

Executive Summary Background

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Same-Sex Marriage and the Threat to Religious Liberty

Thomas M. Messner

Redefining marriage to include same-sex unions poses significant threats to the religious liberties of people who continue to believe that marriage is a relationship between a man and a woman. These threats have loomed large for several years, but recent developments, including the recent Connecticut and California judicial decisions redefining marriage to include same-sex unions, have refocused attention on the issue in a new, particularly urgent way.

Our society has traditionally considered marriage to be an exclusive relationship between a man and a woman based on the understanding that marriage is a fundamental social institution ordered to the common good through the bearing and raising of children. But advocates of same-sex marriage consider the traditional understanding of marriage to be a form of irrational prejudice against homosexuals because it excludes them from marriage and the benefits that go with it. In this view, rationales regarding the bearing and raising of children are flawed or, at least, insufficient bases for defining marriage as a relationship between a man and a woman.

The idea that marriage is a relationship between a man and a woman is a core religious belief for significant numbers of Americans. But the freedom to express this and other beliefs about marriage, family, and sexual values will come under growing pressure as courts, public officials, and private institutions come to regard the traditional understanding of marriage as a form of irrational prejudice that should be purged from public life. The

concept of marriage is too intertwined in our law and customs, and religious individuals and institutions are too integrated in the social and political lives of our communities, to avoid these conflicts.

Specifically, in a society that redefines marriage to include same-sex unions, those who continue to believe marriage is a relationship between a man and a woman can expect to face three types of burdens.

First, within the sphere of the administrative state, officials working out the implications of same-sex marriage will place several types of burdens on individuals and institutions that continue to believe marriage involves a man and a woman. For example, governments may require full acceptance of same-sex unions in programs or activities that are conducted or financially assisted by the state. Religious institutions that believe in marriage could lose equal access to public facilities. Churches that refuse to rent facilities for same-sex weddings could forfeit tax exemptions for those facilities. Public school students and teachers may be required to participate in classroom instruction about homosexual relationships that violates their religious beliefs. And public employees who express their belief in marriage

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could face the threat of discipline, demotion, and even termination.

Second, those who support the traditional understanding of marriage will be subject to even greater civil liability under nondiscrimination laws that prohibit private discrimination based on sexual orientation, marital status, and gender. Faith-based charities that provide valuable social services could be effectively shuttered by nondiscrimination laws that would require them to violate their religious beliefs by, for example, placing adopted children in same-sex households. Small-business owners could face significant liability under nondiscrimination laws that would force them to provide goods and services in situations—like same-sex weddings or civil union ceremonies—that violate their religious beliefs. Religious landlords, including religious educational institutions with married student housing, could encounter conflicts with their beliefs if forced to house same-sex couples under laws that prohibit discrimination based on marital status and sexual orientation. And professionals could be forced to violate their religious beliefs by nondiscrimination laws that, for example, would make it unlawful to decline to provide fertility services to a same-sex couple.

Although similar burdens can arise under nondiscrimination laws even in states that continue to define marriage as between one man and one woman, granting legal recognition to same-sex unions can reasonably be expected to amplify these burdens by significantly increasing the occasions of conflicts with religious liberty. In many cases, a person's sexual orientation is simply not relevant to the beliefs of individuals and institutions that support the traditional understanding of marriage and therefore presents no conflict under nondiscrimination laws. But officially licensed same-sex unions involve a public recognition of sexual union, which means they can make orientation relevant and impossible to ignore where religious beliefs prohibit expressing support for or facilitating openly homosexual conduct. As a result, the number of potential religious liberty conflicts stemming from the appli-

cation of nondiscrimination laws will increase significantly in states that grant legal recognition to same-sex unions.

Third, the existence of nondiscrimination laws, combined with the administrative policies of the state, can invite private forms of discrimination against religious individuals who believe that marriage involves a man and a woman and foster a climate of contempt for the public expression of their views. For example, private employers could become more likely to discipline or even terminate employees who express their beliefs about marriage or refuse to sign diversity statements requiring them to affirm same-sex unions. Religious professionals who consider same-sex unions to be immoral could also face serious conflicts if the private institutions that license and establish standards for social workers, counselors, attorneys, doctors, and members of other helping professions require applicants to condone same-sex relationships.

America's long tradition of supporting religious freedom requires a full accounting of the dangers to religious liberty posed by redefining marriage. This tradition reflects the importance our society attaches to each person's duty to honor his or her conscience and the role religious freedom plays in securing the rights of all citizens to be free from undue coercion by the state. Because religious freedom is a precondition for a civil and free society, citizens of all faiths—and no faith at all—have a deep interest in protecting the rights of others to honor the dictates of their conscience even when others, or even a majority of others, would reach a different conclusion.

Preserving marriage as a relationship between a man and a woman is the most effective way to avoid the dangers to religious liberty associated with granting legal recognition to same-sex unions. At a minimum, however, lawmakers should provide exemptions where changes in marriage policies and nondiscrimination laws would force individuals and institutions to violate their beliefs.

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Backgrounder

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Same-Sex Marriage and the Threat to Religious Liberty

Thomas M. Messner

Redefining marriage to include same-sex unions poses significant threats to the religious liberties of people who continue to believe that marriage is a relationship between a man and a woman. These threats have loomed large for several years, but recent developments, including the recent Connecticut and California judicial decisions redefining marriage to include same-sex unions, have refocused attention on the issue in a new, particularly urgent way.

Our society has traditionally considered marriage to be an exclusive relationship between a man and a woman based on the understanding that marriage is a fundamental social institution ordered to the common good through the bearing and raising of children. But advocates of same-sex marriage consider that understanding of marriage to be a form of irrational prejudice against homosexuals because it prevents them from marrying someone of the same sex and qualifying for the government benefits associated with civil marriage. In this view, rationales regarding the bearing and raising of children are flawed or, at least, insufficient bases for defining marriage as a relationship between a man and a woman.

This logic is at the heart of the conflict between same-sex marriage and religious liberty. The idea that marriage is a relationship between a man and a woman is a core religious belief for a significant number of Americans. But the freedom to express this and other beliefs about marriage, family, and sexual values will come under growing pressure as courts, public officials, and private institutions come to regard the

Talking Points

- Judicial decisions redefining marriage to include same-sex unions state that limiting marriage to men and women is a form of unacceptable discrimination against homosexuals.
- The freedom to express the view that marriage involves a man and a woman will come under growing pressure as courts, public officials, and private institutions come to regard the traditional understanding of marriage as a form of irrational prejudice that should be purged from public life.
- Individuals and institutions that believe marriage is a relationship between a man and a woman could lose access to government benefits and become subject to costly lawsuits under nondiscrimination laws that protect sexual orientation, gender, and marital status.
- Given America's long history of protecting the basic human right to religious liberty and the role of religious liberty as a pillar of free society and liberal democracy, lawmakers have a serious obligation to uphold religious liberty and to provide exemptions where laws would force people to violate their religious beliefs

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traditional understanding of marriage as a form of irrational prejudice that should be purged from public life.

Specifically, in a society that redefines marriage to include same-sex unions, those who continue to believe marriage is a relationship between a man and a woman can expect to face three types of burdens. First, institutions that support the traditional understanding of marriage may be denied access to several types of government benefits, and individuals who work in the public sector may face censorship, disciplinary action, and even loss of employment. Second, those who support the traditional understanding of marriage will be subject to even greater civil liability under nondiscrimination laws that prohibit private discrimination based on sexual orientation, marital status, and gender.¹ Third, the existence of nondiscrimination laws, combined with state administrative policies, can invite private forms of discrimination against religious individuals who believe that marriage involves a man and a woman and foster a climate of contempt for the public expression of their views.

The religious liberty harms associated with redefining marriage must be given full weight consistent with America's long tradition of protecting religious freedom as a fundamental human right. This tradition reflects the importance our society attaches to each person's duty to honor his or her conscience and the role religious freedom plays in securing the rights of all citizens—no matter their beliefs—to be free from undue coercion by the state.

Preserving marriage as a relationship between a man and a woman is the most effective way to avoid the dangers to religious liberty associated with granting legal recognition to same-sex unions. At a minimum, however, lawmakers should provide exemptions where changes in marriage policies and

nondiscrimination laws would force individuals and institutions to violate their deeply-held beliefs.

Transforming the Traditional Understanding of Marriage into a Form of Irrational Discrimination

A. Connecticut and California Same-Sex Marriage Decisions Refocus Questions about Religious Liberty

The effort to redefine marriage to include same-sex unions has never been stronger. In October 2008, the Connecticut Supreme Court ruled that the Connecticut Constitution should be interpreted to guarantee a right to same-sex marriage.² Just months before, in May 2008, the California Supreme Court reached the same conclusion in ruling that the California Constitution allows homosexual couples to get married in that state.³ Using civil union and domestic partnership schemes, both Connecticut and California had already granted same-sex couples almost all the same benefits provided to married couples. Yet the courts in both states concluded that not opening marriage itself to same-sex couples amounted to a form of unacceptable discrimination. Like the high court in Massachusetts five years earlier,⁴ the Connecticut and California courts removed the fundamental social issue of how to define marriage from the democratic process and imposed same-sex marriage by judicial fiat.⁵

Observers have noted the potential nationwide significance of decisions like these.⁶ Because neither California nor Connecticut imposes a residency requirement for obtaining a marriage license, and because Massachusetts lawmakers recently repealed the residency requirement in place when judges redefined marriage in that state,⁷ same-sex couples may travel to any of these three states, get married, and return home to argue

1. The legal recognition of same-sex unions in the form of domestic partnerships and civil unions creates the potential for many of the same types of religious liberty conflicts under nondiscrimination laws as does same-sex marriage. *See infra* at 14 (discussing how legal recognition of same-sex unions—including same-sex marriage, civil unions, and domestic partnerships—amplifies burdens on religious liberty) and 15–16 (discussing religious liberty case involving civil rights protections for civil union status).
2. *See Kerrigan v. Dep't of Pub. Health*, No. 17716, 2008 WL 4530885 (Conn. Oct. 28, 2008).
3. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).
4. *See Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003).

that their states must recognize their same-sex union as marriage under the Full Faith and Credit Clause of the United States Constitution, which requires each state to recognize the public acts, records, and judicial rulings of other states.⁸

The Full Faith and Credit Clause also permits Congress to prescribe the effect of such acts, records and proceedings.⁹ Acting under that authority, Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA), which clarifies that no state is required to recognize a same-sex marriage from another state.¹⁰ Thus, DOMA pre-

vents one state's same-sex marriage decision from being legally imposed on another state in the way described above.

