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MARRIAGE AND THE RELIGION CLAUSES

ELIJAH L. MILNE

INTRODUCTION

Both marriage and religion have commonly given rise to differing degrees of conflict and controversy in various settings. Indeed, many conflicts in marriages are sometimes over religion, and many controversies in religions are sometimes about marriage. It should come as no surprise then that the contemporary debate over same-sex marriage and religious liberty has effectually divided households and sanctuaries throughout the nation.

While it is not the purpose of this Article to stoke the flames of controversy, this Article does attempt to explain and clarify a handful of narrow topics in the modern debate over same-sex marriage which concern the intersection of religion with marriage. Due to the vast array of issues involved in this debate, however, the topics addressed in this Article are only considered in the context of the Religion Clauses of the First Amendment to the United States Constitution. These topics include such things as the historical relationship of marriage and religion, the legality of defining marriage as the union of one man and one woman, the propriety of religious leaders solemnizing civil marriages, the possible effects on religious liberty of either legalizing or prohibiting same-sex marriage, and the continuing significance of marriage for families and religions of all stripes.

The author thanks Professor Kent Greenawalt, the participants in his Seminar on Church and State at Columbia Law School, and Professor Joel A. Nichols for reviewing and commenting on previous drafts of this Article. Thanks also to Megan—for everything.

1 U.S. CONST. amend. I.
2 This Article takes no position on the advisability or merits of either banning or embracing same-sex marriage. Nor does its discussion of the legality of same-sex unions address arguments beyond those arising out of the Religion Clauses of the First Amendment. Rather, this Article only addresses the legality of same-sex marriages under the Religion Clauses.
The layout of this Article in addressing these topics is as follows: First, Part I chronicles the origins and history of marriage in America. Next, Part II explores whether defining marriage to be the union of a man and a woman constitutes an unlawful establishment of religion. Part III then addresses questions involving the religious solemnization of marriage and the possible effects on religious liberty of legalizing same-sex marriage. Part IV analyzes whether refusing to recognize same-sex marriages unlawfully impairs religious liberty. And, finally, Part V provides brief remarks on the continuing significance of marriage for families and religions in America.

I. CHRONICLING MARRIAGE

Marriage is ancient. Exactly when it began is unknown. It seems to predate all existent civilizations, religions, and political systems. It may even be older than mankind. Although its nature has often varied, for more than a millennium western civilizations have understood it primarily to be the union of one man and one woman as husband and wife.

Intimate same-sex relationships have also existed throughout the world in various forms, including marriage, since time immemorial. There is, however, little evidence that same-sex marriages were ever abundant in the West during the last

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3 The brief historical overview of marriage outlined in this Article is, of necessity, somewhat simplistic. For a more thorough and detailed history of marriage in both England and the United States, see generally GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1904) (three volumes).

4 See STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 24 (2006) (noting that, with only one known exception, “marriage has been, in one form or another, a universal social institution throughout recorded history”).


7 See COONTZ, supra note 4, at 27, 31; ESKRIDGE, supra note 6, at 17–35; RITA J. SIMON & HOWARD ALTSTEIN, GLOBAL PERSPECTIVES ON SOCIAL ISSUES: MARRIAGE AND DIVORCE 13 (2003).
1,000 years or so. Instead, the evidence suggests that, beginning in the first two or four centuries of this era and continuing until relatively recently, western societies steadily became more intolerant of intimate same-sex relations. And by the thirteenth century, Europe as a whole was quite decisively opposed to all homosexual relations.

The growth and spread of Christianity over the last two millennia no doubt contributed to this state of antipathy towards sexual diversity. Christians considered homosexual intimacy to be sinful and unnatural. Many also considered heterosexual intimacy to be sinful, especially in cases of adultery, fornication, incest, polygamy, and prevention of conception.

Although marriage has had religious significance for many people throughout time, it was not until the thirteenth century of the present era that the Catholic Church formally declared monogamous Christian marriages to be one of seven sanctifying symbolic sacraments. As a sacrament, marriage became subjected to the Church’s legal jurisdiction and regulation. Consequently, the Church declared that any marriage entered into without the Church’s blessing was improper.

