of religious and civil marriage “such that religious groups can continue to grant or refuse to officiate marriage ceremonies based on their beliefs, and government can get out of the business of granting religious marriage and instead focus on granting equal rights to all of its citizens”).

267. ALTHAUS, *supra* note 4, at 112–24.

268. *Id.*

269. *Id.* at 60.

270. Indeed, that is why the State must attribute relative moral worth to the physical acts of its citizens, and regulate those acts that are inimical to the public welfare. Consider what would happen if the State did not outlaw murder: society would tear itself apart. Similarly, if there is reason to believe that expanding the definition of marriage would be inimical to the

jurisprudence is this: “Woe to those who call evil good and good evil, who put darkness for light and light for darkness, who put bitter for sweet and sweet for bitter!”²⁷¹

Jurisprudentially, there is no basis in Western legal thought to justify same-sex marriage.²⁷² Only since 1993 has same-sex marriage been a legal possibility.²⁷³ Compared against the span of the entire Western Legal Tradition—at least a millennium and a half²⁷⁴—the twenty-year period during which same-sex marriage has gained a legal foothold is insignificant. Yet, the modern American State abrogates that legal tradition with alarming impetuosity. Already, nine states and the District of Columbia authorize same-sex marriage.²⁷⁵ Three of those states did so in 2012 alone.²⁷⁶

Lastly, as a matter of policy, it would be foolish for the modern State to authorize same-sex marriage. By expanding marriage to accommodate same-sex relationships, the State effectively alienates the entire Christian voting population.²⁷⁷ Such a policy would serve only to intensify relations between Church and State. But, theoretically, the State as the sovereign in the secular kingdom, being responsible for ordering society, may validly expand the definition of marriage. And, practically, American states may codify extra liberties in their respective constitutions such that marriage must include same-sex couples.

V. CONCLUSION

The same-sex marriage movement is a special legal phenomenon. On the one hand, traditionalists are desperately trying to preserve the sanctity of marriage. On the other hand, reformers are fiercely fighting to forge a new

public welfare, the State is justified in attributing greater moral worth to traditional marriage and reserving it for men and women.

271. *Isaiah* 5:20.

272. *See supra* Part II.D.

273. *See Baehr v. Lewin*, 74 Haw. 645 (1993).

274. *See supra* note 73 and accompanying text.

275. *See supra* Part III.B.

276. *See supra* Part III.B.

277. This is so because Christians cannot intelligibly accept same-sex marriage. Christians are called to minister to the masses. *E.g.*, *Matthew* 5:13–14 (“You are the salt of the earth . . . You are the light of the world.”); *Mark* 16:15 (“Go into all the world and proclaim the gospel to the whole creation.”); 2 *Timothy* 4:2 (“[P]reach the word; be ready in season and out of season; reprove, rebuke, and exhort, with complete patience and teaching.”). Thus, it would be antithetical to the Christian identity to look on as “civil marriage” and “same-sex marriage” develop alongside actual marriage.

legal identity. The proper way to parse these interests is to start from the Two Kingdoms Doctrine, which recognizes that the Church governs Christians by the divine law, whereas the State governs Christians and non-Christians by human positive law. The divine law works inner conviction among those willing to listen, whereas the positive law works outer coercion among all citizens. Marriage—though a God-ordained union between a man and a woman—is not a sacrament relating to spiritual well-being. Marriage is given to Christians and non-Christians alike. It follows that the divine law corresponds to marriage’s immutable identity, but the positive law corresponds to marriage’s temporal administration. Ultimately, the State has jurisdiction over marriage’s public character.

The State—which exists to institute order—enjoys creative discretion to accomplish this end however it sees fit. Accordingly, the State can look to the divine law for guidance, or it can look to itself in *raison d'état* and embrace a jurisprudence of legal positivism. The State can implement a marriage policy that preserves the male-female configuration or it can open marriage up to same-sex couples. Both policies are equally valid, but each bears its own consequences, for God works even in the secular kingdom for His own good and gracious purposes. In other words, both policies are not equally sound. In fact, there are unavoidable reasons why the State should not recharacterize marriage.

First, there is no theological basis for same-sex marriage. True marriage is the antithesis of same-sex marriage. To authorize same-sex marriage is anathema to Christians and begs an unprecedented cultural backlash. It makes a mockery of marriage. But, “Do not be deceived: God is not mocked, for whatever one sows, that will he also reap.”²⁷⁸ Second, there is no historical jurisprudential basis for same-sex marriage in all of Western legal thought. Neither the Roman, nor the Catholic, nor the English, nor the classic American jurisprudence ever authorized same-sex marriage. Third, the U.S. Constitution does not require same-sex marriage. We ought not discard these historical lessons on a whim.

Despite recent radical changes, the modern State, when confronted by the same-sex marriage movement, should select a policy that recognizes only true marriage. Such a policy is within the State’s discretion as the supreme authority over the secular kingdom. This policy makes the proper theological distinctions. It enjoys more than fifteen hundred years of unbroken legal practice. It is permitted by the U.S. Constitution. And it does this all while respecting the differences between the Two Kingdoms.

278. *Galatians* 6:7.