However, if courts were to accept the argument of same-sex marriage advocates that DOMA should not control the outcome of these cases, then the judicial redefinition of marriage in Massachusetts, California, and Connecticut could create serious conflicts with the marriage laws of the other states, including those states that by statute or constitutional amendment have reasserted that marriage is a relationship between a man and a woman.¹¹

5. At the same time, individuals and institutions that support the traditional understanding of marriage as a relationship between a man and a woman are mounting serious efforts to defend marriage. Californians who support traditional marriage, for example, have placed a constitutional amendment on the November ballot that would define marriage as the union of one man and one woman. This voter initiative, called Proposition 8, would effectively overturn the California same-sex marriage decision, though same-sex couples would continue to enjoy access to all the benefits provided under California's domestic partnership laws. See SECRETARY OF STATE OF THE STATE OF CALIFORNIA, OFFICIAL VOTER INFORMATION GUIDE 128, available at <http://voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop8>; *id.* at 55 (stating that Proposition 8 would limit marriage to one man and one woman "notwithstanding the California Supreme Court ruling of May 2008"), available at <http://voterguide.sos.ca.gov/analysis/prop8-analysis.htm>. Similar constitutional amendment initiatives in Arizona and Florida would preempt judicial decisions creating same-sex marriage in those states and strengthen defenses against possible spillover effects from the California and Massachusetts decisions under the Full Faith and Credit Clause. See 2008 ARIZONA SECRETARY OF STATE, BALLOT PROPOSITIONS AND JUDICIAL PERFORMANCE REVIEW 30, available at <http://www.azsos.gov/election/2008/Info/PubPamphlet/english/Prop102.htm>; SECRETARY OF STATE OF THE STATE OF FLORIDA, PROPOSED CONSTITUTIONAL AMENDMENTS TO BE VOTED ON NOVEMBER 4, 2008, NOTICE OF ELECTION 2-3, available at <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=41550&seqnum=1>.
6. See, e.g., Kenneth Blackwell, Op-Ed, *Same-Sex Marriage: A Tale of Two Cities*, N.Y. SUN, June 17, 2008, at 8, available at <http://www.nysun.com/opinion/same-sex-marriage-a-tale-of-two-cities/80149>.
7. See, e.g., Pam Belluck, *Same-Sex Marriage Barrier Nears End in Massachusetts*, N.Y. TIMES, July 30, 2008, available at <http://www.nytimes.com/2008/07/30/us/30marriageweb.html#>; Michael Levenson, *Governor signs law allowing out-of-state gays to wed*, BOSTON GLOBE, July 31, 2008, available at http://www.boston.com/news/local/breaking_news/2008/07/gov_to_sign_bil.html.
8. See U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.")
9. *Id.*
10. See 28 U.S.C. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.")
11. Twenty-six states have specifically amended their constitutions to limit marriage to relationships between a man and a woman, see LAMBDA LEGAL, STATUS OF SAME-SEX RELATIONSHIPS NATIONWIDE (updated Oct. 10, 2008) (stating that marriage amendments exist in Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin), available at <http://www.lambdalegal.org/nationwide-status-same-sex-relationships.html>, one state, Hawaii, has amended its constitution to empower its legislature to limit marriage to a man and a woman, see *id.*, thirty-seven "states have their own Defense of Marriage Acts (DOMAs)," Alliance Defense Fund, DOMA Watch, <http://www.domawatch.org/index.php> (last visited Oct. 29, 2008), and two "more states have strong language that defines marriage as one man and one woman," *id.*

B. Same-Sex Marriage Policies Fundamentally Irreconcilable with the Traditional Understanding of Marriage

The fallout from the Connecticut and California judicial decisions and the recent legislative repeal of Massachusetts' residency requirement have refocused attention on the threats to religious liberty associated with redefining marriage.¹²

The threats to religious liberty stem from the underlying principles society adopts when it redefines marriage to include same-sex unions. For thousands of years societies have considered marriage to be a relationship between a man and woman that forms the cornerstone of a family and the ideal place for having and raising children.¹³ Societies have a strong interest in the establishment of strong marriages because "procreation [is] fundamental to the very existence and survival of the

[human] race,"¹⁴ and societies through the ages have recognized this interest by according marriage a special and unique place in their customs and laws.¹⁵ Indeed, most communities in America continue to think about marriage in this way.¹⁶

But redefining marriage to include same-sex unions involves a radical break with this traditional understanding of marriage. Judicial decisions imposing same-sex marriage do not merely add same-sex unions to civil marriage, leaving the institution otherwise intact.¹⁷ Rather, the redefinition of marriage to include same-sex unions fundamentally changes the institution of marriage by rejecting its core feature—an exclusive relationship between a man and woman—as a form of irrational discrimination against homosexuals that society should not tolerate. In this view, rationales regarding the bearing and raising of children are flawed

12. See, e.g., Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR, June 16, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=91486340>; Marc D. Stern, Op-Ed, *Will gay rights trample religious freedom?*, L.A. TIMES, June 17, 2008, available at http://www.latimes.com/news/opinion/la-oe-stern17-2008jun17_0,5628051.story. For earlier considerations of the conflict between religious liberty and same-sex marriage, see, for example, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (this book was based on a conference of legal scholars and practitioners in late 2005); Alan Sears & Craig Osten, *THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY* (2003); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007); Maggie Gallagher, *Banned in Boston: The coming conflict between same-sex marriage and religious liberty*, WKLY. STANDARD, May 15, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>; Mary Ann Glendon, Op-Ed, *For Better or For Worse?*, WALL ST. J., Feb. 25, 2004, at A14, available at <http://www.opinionjournal.com/editorial/feature.html?id=110004735>.
13. See, e.g., *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. App. 2005) (explaining that "the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized"); Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 321 (2008) ("Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a woman."), available at <http://marriagelawfoundation.org/mlf/publications/Harvard%20Facts.pdf>; Matthew Spalding, *A Defining Moment: Marriage, the Courts, and the Constitution*, HERITAGE FOUND. BACKGROUNDER (No. 1759), May 17, 2004, at 2 ("For thousands of years, on the basis of experience, tradition, and legal precedent, every society and every major religious faith have upheld marriage as a unique relationship by which a man and a woman are joined together for the primary purpose of forming and maintaining a family."), available at <http://www.heritage.org/Research/LegalIssues/bg1759.cfm>.
14. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race").
15. See Jennifer Marshall, *Marriage: What Social Science Says and Doesn't Say*, HERITAGE FOUND. WEBMEMO (No. 503), May 17, 2004, at 1 (stating that "marriage has always had a special place in all legal traditions, our own included, because it is the essential foundation of the intact family"), available at <http://www.heritage.org/research/Family/wm503.cfm>; see also *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. App. Div. 2005) (Parrillo, J., concurring) ("Procreative heterosexual intercourse is and has been historically through all times and cultures an important feature of [the] privileged status [of marriage], and that characteristic is a fundamental, originating reason why the State privileges marriage."), *aff'd in part and modified in part*, 908 A.2d 196 (2006).

or, at least, insufficient bases for defining marriage as a relationship between a man and a woman.¹⁸

A brief summary of the three state supreme court cases redefining marriage illustrates the logic of marriage redefinition more fully.

The Massachusetts Supreme Judicial Court redefined marriage by concluding that the state's traditional marriage laws "violate[d] the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."¹⁹ The Massachusetts court rejected rationales for marriage

based on the bearing and raising of children in concluding that limiting marriage to male-female couples upholds "persistent prejudices" and "works a deep and scarring hardship on a very real segment of the community for no rational reason."²⁰ This decision effectively declared the state's traditional understanding of marriage as a relationship between a man and a woman to be a form of unlawful bigotry.

The California Supreme Court reached a similar conclusion when it struck down a ballot measure

16. Same-sex marriage exists in only three states, Massachusetts, California, and Connecticut, and in each of these states same-sex marriage was created by judicial fiat not legislative will. In fact, the California judicial decision struck down a voter initiative statute approved by 61 percent of California voters that defined marriage as a relationship between a man and a woman. See, e.g., Robert Alt, *Heritage Foundation: California's Self-Defeating Same-Sex Marriage Decision*, FoxNews.com, May 23, 2008 (stating that the California decision "disregarded the will of the people of California as expressed by 61 percent of the voters, who in 2000 passed an initiative defining marriage as involving one man and one woman"), <http://www.foxnews.com/story/0,2933,357841,00.html>. Furthermore, although a handful of states provide some or all spousal-like benefits to same-sex couples under various legal regimes, see LAMBDA LEGAL, *supra* note 11 (summarizing status of same-sex relationship recognition nationwide), available at <http://www.lambdalegal.org/nationwide-status-same-sex-relationships.html>, forty-seven states and the District of Columbia "do not allow same-sex couples to marry and never have," *id.* (summarizing the state of the law before the Connecticut decision), twenty-six states have specifically amended their constitutions to limit marriage to relationships between a man and a woman, see *id.* (stating that marriage amendments exist in Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin), one state, Hawaii, has amended its constitution to empower its legislature to limit marriage to a man and a woman, see *id.*, thirty-seven "states have their own Defense of Marriage Acts (DOMAs)," Alliance Defense Fund, *supra* note 11, <http://www.domawatch.org/index.php>, and two "more states have strong language that defines marriage as one man and one woman," *id.* In addition, the federal Defense of Marriage Act, which defines marriage as a relationship between a man and a woman for purposes of federal law, see 1 U.S.C. § 7, passed by overwhelming majorities, 342–67 in the House, see [WashingtonPost.com](http://projects.washingtonpost.com/congress/104/house/2/votes/316), The Votes Database, <http://projects.washingtonpost.com/congress/104/house/2/votes/316>, and 85–14 in the Senate, *id.*, <http://projects.washingtonpost.com/congress/104/senate/2/votes/280>, confirming widespread, nearly nationwide support for traditional marriage.
17. Indeed, same-sex marriage is not merely a "new, different, and separate marriage arrangement or institution that will coexist with the old man-woman marriage institution." Stewart, *supra* note 13, at 319. "[O]nce the judiciary or legislature adopts 'the union of any two persons' as the legal definition of civil marriage, that conception becomes the sole definitional basis for the only law-sanctioned marriage that any couple can enter, whether same-sex or man-woman. Therefore, legally sanctioned genderless marriage, rather than peacefully coexisting with the contemporary man-woman marriage institution, actually displaces and replaces it." *Id.* See also Spalding, *Executive Summary of A Defining Moment: Marriage, the Courts, and the Constitution*, *supra* note 13, available at <http://www.heritage.org/Research/LegalIssues/bg1759.cfm>.
18. For discussions of the rationales offered for traditional marriage, see, for example, Stewart, *supra* note 13, at 321–22 (2008), and Maggie Gallagher, *If Marriage Is Natural, Why Is Defending it so Hard? Taking up the Challenge to Marriage in the Pews and the Public Square*, 4 AVE MARIA L. REV. 409, 417–22 (2006). Also consider Joshua Baker, *American Courts on Marriage: Is Marriage Discriminatory?*, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY RESEARCH BRIEF, May 2008, at 1 (stating that, in 1998 to 2008, at least nine state and federal courts have concluded that "unions of husband and wife are sufficiently different from same-sex unions that it is not discriminatory to treat these types of unions differently"), available at <http://www.marriagedebate.com/pdf/iMAPP.May2008.pdf>.
19. See *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 968 (Mass. 2003).
20. See *id.*

passed by 61 percent of California voters that defined marriage as a relationship between a man and a woman. In judicially redefining marriage to include same-sex unions, the California court concluded that society's interest in "promot[ing] a stable relationship for the procreation and raising of children" is an insufficient basis for limiting marriage to relationships between men and women.²¹ The court also stated that sexual orientation is not a "legitimate basis"²² for distinction under California law, including laws regulating who may establish an "officially recognized family."²³ This decision, like the Massachusetts decision, declared the traditional understanding of marriage as a relationship between a man and a woman to be an offense against principles of liberty and equality and an intolerable form of discrimination.