During the Protestant Reformation of the sixteenth and seventeenth centuries, religious reformers rejected the Catholic view of marriage as a sacrament, although they still maintained

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8 ESKRIDGE, supra note 6; SIMON & ALTSTEIN, supra note 7; see COONTZ, supra note 4, at 28 (“Throughout history and across the globe the huge majority of marriages have been between heterosexuals, even in societies where same-sex marriages have the same legitimacy as heterosexual marriages.”).
9 ESKRIDGE, supra note 6, at 23–24.
10 Id. at 35–36; SIMON & ALTSTEIN, supra note 7.
11 ESKRIDGE, supra note 6, at 24–25, 35–37.
12 Id. at 35; E. J. GRAFF, WHAT IS MARRIAGE FOR? 53, 59–63 (1999); JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 4, 18–19 (1997).
13 See GRAFF, supra note 12; WITTE, supra note 12, at 4, 18–22, 27.
14 WITTE, supra note 12, at 3–4, 22–23, 26–30; WESTERMARCK, supra note 5, at 421–30 (discussing the “religious character” of marriage in different traditions); see GRAFF, supra note 12, at 196. The belief that marriage is a sacrament may have found expression in Christianity long before the thirteenth century. See WESTERMARCK, supra note 5, at 427 (noting the Latin Vulgate’s rendition of St. Paul’s words in Ephesians 5:32 about marriage, “[s]acramentum hoc magnum est”). Compare Ephesians 5:32 (Wycliffe) (“This sacrament is great . . . .”), with Ephesians 5:32 (King James) (interpreting this same phrase as “[t]his is a great mystery”).
15 WITTE, supra note 12, at 3–4, 23, 30–36.
16 WESTERMARCK, supra note 5, at 428.
that marriage was a divinely appointed institution. As John Witte Jr. has explained, Lutherans considered marriage to be an earthly and social construct that was largely under the control of the state—rather than of the church and its courts. Calvinists viewed marriage as a covenant needing both religious and state regulation. And Anglicans saw marriage as a "little commonwealth" that was under the authority of the church and its ecclesiastical courts—both of which were, in turn, subordinate to the English Crown.

This latter view of marriage, which Witte refers to as the Anglican commonwealth model, eventually became part of the English common law. It considered marriage to be a part of a natural and divine system of government, wherein the English King was superior to the established Church of England, the Church was superior to individual households, husbands—as heads of household—were superior to their wives, and parents were superior to their children. A husband's legal supremacy over his wife and children was a product of the common-law doctrine of coverture, pursuant to which a wife's rights, body, name, and possessions became and were subsumed into those of her husband. As Nancy F. Cott has explained, coverture "turned the married pair legally into one person—the husband." Although England's American colonies consisted of numerous religious dissenters opposed to the Anglican faith, each of whom also had their own views about the nature of marriage, all of the colonies eventually adopted the common law of their mother country, including its marriage laws—like coverture.

17 Id.; WITTE, supra note 12, at 4–5, 42–44.
18 WITTE, supra note 12, at 4–6, 48–53; see SIMON & ALTSTEIN, supra note 7, at 7.
19 WITTE, supra note 12, at 5, 7–8, 94–100.
20 Id. at 5, 8–10, 165–79.
22 WITTE, supra note 12, at 9, 131–32, 165–76.
23 COTT, supra note 6, at 11–12.
24 Id. at 11; see COONTZ, supra note 4, at 142 ("[A husband] could force sex upon [his wife], beat her, and imprison her in the family home, while . . . she . . . endowed him with all her worldly goods.").
25 Charles P. Kindregan, Jr., Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History, 38 FAM. L.Q. 427, 430 (2004); see NANCY D. POLIKOFF,
Unlike England, however, the predominantly Protestant colonies in America generally did not create ecclesiastical courts to oversee sexual and marital matters, even though they continued to consider marriage to be a divine institution.26 For this reason, civil authorities typically had greater direct rein over sexual and marital matters in America than was the case in England.27 And while the clergy regularly continued to perform marriages in the colonies, the state maintained the right to oversee all marital, sexual, and familial affairs.28 The hierarchical structure of English government and marriage gradually changed.29 Because of the revolutions of 1640 to 1689 in England and the subsequent dawn of the Enlightenment throughout the West, English conceptions of marriage and government slowly became more democratic on both sides of the Atlantic.30 For Enlightenment thinkers like John Locke, government was a voluntary social contract and marriage was a voluntary familial one.31 Although the contractual nature of marriage had long been recognized, proponents of the Enlightenment declared the essence of marriage to be contractual, rather than sacramental, covenantal, biblical, or patriarchal.32 According to this “contractarian” model of marriage, people who entered into a marital contract did so freely as equal individuals, with full power to negotiate its terms and the unbridled right to rescind it if they later so desired.33 The state, upon petition of either or both of the parties, could only enforce the contract’s terms.34