The Connecticut Supreme Court followed the Massachusetts and California decisions in declaring

traditional marriage laws to be discriminatory in that state as well. Unlike the Massachusetts and California courts, however, the Connecticut court did not even bother to consider whether the state's interest in procreation and child rearing was sufficient to justify confining marriage to relationships between men and women—the court ignored this most fundamental question altogether in ruling that the "conventional" understanding of marriage must yield to a more "contemporary appreciation"²⁴ of equality that does not "discriminate" against homosexual couples.

By fundamentally rejecting the traditional understanding of marriage as a form of discrimination, these court decisions create serious conflicts with religious liberty.²⁵ The traditional understanding of marriage insists that marriage is a relationship between a man and a woman sanctioned by the state for the primary purpose of bearing and raising

21. *In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008).

22. *Id.* at 429.

23. *Id.* at 399–402.

24. *Kerrigan v. Dep't of Pub. Health*, No. 17716, 2008 WL 4530885, at *47 (Conn. Oct. 28, 2008). In concluding that homosexual persons are a "quasi-suspect class," *id.* at *12, the Connecticut court found that the same-sex attraction "bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens," *id.* at *13, but the Court never considered this question in relation to the procreative and child rearing rationale historically advanced in defense of marriage laws. The court excused its failure to address this fundamental question on the ground that, in defending its marriage laws, the State of Connecticut "expressly [] disavowed" any claim that its marriage laws were "motivated by the belief that the preservation of marriage as a heterosexual institution is in the best interests of children, or that prohibiting same sex couples from marrying promotes responsible heterosexual procreation." *Id.* at *43. But, as Justice Zarella observed in his dissenting opinion, several amici raised precisely these arguments, nothing prevented the court from considering them, and the majority of the court was well aware of the arguments. *Id.* at *80 n.15 (Zarella, J., dissenting). Given that the "only argument" that "any court ever has found to be persuasive" in similar cases is that "marriage was intended to privilege and regulate sexual conduct that may result in the birth of a child," *id.* at *80, the failure of the court to grapple with questions regarding procreation and child rearing raises serious questions about its credibility and judgment.

25. The rhetoric of "equality," "liberty," and "discrimination" is also reflected in the political debate about marriage definition. Previous efforts to redefine marriage in California, for example, characterized traditional marriage policies as "pernicious" forms of "marriage discrimination" that violate constitutional principles of "due process," "privacy," "equal protection of the law," and "free expression." Assemb. B. 43, 2007-2008 Reg. Sess. (Cal. 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_bill_20070927_enrolled.html, vetoed by Letter from Arnold Schwarzenegger, Governor, State of California, to Members of the California State Assembly (Oct. 12, 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vt_20071012.html. And public officials have used words like "discriminatory" and "divisive" to describe the attempt to amend the California Constitution to define marriage as a relationship between a man and a woman. Letter from Senator Barack Obama to Alice (Mar. 24, 2008), in ALICE B. TOKLAS LESBIAN, GAY, BISEXUAL, TRANSGENDER DEMOCRATIC CLUB, ALICE REPORTS (July 2008), <http://www.alicebtoklas.org/abt/newsletters/newsletter0807.htm>. See also John Wildermuth, *Obama opposes proposed ban on gay marriage*, S.F. CHRON., July 2, 2008, at A1 (quoting letter from Barack Obama, Senator, U.S. Senate, to the Alice B. Toklas Lesbian Gay Bisexual Transgender Democratic Club of San Francisco), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/01/MN8J111731.DTL>.

children and, therefore, certain distinctions based on gender are rational in the context of marriage policy. But redefining marriage transforms this traditional understanding of marriage into a form of irrational prejudice and will lead public officials and private individuals to become less tolerant of, and even hostile to, individuals and institutions that continue to believe that marriage involves a man and a woman.

C. Unavoidable Conflicts with Religious Liberty

Parties on both sides of the marriage debate acknowledge the coming conflict between same-sex marriage and religious liberty, citing burdens that redefining marriage will create for those who continue to believe that marriage is a relationship between a man and a woman.²⁶

The conflict between same-sex marriage and religious liberty is due in part to how deeply intertwined the concept of marriage is in our civil law and how integrated religious individuals and institutions are in our society. Civil marriage is a legal concept that pervades the laws, regulations, and policies of the federal, state, and local governments and significantly affects the rights of married individuals and the duties due them by other parties. At the same time, religious individuals and institutions participate in all areas of public life, including in the public arena as government contractors and public employees and public school students and also in the private sector as professionals and charities and small businesses.

Marriage and religion are fundamental features of American law, tradition, and culture; removing either would be a dramatic departure from these legal and cultural roots, affecting the future course of our society. But this is also precisely the reason that fundamental social and legal conflicts are inescapable when a society commands “equal” treatment of

same-sex relationships in the face of widespread commitment to traditional marriage policies.

Three Ways Redefining Marriage Will Burden Religious Liberty

Redefining marriage will create or amplify at least three types of burdens for religious individuals and institutions that continue to believe marriage is an exclusive relationship between a man and a woman.

First, within the sphere of the administrative state, individuals and institutions that support the traditional understanding of marriage will likely face several types of growing burdens as officials work out the implications of same-sex marriage. In some cases, for example, the state might condition the granting of government benefits—including government contracts, government financial assistance, access to public facilities, and tax exemptions—on recipients renouncing support for limiting marriage to relationships between men and women. In other cases the state might censor the views of public employees who openly support limiting marriage to male-female couples, require instruction about same-sex unions in public schools, and use the bully pulpit to condemn individuals and groups that express views at odds with “official” doctrines of the state.

Second, same-sex marriage will expose religious individuals and institutions that support the traditional understanding of marriage to increased liability under civil rights laws that protect sexual orientation, marital status, and gender. Because these types of laws directly regulate the conduct of private individuals and institutions, they are significantly more invasive than regulations a government imposes on itself or on individuals and institutions that seek some benefit from the government. Religious individuals and institutions that participate in a wide swath of public life—from

26. See, e.g., Anthony R. Picarello, Jr., *Introduction to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 12 at xi (explaining that scholars contributing to book discussing religious liberty implications of same-sex marriage have “a wide range of views on same-sex marriage”); Hagerty, *supra* note 12, available at <http://www.npr.org/templates/story/story.php?storyId=91486340>; Peter Steinfeld, *Will Same-Sex Marriage Collide With Religious Liberty?*, N.Y. TIMES, June 10, 2006 (quoting Marc Stern describing collision between same-sex marriage and religious liberty as a “train wreck”), available at <http://www.nytimes.com/2006/06/10/us/10beliefs.html>; Gallagher, *supra* note 12 (reporting that prominent gay rights scholar, Chai Feldblum, perceives genuine conflicts between free exercise of religion and sexual liberty), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

offering social services and renting wedding facilities to operating small businesses and providing professional services—will have to think twice before openly exercising their belief that marriage is a relationship between a man and a woman.

Third, official policies that effectively outlaw or materially burden the open expression of religious beliefs about marriage involving a man and a woman can brand religious individuals and institutions as bigots, providing an official stamp of approval on private discrimination against them and fostering a climate of hostility toward the public expression of their views. These burdens, which are in addition to the burdens imposed by the state itself, must also be considered in any debate concerning marriage policy.

A. Burdens Imposed by the Government on Religious Individuals and Institutions that Support the Traditional Understanding of Marriage

Once a state concludes that defining marriage as an exclusive relationship between a man and a woman is a form of irrational prejudice against homosexuals, officials will also experience increased political pressure to work out the implications of this conclusion in several other contexts.

1. Burdens on Access to Government Benefits and Privileges

a) Government contracts and program funding

Religious institutions committed to a traditional understanding of marriage risk significant burdens

on their ability to obtain valuable government contracts and financial assistance to provide social services and other charitable functions.²⁷ For example, even before the California same-sex marriage decision, that state prohibited state agencies from contracting with entities that differentiate between employees with spouses and employees with domestic partners.²⁸ California also outlaws any distinction based on sexual orientation or the perception of sexual orientation in any program or activity that is conducted or financially assisted by the state.²⁹ In states with same-sex marriage, religious institutions that believe marriage involves a man and a woman would obviously be at odds with laws like these if they seek government contracts or accept financial assistance for social services they provide.

Although some private institutions decide on principle to forgo government aid,³⁰ some charities that provide valuable social services—like hospitals, half-way houses, adoption agencies, rehabilitation centers, and institutions that are regularly involved with government programs like Medicaid and Medicare—might not be able to operate without significant government financial interaction, forcing them to choose between providing much-needed social services and honoring their religious convictions. This type of conflict will be more likely to occur in states that redefine marriage to include same-sex unions.³¹

b) Access to public facilities and programs

Institutions that support traditional marriage also risk significant burdens on their ability to gain access to public facilities and programs. For example, the

27. See Marc Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 12, at 24-25; Severino, *supra* note 12, at 974-76.

28. See CAL. PUB. CONT. CODE § 10295.3(a)(1) (2008), available at http://www.assembly.ca.gov/LGBT_Caucus/laws/2003/ab0017/fulltextchapteredbill.htm.

29. CAL. GOV'T CODE § 11135(a) (2008), available at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1401-1450/sb_1441_bill_20060828_chaptered.pdf.

30. See, e.g., Grove City College, Quick Facts & Figures, http://www.gcc.edu/Quick_Facts_Figures.php (last visited Sep. 26, 2008) (stating that “Grove City College accepts no federal aid of any kind, including federal student grants and loans, in order to avoid federal regulation and preserve the integrity of its mission”); Press Release, Hillsdale College, Hillsdale College Declines State of Michigan Funding to Become Completely Independent of Taxpayer Support (Aug. 13, 2007) (explaining that the institution does not accept taxpayer monies “earmarked for student financial aid”), available at <http://www.mrgmi.com/HillsdaleCollege081307.pdf>.

31. See *supra* at 14 (discussing how legal recognition of same-sex unions—including same-sex marriage, civil unions, and domestic partnerships—amplifies burdens on religious liberty).

Boy Scouts of America have lost equal access to public after-school facilities, the right to participate in state charitable fundraising programs, and berthing rights a city marina provides to public interest groups, all because of the group's "unwavering requirement" that members "not advocate for or engage in homosexual conduct."³² According to one religious liberty scholar, these government responses to the Boy Scouts are "merely a foretaste" of what religious institutions can expect for taking similar stands against homosexual conduct and same-sex marriage.³³

c) Tax exemptions

The revocation of tax-exempt status is one of the severest burdens a government might impose on institutions that continue to support the traditional understanding of marriage. Governments give tax-exempt status to groups that provide services benefiting the public.³⁴ But, once a government decides that traditional marriage principles are a form of discrimination, some officials might argue that groups that support limiting marriage to male-female couples are so out of step with society's values that they no longer merit a tax exemption.³⁵

A recent case from New Jersey illustrates the concern about religious institutions losing tax exemptions for honoring their beliefs about marriage. In this case, a Christian ministry declined to allow two lesbian couples to use one of its facilities for their

civil union ceremonies because of the ministry's religious beliefs about marriage. The lesbian couples filed complaints against the ministry for allegedly violating a civil rights law prohibiting discrimination in public accommodations based on civil union status.³⁶ As a result, the State of New Jersey has already stripped the ministry of the tax exemption for the disputed facility and could yet impose additional liability.³⁷

The revocation of tax-exempt status can result in "staggering financial losses" for religious institutions that believe marriage involves a man and a woman.³⁸ Furthermore, merely the threat of this type of costly government action may be enough to force many religious institutions to adopt the state's position on controversial moral issues like same-sex marriage.³⁹ Even if courts determined that states were constitutionally permitted to enforce official government viewpoints in this way, the significant harms to religious liberty must be weighed in any decision redefining marriage to include same-sex unions.

2. Burdens on Public Employees Who Support Traditional Marriage

Once states conclude that limiting marriage to male-female relationships is a form of irrational prejudice, public employees who openly express support for that traditional understanding of

32. Severino, *supra* note 12, at 976–77 (discussing Boy Scout cases and providing citations).

33. *Id.* at 977.

34. See, e.g., Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 12, at 113 (discussing *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)). For analysis of the more fundamental issue of how the government's power to tax and to exempt from taxation can "destroy[] authentically religious consciousness," see Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 802 (2001) (internal quotations omitted).

35. See Severino, *supra* note 12, at 973–74.

36. See Letter from J. Frank Vespa-Papaleo, Director, Div. on Civil Rights, Dep't of Law & Pub. Safety, Office of the Attorney Gen., State of New Jersey, to Counsel (Jan. 7, 2008) (denying ministry's motion to dismiss civil rights complaints), available at <http://media.npr.org/documents/2008/jun/pavilion.pdf>; Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007, available at http://www.nytimes.com/2007/09/18/nyregion/18grove.html?_r=1&oref=slogin; Jill P. Capuzzo, *Civil Union Dispute Pits Methodist Retreat Against Gays Who Aided in Its Rebirth*, N.Y. TIMES, Sept. 3, 2007, available at <http://www.nytimes.com/2007/09/03/nyregion/03ocean.html>.

37. See Hagerty, *supra* note 12, available at <http://www.npr.org/templates/story/story.php?storyId=91486340>.

38. "Religious institutions that refuse to treat same-sex spouses as equivalent to traditional spouses may face staggering financial losses if state or federal authorities revoke their tax exemption because of their 'discrimination.'" Severino, *supra* note 12, at 973. See *id.* at 974.

39. *Id.* at 973. See *id.* at 974.

marriage could face discipline, demotion, and even termination. The cases below involve public employees who suffered retaliation for expressing views about homosexual conduct generally. In states that grant official recognition to same-sex unions, public employees who support the traditional understanding of marriage—and thus implicitly oppose granting legal recognition to same-sex unions—will face even greater burdens.

The treatment alleged by Los Angeles Police Officer Eric Holyfield provides one example of such discrimination. Holyfield is a Police Sergeant with the Los Angeles Police Department and is also the Pastor of the Gospel Word of Life Apostolic Church.⁴⁰ The family of a fellow officer who had recently died asked Holyfield to preach a short sermon at the funeral.⁴¹ Holyfield, who was off-duty and on vacation status at the time, agreed; wearing a black clergy shirt and white clergy collar, he preached about the need to prepare for death by avoiding sin, including sins involving homosexuality.⁴² When another officer also attending the funeral overheard Holyfield's sermon, including quotations from Bible verses prohibiting adultery and homosexuality and other sexual conduct, he filed a formal complaint against Holyfield alleging that Holyfield had made disparaging remarks toward gays, lesbians, and adulterers.⁴³ Holyfield

claims he was subsequently demoted and denied promotion for expressing his religious beliefs through the sermon he preached.⁴⁴

Crystal Dixon, a former Associate Vice President for Human Resources at the University of Toledo in Ohio, encountered similar discrimination for suggesting that the “gay lifestyle” was immoral.⁴⁵ The state university fired Dixon, who is an African American, after she wrote an op-ed in the *Toledo Free Press* taking “umbrage” with comparisons of race with sexual orientation.⁴⁶ After she was fired, Dixon explained that university officials never cited “a single policy or procedure [she] had violated”,⁴⁷ instead, as the president of the university stated in an op-ed of his own, Dixon's comments failed to accord with the “values” of the public university.⁴⁸

Political appointees, though often governed by different rules than career employees, can face similar discrimination for expressing traditional views on marriage. For example, Robert Smith was an appointee to the Washington Metropolitan Area Transit Authority when, as a guest on a local cable talk show that included discussion of the proposed federal marriage amendment, he shared his belief that homosexual conduct was a form of sexual deviancy.⁴⁹ Maryland Governor Robert Ehrlich fired Smith, calling Smith's comments “insensitive” and incompatible with the governor's commitment to

40. See Complaint at ¶ 2, *Holyfield v. City of Los Angeles*, No. BC392939 (Cal. Super. Ct. filed June 19, 2008), available at <http://www.alliancealert.org/2008/20080703.pdf>.

41. See *id.* at ¶ 13.

42. See *id.* at ¶¶ 14–17.

43. See *id.* at ¶ 16-17, 20, 23.

44. See *id.* at ¶¶ 39, 44; see also Pete Vere, *Gay rights vs. faithful*, WASH. TIMES, July 31, 2008, at 3 (discussing the case), available at <http://www.washtimes.com/news/2008/jul/31/gay-rights-vs-faithful>.

45. Crystal Dixon, Op-Ed, *Gay rights and wrongs: another perspective*, TOLEDO FREE PRESS, Apr. 18, 2008, available at <http://www.toledofreepress.com/2008/04/18/gay-rights-and-wrongs-another-perspective>.

46. *Id.* See John Krudy, *Dixon to file First Amendment, discrimination suits*, TOLEDO FREE PRESS, May 15, 2008, available at <http://www.toledofreepress.com/2008/05/15/dixon-to-file-first-amendment-discrimination-suits>. Dixon's op-ed was responding to an editorial by the paper's Editor in Chief about gay rights in Ohio. See Michael S. Miller, Editorial, *Gay rights and wrongs*, TOLEDO FREE PRESS, Apr. 4, 2008, available at <http://www.toledofreepress.com/2008/04/04/gay-rights-and-wrongs>.

47. Krudy, *supra* note 46, available at <http://www.toledofreepress.com/2008/05/15/dixon-to-file-first-amendment-discrimination-suits>.

48. Lloyd Jacobs, Op-Ed, *UT protects gay rights*, TOLEDO FREE PRESS, May 2, 2008, available at <http://www.toledofreepress.com/2008/05/02/ut-protects-gay-rights>.

“tolerance.”⁵⁰ One of Smith’s colleagues, an openly homosexual councilman in Washington, D.C., was even more pointed than the governor, calling Smith “clueless” and the defense of his beliefs, which Smith linked directly to his Roman Catholic faith, “beyond the pale.”⁵¹

None of these cases involved a public employee refusing to perform official duties because of his or her religious beliefs, although that scenario would also raise serious religious liberty questions.⁵² Instead, in each case, the public employee suffered severe discrimination simply for openly expressing his or her views on homosexual conduct. And in each case, the government sent a clear message to its religious employees that they should keep their beliefs to themselves, even when they are not at work, or they could lose their jobs. When courts extend constitutional recognition to same-sex unions, public employees who believe that homosexual unions are immoral will likely encounter even greater difficulties.

3. Burdens on Public School Students and Teachers Who Support Traditional Marriage

States that redefine marriage to include same-sex unions are likely to reflect that policy shift in their

public schools.⁵³ In Massachusetts, for example, after that state redefined marriage to include same-sex unions, one public school introduced students as young as kindergarten and second grade to books like *Who’s in a Family*, which depicts same-sex couples along with traditional families, and *King & King*, which shows two princes who marry each other kissing.⁵⁴ Education officials defended the disputed materials by saying that the school was “committed to teaching about the world they live in, and in Massachusetts same-sex marriage is legal.”⁵⁵

Families that support the traditional understanding of marriage might reasonably be concerned about public school curriculum teaching their children that beliefs about traditional marriage amount to irrational prejudices. This concern involves an added dimension for families whose views on marriage are matters of religious conviction, especially when education officials refuse to notify parents and allow them to exclude their children from objectionable instruction.⁵⁶

Families that teach their children that marriage is a relationship between a man and a woman might also be concerned about policies potentially restricting the expression of that viewpoint in public schools. A

49. See Jennifer Skalka, *Ehrlich appointee fired over remark; Transit official equates gay lifestyle with deviancy*, BALT. SUN, June 16, 2006, at 1B.

50. *Id.*

51. *Id.*

52. For example, the duties of certain employees in county clerk offices often include issuing marriage licenses, officiating at civil weddings, and acting as witnesses; for religious employees, the legal recognition of same-sex unions can create conflicts with religious beliefs in fulfilling these duties. See Tony Perry, *Clerk reassigns workers who object to gay marriage*, L.A. TIMES, June 21, 2008, available at <http://articles.latimes.com/2008/jun/21/local/me-clerk21>.

53. Gay rights activists make no secret of their strategy to teach public school students about same-sex lifestyles. The Gay, Lesbian and Straight Education Network (“GLSEN”), for example, holds conferences for administrators and teachers that include workshops like “The Struggles and Triumphs of Including Homosexuality in a Middle School Curriculum,” “From Lesbos to Stonewall: Incorporating Sexuality into a World History Curriculum,” and “Early Childhood Educators: How to Decide Whether to Come Out at Work or Not.” Rod Dreher, *Banned in Boston: Better not complain about the gay agenda for Massachusetts Schools*, WKLY. STANDARD, July 3–10, 2000, at 16 (internal quotations omitted), available at http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=11094&R=13A12B8D. GLSEN’s goal, as explained by its Boston chapter leader, is to “challenge” the “hetero-centric culture that still prevails in our schools.” *Id.* at 16.

54. See *Parker v. Hurley*, 514 F.3d 87, 92–93 (1st Cir. 2008), cert. denied, 2008 WL 1926813 (Oct. 6, 2008); see also Tracy Jan, *Parents Rip School Over Gay Storybook*, BOSTON GLOBE, Apr. 20, 2006, at B1, available at http://www.boston.com/news/local/articles/2006/04/20/parents_rip_school_over_gay_storybook/.