27 Estin, supra note 26.
29 WITTE, supra note 12, at 133–34.
30 COTT, supra note 6, at 14; WITTE, supra note 12, at 9–11, 130–34, 176, 196–97.
31 WITTE, supra note 12, at 186–93.
32 See COTT, supra note 6, at 11; WITTE, supra note 12, at 9–11, 196–97.
33 WITTE, supra note 12, at 11, 188–93.
34 COONTZ, supra note 4, at 146–47; WITTE, supra note 12, at 10–11, 188–93, 196–97.
In time, these ideas of the Enlightenment—emphasizing liberty, equality, individuality, reason, and freedom of contract—revolutionized the nature of marriage and family life in America. More immediately, however, they revolutionized America itself. Not only did they serve as the moral justification for waging the Revolutionary War against England, but they also provided the philosophical underpinnings for the new nation's founding documents, including the Declaration of Independence, the Articles of Confederation, and the United States Constitution.

Although one of the Constitution's stated objectives is to "insure domestic Tranquility," this provision obviously has little—if anything—to do with household notions of domesticity, such as marriage and divorce. In fact, the Constitution generally reserves to the several states the right to regulate marriage and family matters. Questions of marriage without the jurisdiction of the states, however, are entirely different. The regulation of marriage and divorce within the country's territories, for instance, are subject to Congress's exclusive jurisdiction. It was Congress's exercise of this right to regulate marital affairs within the territories during the nineteenth century that ultimately gave rise to the nation's first widespread debate over the intersection of marriage, religion, and the Constitution.

Intent on quashing the religious practice of Mormon polygamy in the western territories, Congress passed the nation's first federal statute outlawing polygamy in 1862. Efforts to

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35 COONTZ, supra note 4, at 145–47; COTT, supra note 6, at 14–17.
36 COTT, supra note 6, at 14–16.
38 U.S. CONST. pmbl.
39 See id. amend. X ("The powers not delegated to the United States . . . are reserved to the States . . . ").
40 See id. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ").
41 Elijah L. Milne, Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion, 28 W. NEW ENG. L. REV. 257, 265–66 (2006); see Morrill Anti-Bigamy Act of July 1, 1862, ch. 126, 12 Stat. 501 (1862) (repealed 1978). It may be noted that the Morrill Anti-Bigamy Act appears to fall squarely within that provision of the Constitution which prohibits Congress from passing any "Bill of Attainder or ex post facto Law." U.S. CONST. art.
enforce this anti-polygamy law in what was then the territory of Utah eventually led to the United States Supreme Court case of Reynolds v. United States—one of the Court’s earliest published opinions on freedom of religion. Although acknowledging that “religious freedom is guaranteed everywhere throughout the United States,” the Court in Reynolds concluded that Congress is only deprived of power under the Constitution to regulate mere opinions, but not of power to control actions. In addition, the Court also found that marriage is, “in most civilized nations, a civil contract, and usually regulated by law.” Given this state of law and fact, together with the Court’s views on the “odious” nature of polygamy, the Court did not hesitate to sustain the statute at issue in Reynolds.