55. Jan, *supra* note 54, at B1 (quoting Lexington Superintendent of Schools Paul Ash) (emphasis added), available at http://www.boston.com/news/local/articles/2006/04/20/parents_rip_school_over_gay_storybook/.

California law, for example, includes sexual orientation and gender identity among “protected classes” for purposes of the kinds of instruction, activities, and materials covered by nondiscrimination policies in California public schools.⁵⁷ The legislation passed despite predictions that “any teaching promoting traditional families would be discriminatory”⁵⁸ and students and teachers would be “silence[d]” from “the free expression of beliefs and opinions that run contrary to total and complete acceptance of all forms of sexual behavior.”⁵⁹

Although these types of education policies impose significant burdens on public school families who support the traditional understanding of marriage, they can be expected to become more common in states that consider traditional marriage laws to be a form of irrational prejudice.⁶⁰ For religious families, in particular, and for teachers who might be required to teach about homosexual relationships and same-sex marriage, these laws raise legitimate concerns about the ability to honor religious beliefs while participating in public school systems.

4. Use of the Bully Pulpit to Condemn Religious Institutions

In addition to excluding citizens with religious perspectives from government benefits and govern-

ment jobs, the state can also use its bully pulpit to condemn those who express disagreement with official state policies relating to same-sex unions.

Public officials in California provide several illustrations of this phenomenon. The San Francisco Board of Supervisors, for example, passed a resolution condemning a decision by Roman Catholic Church officials not to place children for adoptions with same-sex couples, even though the traditional understanding of marriage as a relationship between a man and a woman is a key tenet of the Catholic faith.⁶¹ City officials characterized the Church’s position as “ignorant,” “defamatory,” “insulting,” “discriminatory,” “unacceptable,” “callous,” “insensitive,” and “hateful,” and called on the local Bishop to “defy” Vatican officials on Catholic social teaching.⁶²

The San Francisco Board of Supervisors also passed a resolution condemning what it labeled a “right-wing Christian fundamentalist” ministry that holds religious youth rallies throughout the nation to discuss issues like sexuality. Days before the ministry held a rally in San Francisco, city officials condemned the religious event as “an act of provocation,” “unfortunate,” “alarming,” “anti-gay,” and “intolerant.”⁶³ One city official reportedly told protestors that the Christians were “loud,” “obnox-

56. See *Parker*, 514 F.3d at 90 (affirming trial court ruling dismissing lawsuit by parents, based on claims under U.S. Constitution, seeking notice of and right to exclude children from objectionable instruction), *cert. denied*, 2008 WL 1926813 (U.S. Oct. 6, 2008).

57. SENATE FLOOR ANALYSIS OF S.B. 777, SENATE RULES COMMITTEE, OFFICE OF SENATE FLOOR ANALYSIS 2 (Sept. 19, 2007) (internal quotations omitted), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_cfa_20070919_103650_sen_floor.html. See S.B. 777, 2007-2008 Reg. Sess. (Cal. 2007), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_bill_20071012_chaptered.pdf; see also EQUALITY CALIFORNIA, 2007 LEGISLATIVE SCORECARD (stating that SB 777 “[p]rohibits curriculum that is discriminatorily biased against LGBT people” (emphasis added)), available at <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026385> (follow “Legislation” hyperlink; then follow “2007” hyperlink under “Past Legislation”; then follow “Click here” hyperlink next to “for the 2007 Scorecard”).

58. SENATE FLOOR ANALYSIS OF S.B. 777, *supra* note 57, at 6 (quoting written comments from Capitol Resources Institute), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_cfa_20070919_103650_sen_floor.html

59. *Id.* (quoting written comments from California Family Council), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_cfa_20070919_103650_sen_floor.html.

60. See *supra* at 14 (discussing how legal recognition of same-sex unions—including same-sex marriage, civil unions, and domestic partnerships—amplifies burdens on religious liberty).

61. See CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (2003), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

ious,” and “disgusting” and “should get out of San Francisco.”⁶⁴ The *San Francisco Chronicle* noted the “irony” that the San Francisco Board of Supervisors would “warn[] that a Christian youth gathering could ‘negatively influence the politics of America’s most tolerant and progressive city.’”⁶⁵

California politicians at the state level have made similar use of the bully pulpit. In 2006, for example, the California Senate passed a resolution praising the Girl Scouts for their “proud history of inclusion and acceptance” and openness to members without regard to “sexual orientation.”⁶⁶ In contrast, a resolution introduced in the California Assembly that would have recognized the efforts of Boy Scouts who achieved the rank of Eagle failed to pass a committee vote⁶⁷—a powerful gay rights group had opposed the bill because it “honors an organization whose membership policies continue to discriminate on the basis of sexual orientation.”⁶⁸

Given that these cases in California occurred even before that state’s supreme court redefined

marriage to include same-sex unions, religious institutions that support traditional marriage can reasonably expect similar treatment in states that officially recognize same-sex unions.

B. Increased Civil Liability Under Nondiscrimination Laws for Those Who Believe that Marriage Is a Relationship Between a Man and a Woman

Redefining marriage to include same-sex unions will increase burdens on religious liberty under civil rights laws that prohibit private discrimination based on sexual orientation, marital status, and gender.⁶⁹ Civil rights laws often reach far beyond government funding restrictions and conditional tax exemptions; as illustrated below, private individuals and institutions can become subject to nondiscrimination requirements merely by opening a small business, operating a local charity, or offering professional services to the public. For this reason, even many people who may support same-sex marriage express serious reservations about the

62. Res. No. 168-06, City and County of Francisco (2006), available at http://www.thomasmore.org/downloads/sb_thomasmore/CityofSanFrancisco-Resolution.pdf. A federal judge reviewing the constitutionality of the City’s action admitted that the City’s “entreaty to the Archdiocese to defy [the Vatican’s] discriminatory directives” was “ostensibly an attempt to influence the general policies of a religious organization,” but nevertheless concluded, in dismissing an Establishment Clause challenge to the resolution, that the City’s action was “primarily secular” because it was “principally geared toward promoting an adoption policy rather than meddling with internal church affairs.” *Catholic League for Religious and Civil Rights v. San Francisco*, 464 F. Supp. 2d 938, 945-46 (N.D. Cal. 2006). The decision of the district court is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit, which heard oral arguments on July 16, 2008. See *Catholic League for Religious and Civil Rights v. San Francisco*, No. 06-17328 (9th Cir. argued July 16, 2008).
63. See Res. No. 180-06, City and County of San Francisco (2006), available at <http://www.sfgov.org/site/uploadedfiles/bdsupvrs/resolutions06/r0180-06.pdf>.
64. Joe Garofoli, *Evangelical teens rally in S.F.*, S.F. CHRON., Mar. 25, 2006, at A1 (internal quotations omitted) (discussing event organized by group called Battlecry for a Generation), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/03/25/MNG6OHU6RR1.DTL>.
65. Editorial, *Intolerant City*, S.F. CHRON., Mar. 28, 2006, at B6 (quoting city resolution (emphasis added)), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/03/28/EDGGAHUR4T1.DTL>.
66. S. Concurrent Res. 75, 2005-2006 Reg. Sess. (Cal. 2006), http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0051-0100/scr_75_bill_20060908_chaptered.pdf.
67. See Current Bill Status, Assemb. Concurrent Res. 155, 2005-2006 Reg. Sess. (Cal. 2006), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0151-0200/acr_155_bill_20060531_amended_asm.pdf.
68. Equality California, 2006 Legislation, 2006 Equality California-Opposed Legislation, <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4025853&ct=5196615> (last modified Apr. 16, 2008). The analysis of the bill prepared by the Assembly Committee on the Judiciary includes a litany of grievances against the Boy Scouts and explains that governments have started to deny the Boy Scouts public benefits because of their unwavering stance on homosexuality. See ASSEMBLY COMMITTEE ON JUDICIARY, ANALYSIS OF ASSEMB. CONCURRENT RES. 155 5-7 (Aug. 17, 2006), available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0151-0200/acr_155_cfa_20060816_170031_asm_comm.html; cf. *supra* note 32 and associated text (discussing Boy Scout cases).

dangers to liberty associated with nondiscrimination laws.⁷⁰

Although nondiscrimination laws can impose significant burdens on religious individuals and institutions, even in states that continue to define marriage as between one man and one woman, redefining marriage to include same-sex unions can reasonably be expected to amplify these burdens on religious liberties in at least two ways.

First, granting legal recognition to same-sex unions—whether in the form of domestic partnerships, civil unions, or same-sex marriage—creates new sets of circumstances that can trigger conflicts between religious beliefs and nondiscrimination laws. In many cases a person's sexual orientation is simply not relevant to the beliefs of individuals and institutions that support the traditional understanding of marriage and therefore presents no conflict under nondiscrimination laws. But officially licensed same-sex unions involve a public recognition of sexual union, which means they can make orientation relevant and impossible to ignore where religious beliefs prohibit expressing support for or facilitating openly homosexual *conduct*. As a result, the number of potential religious liberty conflicts stemming from the application of nondiscrimination

laws will increase significantly in states that grant legal recognition to same-sex unions.

Second, by eliminating distinctions based on sexual orientation in an institution as fundamental to the social order as civil marriage, same-sex marriage reinforces and strengthens the political and legal assumptions on which nondiscrimination laws are based. Although nondiscrimination policies preceded same-sex marriage in the three states that already have redefined marriage,⁷¹ it is fair to argue that same-sex marriage further entrenches social, political, and legal ideas about homosexuality in a way that would support the expansion of nondiscrimination laws where they already exist in some form, compel the rigid enforcement of those laws even in cases involving competing public policy interests, and discourage the accommodation of religious individuals and institutions that have conscientious objections to complying with those laws under certain circumstances. Furthermore, redefining marriage to include same-sex unions could also lead to the enactment of nondiscrimination laws in jurisdictions where they do not already exist, causing further conflicts for religious individuals and institutions.⁷²

The following brief summary of nondiscrimination cases illustrates how the legal recognition of

69. See, e.g., Chai R. Feldblum, *Moral Conflicts and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 12, at 125 (acknowledging that “civil rights laws can burden an individual’s belief liberty interest when the conduct demanded by these laws burdens an individual’s core beliefs”); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 12, at 60 (“Same-sex marriage brings us once again to this inherent conflict between the exercise of First Amendment rights and the government’s enforcement of a nondiscrimination policy penalizing discriminatory views.”). See also generally BECKET FUND ISSUE BRIEF ON SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS, available at www.becketfund.org (forthcoming Nov. 2008).
70. See Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1179 (2005) (“Libertarians who fervently support sexual autonomy, and who generally support equal access to marriage, may generally oppose legal restrictions on private discrimination.”); see generally David E. Bernstein, YOU CAN’T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003).
71. Cf. Posting of Eugene Volokh to volokh.com, http://www.volokh.com/archives/archive_2008_05_11-2008_05_17.shtml#1210877596 (May 15, 2008, 2:53 PM) (discussing “the tendency of some legislative decisions [like sexual orientation nondiscrimination laws] to affect future judicial decisions, even judicial decisions that cover territory considerably beyond the original statute,” like the California Supreme Court decision to create same-sex marriage).
72. See also Volokh, *supra* note 70, at 1182 (discussing concern that “a gay rights victory on government recognition of same-sex marriage [could] yield broader gay rights victories . . . as to private discrimination”); *id.* at 1183–93 (discussing various ways that same-sex marriage might lead to expansion of nondiscrimination laws); *id.* at 1178 n.65 (explaining that opponents of nondiscrimination laws “may understandably worry that shifts in political attitude could enable those laws to be enacted in those jurisdictions [that currently lack such laws] or at the federal level”).

same-sex unions threatens to increase burdens on religious liberty.

1. Charitable Services

Certain faith-based social service providers and charities that understand marriage as a relationship between a man and a woman could find themselves effectively shuttered by nondiscrimination laws. For example, Catholic Charities in Boston, Massachusetts, was forced to stop handling adoptions after a state law barring discrimination based on sexual orientation was applied through a licensing procedure to require the charity to place children in same-sex households despite the Catholic Church's religious objection to same-sex adoption.⁷³ Although Catholic Charities had traditionally handled some of the state's most difficult adoption cases—older children, sibling groups, and disabled children—state legislators refused to provide any accommodation for the charity to honor its religious beliefs.⁷⁴

Other social service providers called the loss of those adoption services a “shame” and even a “tragedy” for Massachusetts children, and indeed it was.⁷⁵ The religious mission of Catholic Charities also suffered because performing acts of service like helping children find adoptive homes is an important part of the Catholic religion.⁷⁶ In the end, Massachusetts elevated the right of homosexual persons to receive adoption services from every

agency in the state over the welfare interests of children and the religious freedoms of faith-based social service providers. Redefining marriage to include same-sex unions will only increase these types of conflicts between competing social values.⁷⁷

2. Church Facilities

Supporters of same-sex marriage often contend that religious institutions have nothing to fear from marriage redefinition because no church will be forced to perform a same-sex marriage ceremony.⁷⁸ But those who support the redefinition of marriage often ignore the plight of churches and other religious organizations under nondiscrimination laws. For example, although a church might not be forced to bless a same-sex marriage, sexual orientation nondiscrimination laws might force religious institutions to rent their facilities for same-sex weddings on the same terms they rent their facilities for traditional weddings.

A Christian ministry in New Jersey encountered this type of problem when it declined to rent one of its facilities for civil union ceremonies because of the ministry's religious beliefs about marriage.⁷⁹ Because the ministry had opened its facilities to the general public, opponents argued the ministry could not invoke its religious beliefs—“no matter how deeply held”—in limiting use of the facility for male-female weddings only.⁸⁰

73. Gallagher, *supra* note 12, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

74. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 27, at 24 (“The Massachusetts legislature refused to carve out a special rule for religious groups opposed to same-sex marriage.”).

75. Michael Levenson, *Workers Rush to Fill Void Left by Boston Agency's Decision*, BOSTON GLOBE, Mar. 11, 2006, at A4 (internal quotations omitted), available at http://www.boston.com/news/local/articles/2006/03/11/workers_rush_to_fill_void_left_by_boston_agencys_decision.

76. See, e.g., CATECHISM OF THE CATHOLIC CHURCH, No. 2447 (1993) (“The corporal works of mercy consist especially in feeding the hungry, sheltering the homeless, clothing the naked, visiting the sick and imprisoned, and burying the dead.”), available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a7.htm.

77. See *supra* at 14 (discussing how legal recognition of same-sex unions—including same-sex marriage, civil unions, and domestic partnerships—amplifies burdens on religious liberty).

78. See, e.g., *Kerrigan v. Dep't of Pub. Health*, No. 17716, 2008 WL 4530885, at *41 (Conn. Oct. 28, 2008) (dismissing concerns about religious freedom based on peremptory conclusion that “religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations”).

79. See *supra* at notes 36–37 and associated text.

The state of New Jersey has launched an investigation into whether the ministry violated a law prohibiting discrimination based on civil union status and, in the meantime, has stripped the ministry of the tax exemption for the disputed facility.⁸¹ Churches in states with same-sex marriage can expect an increase in these types of conflicts and, consequently, to spend more money on costly legal fees incurred in similar types of challenges.

3. Small Businesses

Nondiscrimination laws can create significant conflicts for small business owners when a customer requests some service that would violate the owners' religious beliefs.⁸² In New Mexico, for example, a family-owned photography business declined to photograph a same-sex "commitment ceremony" because of the owners' religious belief that marriage is a relationship between a man and a woman.⁸³ The New Mexico Human Rights Commission prosecuted the small business and required it to pay thousands of dollars in costs for violating a sexual orientation nondiscrimination law.⁸⁴ In states that redefine marriage to include same-sex unions, small-business owners will almost certainly encounter these types of costly dilemmas more often.

4. Married Student Housing and Religious Landlords

Religious landlords could encounter similar conflicts in states with same-sex marriage. For example, Yeshiva University, which operates under Orthodox Jewish auspices, had a policy of limiting its married housing facilities to students who were married.⁸⁵ However, because same-sex couples could not get married in New York, the state's high court ruled that Yeshiva violated a state law prohibiting sexual orientation discrimination in housing, even though the university's requirement was based on marital status and not sexual orientation.⁸⁶ Marital status nondiscrimination laws, of course, can create the same type of dilemma more directly, including for individual religious landlords who in some cases are already burdened by laws that force them to rent their property to unmarried heterosexual couples.⁸⁷ Redefining marriage to include same-sex unions would significantly increase the number of such conflicts.

5. Professional Services

Nondiscrimination laws protecting sexual orientation can also create significant burdens for professionals who support traditional marriage. In one

80. Hagerty, *supra* note 12 (summarizing argument of attorney for lesbian couples that "the pavilion is open to everyone—and therefore the [ministry] could no more refuse to accommodate the lesbians than a restaurant owner could refuse to serve a black man"), available at <http://www.npr.org/templates/story/story.php?storyId=91486340>.

81. See *supra* at notes 36–37 and associated text.

82. See Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 12, at 195 (explaining that conflicts between public accommodation laws protecting sexual orientation and religious liberty are more likely to occur in situations involving "small businesses" and "entrepreneurs" than "large and impersonal business enterprises").

83. Respondent's Brief and Closing Argument at 2, *Willock v. Elane Photography*, No. 06-12-20-0685 (N.M. Human Rights Comm'n filed Apr. 4, 2008); see *id.* at 5 (asserting that the business's "policy against photographing any images conveying the message that marriage consists of anything other than the union of one man and one woman" stems from owners' "sincerely held religious and philosophical beliefs").

84. *Willock v. Elane Photography*, No. 06-12-20-0685 (N.M. Human Rights Comm'n Mar. 9, 2008), available at <http://www.telladf.org/UserDocs/ElaneRuling.pdf>. The small business has challenged the decision of the Human Rights Commission in federal court. See Plaintiff's Verified Complaint for Injunctive and Declaratory Relief, *Elane Photography, Inc. v. Cordova*, No. 07-173, 2007 WL 4657057 (D.N.M. filed Feb. 20, 2007).

85. Stern, *Same-Sex Marriage and the Churches*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 27, at 26. See *id.* at 26–27.

86. *Levin v. Yeshiva University*, 96 N.Y.2d 484 (N.Y. 2001). Same-sex marriages were not then recognized in New York; in May 2008, however, the governor of New York directed all state agencies to recognize same-sex marriages from other states. See, e.g., Jeremy W. Peters, *New York to Back Same-Sex Unions From Elsewhere*, N.Y. TIMES, May 29, 2008, available at <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html>.

87. See Bernstein, *supra* note 70, at 121–130 (discussing conflicts individual religious landlords face under nondiscrimination laws).

case, two Christian doctors were sued under a sexual orientation nondiscrimination law for not conducting an artificial insemination for a woman in a lesbian relationship because of the doctors' religious beliefs. The doctors argued they should be exempt from the law where it would require them to violate their religious beliefs. But attorneys for the lesbian woman—who likened the doctors' conscientious objections to “religious sectarianism” exhibited in the Crusades, Inquisition, and disputes in the Middle East—argued that California law should not excuse doctors from providing services in cases that would require them to violate their beliefs.⁸⁸

The California Supreme Court denied any religious exemption for the doctors,⁸⁹ essentially confirming the view of the plaintiff's attorney that, “[w]hen [a] doctor is in her church, she can do religion, but not in the medical office.”⁹⁰ In states that

redefine marriage to include same-sex unions, conflicts like these will likely occur more frequently and judges and lawmakers will be less likely to recognize exemptions from nondiscrimination laws that force individuals to violate religious beliefs.

6. Sermons and other Speech about Homosexuality

In liberal democracies, censoring speech on controversial issues is usually considered to be beyond the pale. But Western-style democracies, under the guise of “hate speech” laws, have investigated, prosecuted, fined, restricted, and even sentenced to prison private individuals—including pastors—who have publicly expressed their beliefs about homosexuality.⁹¹ Civil libertarians, religious liberty advocates, and pastors share concerns about the possible development of similar speech restrictions in the United States.⁹²

88. Opening Brief on the Merits of Plaintiff and Real Party in Interest Guadalupe T. Benitez at 1-2, *North Coast Women's Care Medical Group v. Benitez*, No. S142892 (filed Sep. 20, 2006), available at <http://data.lambdalegal.org/pdf/legal/benitez/benitez-opening-brief.pdf>.

89. See *N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959, 962 (Cal. 2008) (“Do the rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, exempt a medical clinic's physicians from complying with the California Unruh Civil Rights Act's prohibition against discrimination based on a person's sexual orientation? Our answer is no.”)

90. Interview on Fox Hannity & Colmes with Jennifer Pizer, Counsel to Guadalupe T. Benitez (Feb. 18, 2003) (transcript on file with The Heritage Foundation).

91. In *Canada*, for example, the Human Rights Panel of Alberta ordered a pastor who wrote an op-ed in a newspaper expressing his views on homosexuality to pay \$5,000 for damages for pain and suffering, apologize to the person who accused him of hate speech, and stop expressing his biblical perspective about homosexuality. See *Decision on Remedy, Lund v. Boissin*, No. S2002/08/0137 (Human Rights Panel of Alberta May 30, 2008), available at http://www.albertahumanrights.ab.ca/Lund_Darren_Remedies053008.pdf. In Sweden, authorities attempted to go even further by sentencing a pastor to one month in jail for preaching a sermon about homosexuality; the pastor was found guilty of violating a law that makes it illegal to “express[] disrespect” toward homosexuals, see <http://www.akegreen.org> (last visited Oct. 5, 2008), although a Swedish appeals court later overturned the pastor's conviction, see BBC News, *Swedish anti-gay pastor acquitted*, Nov. 29, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4477502.stm>; see also Keith B. Richburg, *Swedish Hate-Speech Verdict Reversed; Sermon Condemning Homosexuals Ruled Not Covered by Law*, WASH. POST, Feb. 12, 2005, at A16, available at <http://www.washingtonpost.com/wp-dyn/articles/A17496-2005Feb11.html>. And in Ireland, a major news source reported that “[c]lergy and bishops who distribute the Vatican's latest publication describing homosexual activity as ‘evil’ could face prosecution under incitement to hatred legislation,” which allows a penalty of up to six months in jail for conviction. Liam Reid, *Legal warning to church on gay stance*, IRISH TIMES, Aug. 2, 2003, at 1.

92. See Alan Sears, *Commentary, Sirens' lure of foreign law*, WASH. TIMES, July 1, 2008, at A14 (discussing potential for foreign precedents to influence American law), available at <http://www.washingtontimes.com/news/2008/jul/01/sirens-lure-of-foreign-law>; Barbara Karkabi, *Hate-crimes legislation stirs pulpit and podium; Senate-bill controversy centers mostly on gender identity, sexual orientation*, HOUSTON CHRON., Sept. 1, 2007, at 1 (reporting concerns of conservative Christian pastors that federal hate crime bill “could criminalize preaching against issues including homosexuality[] [and] same-sex marriage”), available at http://www.chron.com/CDA/archives/archive.mpl?id=2007_4415659; James Dowd, *Baptist pastors slam hate crimes bill; Cohen says proposal would not affect free speech of ministers*, COMMERCIAL APPEAL, Aug. 15, 2007, at B1 (discussing concerns of pastors that federal hate crime bill could restrict the freedom to preach), available at <http://m.commercialappeal.com/news/2007/Aug/15/baptist-pastors-slam-hate-crimes-bill/>.

Gay rights advocates, dismissing such arguments,⁹³ contend that religious individuals in the United States have nothing to fear because First Amendment speech protections are more robust than in many European countries. But, to religious individuals and institutions committed to supporting the traditional understanding of marriage, these assurances can ring hollow for several reasons.

One reason is that homosexual activists have identified religion posing as an obstacle to full social support for homosexual lifestyles in the United States. “People often get their views [about homosexuality] from their religion,” says Cathy Renna, a former spokeswoman for the Gay and Lesbian Alliance Against Defamation (GLAAD), “so we don’t want the pulpit saying that being gay is wrong’.”⁹⁴

In another situation, an official with the Legal Marriage Alliance in the state of Washington told a reporter that, “if a newspaper writes that a given same-sex marriage wasn’t really a marriage, ‘it is certainly in the realm of possibility for someone to bring a (libel) suit, and quite possibly to be successful.’” An official with the Triangle Foundation, a prominent gay rights group in Michigan, agreed, stating “I would be sympathetic to some damages. They need to be slapped publicly.”⁹⁵

Sentiments like these, combined with recent trends in jurisprudence, including the U.S. Supreme Court’s recent practice of considering international law in interpreting the U.S. Constitution,⁹⁶ heighten concerns about the future of First Amendment protections for speech concerning homosexuality and same-sex marriage.⁹⁷

93. See, e.g., Keith B. Richburg & Alan Cooperman, *Swede’s Sermon on Gays: Bigotry or Free Speech?*, WASH. POST, Jan. 29, 2005, at A1, “Kevin Cathcart, executive director of the gay rights group Lambda Legal, said that religious conservatives in the United States were ‘trying to twist’ the Green case to their advantage, but that it was ‘not relevant to any actual debate about gay civil rights or the role of religion in the United States,’” available at <http://www.washingtonpost.com/ac2/wp-dyn/A45538-2005Jan28?language=printer>.
94. Marco R. della Cava, *Church calls acts ‘disordered,’ gays feel ‘blamed’*, USA TODAY, June 12, 2002, available at <http://www.usatoday.com/news/nation/2002/06/12/acov-usat.htm>. Renna also believes that religion is often “at the core” of why people “hate” gay and lesbians. *Id.*
95. David Benkof, *Why California gays shouldn’t celebrate state court ruling*, SEATTLE POST-INTELLIGENCER, May 20, 2008, http://seattlepi.nwsource.com/opinion/363878_califgays21.html. See also News Release, Wake Forest School of Law, Professor Shannon Gilreath to Deliver University’s Constitution Day Lecture: The Sexual Politics of the First Amendment (Sept. 15, 2008) (announcing private lecture by scholar who asserts that the “continuing invisibility of traditionally marginalized people [like gays] is most obvious in the absolutist interpretation of the First Amendment’s right to free speech” that has “amounted to protecting hate speech at the expense of the victim”), available at <http://law.wfu.edu/news/release/2008.09.15.2.php>.
96. See Edward Whelan, President, Ethics & Pub. Pol’y Ctr., Testimony before the House Judiciary Committee’s Constitution Subcommittee: The Appropriate Role of Foreign Judgments in the Interpretation of American Law (July 19, 2005) (discussing practice of certain justices of the U.S. Supreme Court to rely on the judgments, laws, and pronouncements of foreign institutions), available at http://www.eppc.org/publications/pubID.2399/pub_detail.asp; see also CHARLIES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 245 (2004) (explaining that “the consideration of materials from other constitutional democracies and their constitutional courts...would have implications for the development of the law in respect to...hate speech”); Sears, *supra* note 92, at A14 (discussing freedom to preach in Canada and Sweden and criticizing increasing reliance by American state and federal courts on foreign precedents), available at <http://www.washingtontimes.com/news/2008/jul/01/sirens-lure-of-foreign-law>.
97. See Adam Liptak, *Unlike Others, U.S. Defends Freedom to Offend in Speech*, N.Y. TIMES, June 12, 2008 (reporting that “[s]ome prominent legal scholars say the United States should reconsider its position on hate speech”), available at http://www.nytimes.com/2008/06/12/us/12hate.html?_r=1&pagewanted=print&oref=slogin; John M. Templeton, Jr., Op-Ed, *Freedom of religious speech; Some preachers deeply believe that homosexuality is a sin. What if ‘hate speech’ laws prosecute them for saying so?*, PITTSBURGH POST-GAZETTE, June 10, 2006, at B-7 (explaining that the freedom to preach in opposition to homosexual conduct or same-sex marriage “has already been seriously eroded abroad” and “trends in America are discouraging”), available at <http://www.post-gazette.com/pg/06161/697111-109.stm>.

C. The Closeting of Religion: Contempt for the Views of Religious Individuals and Institutions in the Public Square

Not all the burdens experienced by religious individuals and institutions that support the traditional understanding of marriage come from official sources. Even where government policies or non-discrimination laws do not result in the denial of government benefits or costly lawsuits, the mere existence of such laws and policies can invite private discrimination and foster contempt for individuals and institutions that openly express their belief that marriage is a relationship between a man and a woman.⁹⁸ As discussed below, private discrimination against those who support the traditional understanding of marriage manifests itself in many circumstances, including in private employment, professional licensing, academic endeavor, and political involvement.

I. Discrimination in Private Employment

Individuals who support traditional marriage may reasonably expect to face discrimination for their beliefs in their workplaces if their views come to be seen as irrational prejudice.

In one case, for example, a professional counselor in Georgia felt ethically obligated to recommend that a lesbian woman seeking counseling to

improve her relationship with another woman would be better served by a colleague who did not share the counselor's religious objection to same-sex relationships.⁹⁹ The counselor had no problem counseling homosexual clients and had previously counseled clients involved in same-sex relationships, but felt she could not counsel a client when the goal was "to repair or otherwise facilitate a same-sex relationship, because that goal is at odds with her religious principles."¹⁰⁰ After the lesbian woman complained of "homophobia," the counselor's employer suspended her without pay almost immediately and fired her soon thereafter.¹⁰¹ The counselor has filed a federal court lawsuit alleging discrimination based on her religious beliefs.¹⁰²

In another case, a Christian employee alleged he was fired by a large company "for refusing to sign a diversity policy requiring him to 'value' the beliefs of others, including gays."¹⁰³ Although the employee made clear he would respect his co-employees regardless of their "differing beliefs or behaviors,"¹⁰⁴ he explained he could not in good conscience "value homosexuality and any different religious beliefs."¹⁰⁵ "I think [my employer] should be able to expect certain behavior from people," the employee reasoned, "but not force their beliefs on people."¹⁰⁶ Ultimately, the employee was awarded compensation for his company's failure to

98. See Robert P. George, *What's Sex Got to Do with it? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 84 (2004) ("The law is a teacher."); cf. *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 963 (Mass. 2003) (stating that limiting marriage to a man and a woman "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior" and "not worthy of respect").

99. See Complaint at ¶¶ 1-2, 13-16, *Walden v. Ctr. for Disease Control and Prevention*, No. 1:08cv2278 (N.D. Ga. filed July 14, 2008), available at <http://www.telladf.org/UserDocs/WaldenComplaint.pdf>.

100. See *id.* at ¶¶ 19.

101. See *id.* at ¶¶ 13-28; Vere, *supra* note 44, available at <http://www.washtimes.com/news/2008/jul/31/gay-rights-vs-faithful>. The counselor's employer may have been a government actor in this case because it had entered into a contract with a federal agency to provide counseling services and the conduct in question occurred during the course of that contract. See Complaint at ¶¶ 7-8, 12-23, 32, *Walden v. Ctr. for Disease Control and Prevention*, No. 1:08cv2278 (N.D. Ga. filed July 14, 2008), available at <http://www.telladf.org/UserDocs/WaldenComplaint.pdf>. The counselor alleges her employer fired her at the urging of the federal agency, which had the express right, under its contract with the employer, to remove any of the employer's employees. See *id.* at ¶¶ 24-28. However, even if the counselor's employer is determined not to be a state actor, the employer could still be subject to potential civil liability under Title VII of the Civil Rights Act of 1964 for discrimination based on the employee's religious beliefs. See *id.* at ¶¶ 29-30, 65-71.

102. See *id.*

103. *Fired Christian Wins Discrimination Suit Against AT&T*, Newsmax.com, Apr. 6, 2004, available at <http://archive.newsmax.com/archives/articles/2004/4/6/141535.shtml>; see also Amy Fagan, *Worker opposed to gays wins suit*, WASH. TIMES, Apr. 7, 2004, at A1.

accommodate his religious beliefs, but not without the burden of filing a federal court lawsuit.¹⁰⁷

To the extent private actors take cues from changes in the law, these types of cases will only increase in number in states that redefine marriage by rejecting the traditional understanding of marriage as a form of irrational prejudice.

2. Moral Pressure in Professional Licensing

According to one scholar, future conflicts over professional licensing and accreditation standards are “certain.”¹⁰⁸ The professional bodies that license and establish standards for social workers, counselors, attorneys, doctors, and members of other helping professions might require applicants to condone same-sex relationships.¹⁰⁹ Conditioning licensing in this way would present serious problems for religious professionals who believe that marriage is a relationship between a man and a woman, and religious institutions seeking to operate accredited educational programs and clinics

could face similar conflicts. The redefinition of marriage to include same-sex unions would increase the intensity of such conflicts and make them more likely to occur.¹¹⁰

3. Hostility in the Academy

Those who take the traditional view of marriage can encounter hostility even in the academy, where esteem for free speech and thought are often proclaimed as cardinal virtues. For example, Gilbert Meilaender, a former professor at Oberlin College in Ohio, was vilified on campus after he joined a group of Christian and Jewish scholars in signing a statement about “the homosexual movement” that called for “a civil conversation about the kind of people we are and hope to be.”¹¹¹ Students called for a boycott of his classes, others labeled him a “super bigot,” some talked about bringing charges against him through the college’s judicial system, and a quarter of the faculty signed a letter calling his views “intellectually naive.”¹¹² Philip Turner, then dean of the

104. *Buonanno v. AT&T Broadband*, 313 F. Supp. 2d 1069, 1075 (D. Colo. 2004) (explaining that Buonanno “would not discriminate against or harass any person based on that person’s differing beliefs or behaviors” but “could not comply with the challenged language [of the diversity statement his company wanted him to sign] insofar as it apparently required him to ‘value’ the particular belief or behavior that was repudiated by Scripture”).
105. *Fired Christian Wins Discrimination Suit Against AT&T*, *supra* note 103, available at <http://archive.newsmax.com/archives/articles/2004/4/6/141535.shtml>. See also John A. Thain, *Specialists Finances Pondered*, WASH. POST, Apr. 7, 2004, at E2 (reporting that employee-plaintiff “said he is a Christian and loves all people regardless of their lifestyle but cannot value homosexuality and other religions”).
106. *Fired Christian Wins Discrimination Suit Against AT&T*, *supra* note 103, available at <http://archive.newsmax.com/archives/articles/2004/4/6/141535.shtml>.
107. See *Buonanno*, 313 F. Supp. 2d at 1086 (granting employee a total damage award of \$146,269).
108. Stern, *Gay Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 27, at 22.
109. *Id.* at 22–24. The National Association of Social Workers, for example, states that social workers may not discriminate based on sexual orientation and “should obtain education about and seek to understand the nature of social diversity and oppression with respect to” sexual orientation. National Association of Social Workers, Code of Ethics of the National Association of Social Workers, § 1.05 (revised 1999), available at <http://www.socialworkers.org/pubs/code/code.asp> (last visited Oct. 7, 2008).
110. In the same way that redefining marriage can entrench the political and legal assumptions underlying nondiscrimination laws, see *supra* at 14 (discussing how legal recognition of same-sex unions—including same-sex marriage, civil unions, and domestic partnerships—amplifies burdens on religious liberty), it is reasonable to expect that marriage redefinition could have similar effects on social attitudes generally, cf. Volokh, *supra* note 70, at 1184–89 (explaining how same-sex marriage can alter attitudes toward nondiscrimination laws).
111. The Ramsey Colloquium, *The Homosexual Movement*, FIRST THINGS, Mar. 1994, available at http://www.firstthings.com/article.php3?id_article=4429; see Carolyn J. Mooney, *Attack on Homosexuality Angers Divinity Students*, CHRON. HIGHER EDUC., May 11, 1994, at A38.
112. Gilbert Meilaender, *On Bringing One’s Life to a Point*, FIRST THINGS, Nov. 1994, available at http://www.firstthings.com/article.php3?id_article=4509.

Divinity School at Yale University, encountered similar outrage from students for signing the same statement,¹¹³ and another professor at a major university would not sign the statement in the first place “because it would jeopardize his grant applications to major foundations.”¹¹⁴ That such acts of hostility to religion might not violate any laws makes them no less opprobrious and redefining marriage will certainly make them more difficult to combat.

4. Contempt in Political Discourse

In political discourse about marriage, support by religious individuals and institutions for the traditional understanding of marriage is often treated with contempt. During a town hall meeting to discuss civil unions in California, for example, openly homosexual California Assemblywoman Christine Kehoe reportedly stated “she is amazed that there are still people today who allow their religious beliefs to influence their politics.”¹¹⁵ Former U.S. Senator Mark Dayton (D-MN) once told a crowd of gay-rights activists that supporters of traditional marriage were “the forces of bigotry and hatred” who “spew hatred and inhumanity.”¹¹⁶ And Senator Barack Obama (D-IL) has described attempts in California to limit marriage to male-female couples as “discriminatory” and “divisive.”¹¹⁷

Far from distancing themselves from such contempt for religion, advocates for gay and lesbian interests have endorsed it. Kevin Cathcart, an executive director at Lambda Legal, said that Senator Dayton’s speech was a “very, very strong statement” and he “couldn’t be happier.”¹¹⁸ Similarly, two

other individuals, a representative of a large gay-rights group and an openly homosexual state senator, recently told one reporter that “people who continue to act as if marriage is a union between a man and a woman should face being fined, fired and even jailed until they relent.”¹¹⁹

State policies that effectively prohibit or materially burden public expressions of support for the traditional understanding of marriage can reasonably be expected to contribute to this type of rhetoric and contempt for religion in the public square. Therefore, these burdens must be considered in any attempt to grant legal recognition to same-sex unions, including through the redefinition of marriage.

The Importance of Religious Freedom in a Liberal Democracy

In weighing the threats to religious liberty against the purported merits of same-sex marriage, lawmakers must fully understand society’s fundamental interest in protecting the right of all individuals to honor their consciences and practice their religious beliefs.

American principles concerning religious freedom can be traced back at least to the Declaration of Independence, which states the “self-evident” truth that all men are “endowed by their Creator” with certain “unalienable” rights. This foundational precept of the American political order reflects the understanding that human rights are grounded in a reality that transcends the authority of the state and,

113. Mooney, *supra* note 111, at A38 (“Students who belong to a gay-rights coalition at the divinity school were outraged.”).

114. Richard Neuhaus, *While we’re at it: religion and society*, FIRST THINGS, Oct. 2000, available at http://www.firstthings.com/article.php3?id_article=2662.

115. Sally Thomsin, *Until We Get Civil Unions We’ll Never Get Marriage: Hillcrest Town Hall Meeting 2001*, S.D. NEWS NOTES, <http://www.sdnewsnotes.com/ed/articles/2001/1001st.htm> (reporting what Kehoe said but not quoting her).

116. Bob von Sternberg, *Dayton attacks proposed ban on gay marriage*, STAR TRIB., Feb. 29, 2004, at 1B.

117. *Letter from Senator Barack Obama to Alice* (Mar. 24, 2008), in ALICE B. TOKLAS LESBIAN, GAY, BISEXUAL, TRANSGENDER DEMOCRATIC CLUB, ALICE REPORTS, *supra* note 25, <http://www.alicebtoklas.org/abt/newsletters/newsletter0807.htm>; see Wildermuth, *supra* note 25, at A1 (quoting letter from Barack Obama, Senator, U.S. Senate, to the Alice B. Toklas Lesbian Gay Bisexual Transgender Democratic Club of San Francisco), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/01/MN8J111731.DTL>.

118. Sternberg, *supra* note 116, at 1B.

119. Benkof, *supra* note 95 (reporting what these individuals told him but not quoting them), available at http://seattlepi.nwsources.com/opinion/363878_califgays21.html.

as a consequence, the state must respect and protect those rights. This is the basis for our system of limited government and the moral claims we rightly levy against the state when it encroaches upon basic human rights.

A society weakens this principle of limited government when it burdens the human right to religious freedom. Nothing is more integral to being human than one's convictions about the most fundamental questions of life; indeed, the duty to honor the dictates of one's conscience "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."¹²⁰ And precisely because no right is more fundamental and less alienable than the right to observe one's religious convictions, the state cannot violate the right to religious freedom without also undermining the basis for a limited government that is subject to moral claims by its citizens. Respect for religious freedom is therefore a condition for respect of all other rights, whether human rights rooted in an authority that transcends the state or civil rights that spring directly from the state itself.

This is why religious freedom is often called America's "first freedom."¹²¹ Upon the foundation of religious freedom all other freedoms rest, and this is true no matter the substance of one's convictions or religious beliefs. America's long tradition of protecting religious freedom, even in cases of great cost to society, reflects the important role religious freedom plays in securing the freedoms of all citizens, including homosexual persons, to be free from undue coercion by the state. The religious liberty harms associated with same-sex marriage must be assessed in the light of these principles.

In considering the threat to religious liberty associated with same-sex marriage, it is important to realize that none of the religious liberty cases discussed in this paper involve a choice between protecting reli-

gious beliefs and allowing homosexual persons to live in sexual unions—homosexual relationships are legal and protected by law throughout America.¹²² Instead, in most cases, the choice is between protecting the fundamental human right to religious freedom, on the one hand, and *mandating* that all individuals and institutions in society, including the government, accommodate homosexual preferences, on the other hand. Given the deep interest that citizens of all faiths and no faith at all have in protecting the right to honor the dictates of one's conscience even when others, or even a majority of others, would reach a different conclusion, those who would suppress religious liberty to advance protections for individual sexual preferences bear a heavy burden in making their case.

Conclusion

Judicial decisions redefining marriage to include same-sex unions are precipitating a coming storm of social and legal conflicts that threaten to severely burden the freedom to openly express support for marriage as a relationship between a man and a woman. The threats to religious liberty associated with same-sex marriage are acknowledged by both those who support and those who oppose redefining marriage.

Decisions to redefine marriage to include same-sex unions rest on the assumption that traditional marriage laws embody unacceptable prejudices against homosexual persons. This understanding leads society to regard support for confining marriage to the relationship between a man and a woman as a form of irrational prejudice that should be purged from society.

Therefore, in states with same-sex marriage, individuals and institutions that believe marriage is a relationship between a man and a woman can expect to encounter an increasing number of chal-

120. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 34, at 121 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in THE SUPREME COURT ON CHURCH AND STATE 18–19 (Robert A. Alley ed., 1988)).

121. See, e.g., U.S. Dep't of Justice, DOJ Launches Initiative to Protect Religious Freedom: The First Freedom Project (explaining that religious liberty "is a fundamental freedom on which so many of our other freedoms rest"), <http://www.firstfreedom.gov> (last visited Oct. 7, 2008).

122. See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (concluding that state laws criminalizing sodomy violate U.S. Constitution).

lenges to their freedom to express their beliefs and live by them inside and outside of their places of worship. These challenges will come from the state itself, from increased civil liability under nondiscrimination laws, and from private actors.

America's long tradition of supporting religious freedom requires a full accounting for the threats to religious liberty associated with same-sex marriage. Because religious freedom is a precondition for a civil and free society, citizens of all faiths—and no faith at all—have a deep interest in protecting the rights of others to honor the dictates of their conscience even when others, or even a majority of others, would reach a different conclusion.

Preserving marriage as a relationship between a man and woman is the most effective way to eliminate the religious liberty harms associated with granting legal recognition to same-sex unions. At a minimum, however, lawmakers should honor America's rich tradition of religious liberty by ensuring that exemptions exist for cases where changes in marriage policies and nondiscrimination laws would force people to violate their religious beliefs.¹²³

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123. See generally Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 12, at 77–102 (stating that “legislative accommodations in medicine offer a number of approaches for resolving the clash between those who want a service and those who have moral objections to performing it”).