I, § 9, cl. 3; see L. Rex Sears, Punishing the Saints for Their “Peculiar Institution”: Congress on the Constitutional Dilemmas, 2001 UTAH L. REV. 581, 606-07 (2001) (observing the same). A bill of attainder is a "legislative act prescribing [capital] punishment, without a trial" for a person guilty of a high offense. BLACK'S LAW DICTIONARY 188 (9th ed. 2009). Similar to a bill of attainder is a bill of pains and penalties, the only difference between the two being that the latter "prescribes punishment less severe than capital punishment." Id. at 189. The Constitution’s ban on bills of attainder has been interpreted as extending to bills of pains and penalties. Cummings v. Missouri, 71 U.S. 277, 323 (1866). A bill of attainder may, but need not, also constitute an ex post facto law. Carrell v. Texas, 529 U.S. 513, 536-37 (2000). An ex post facto law is one “that impossibly applies retroactively, esp. in a way that negatively affects a person’s rights, as by criminalizing an action that was legal when it was committed.” BLACK'S LAW DICTIONARY, supra, at 661. To the extent the Morrill Anti-Bigamy Act sought to punish—or had the effect of punishing—individuals who may have entered into a polygamous relationship prior to the date the Morrill Anti-Bigamy Act was passed, it could be seen as an ex post facto law since there were no previously existing federal anti-polygamy laws in place. And to the extent it directly targeted Mormons—on its face or as applied—it may have been a bill of pains and penalties too. See §§ 2–3, 12 Stat. at 501 (singling out “spiritual marriage,” dissolving The Church of Jesus Christ of Latter-day Saints, and seeking to have that organization’s real property escheat to the United States). For additional evidence that Congress did in fact intend its anti-polygamy legislation primarily to target Mormons and that it had the effect of so doing, see Milne, supra, at 265–71.

42 98 U.S. 145 (1878). The Court’s opinion in Watson v. Jones, 80 U.S. 679 (1871), a church property case decided under federal common law, concerns religious freedom and predates Reynolds.

43 Reynolds, 98 U.S. at 162, 164, 166.

44 Id. at 165 (emphasis added). Apparently included among the Court’s conception of “civilized nations” were “the northern and western nations of Europe.” Id. at 164. Expressly excluded from this category, however, were “Asiatic and . . . African people.” Id.

45 Id. at 164, 166.
As emphasis on the contractual nature of marriage continued to grow unabated throughout the nineteenth century, both before and after Reynolds, many prior conceptions of marriage were gradually modified and discarded. Common law doctrines associated with marriage, such as coverture, became increasingly distasteful. Notions of marriage legally merging two people into one became less palatable. Beliefs that a person’s individuality and property remained unchanged and unchecked following marriage became more widespread. And when the nineteenth century finally ended, “Married Women’s Property Acts” abolishing coverture and allowing wives to control their own separate property were firmly in place throughout the country.

As America progressed into the twentieth century, the momentum with which the “contractarian” model of marriage garnered widespread acceptance and support continued to accelerate. Because this model envisioned marriage as an egalitarian partnership that individuals voluntarily created for the purpose of satisfying their unique wants and desires, many Americans began to believe that marital partners should be permitted to dissolve their union if, for whatever reason, they were no longer satisfied with their contractual relationship. Consequently, as dissatisfaction with (in) marriages seemingly became more prevalent in the United States, prenuptial and postnuptial agreements proliferated, no-fault divorce laws multiplied, and the nation’s divorce rate skyrocketed.

Americans did not only flock to exit marriage. Increasingly, they also avoided entering into it altogether, choosing instead to cohabit under living arrangements devoid of marital trappings. As the stability, durability, and popularity of marriage waned,

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47 Id.
48 Id. at 10–11.
50 See Witte, supra note 12, at 10–12.
51 Id. at 211–13; see Lee Walzer, Marriage on Trial: A Handbook with Cases, Laws, and Documents 32 (2005).
notions of individuality, autonomy, and privacy correspondingly waxed more sacrosanct. This changing reality also found expression in United States Supreme Court decisions. In a series of opinions handed down during the latter twentieth century and extending somewhat into the twenty-first, the Court established and defined a constitutional right to privacy involving matters of marriage and sexuality. In doing so, the Court consistently reaffirmed the inviolability of individual liberty while invalidating infringements of it, including bans on contraceptives, abortions, interracial marriages, and sodomy.53

Encouraged by these changing legal and societal norms, people across the country started to express their sexual preferences more openly.54 As they did so, however, intolerance and discrimination frequently followed. Consequently, when police raided a gay bar at the Stonewall Inn in New York City's Greenwich Village during the summer of 1969, a long-suppressed community protested, riots ensued, and the gay-liberation movement began.55

Efforts to secure the legal recognition of gay rights in America have, from the beginning, been fraught with opposition. When, for instance, Hawaii appeared during the 1990s to be on the cusp of becoming the first state to legalize same-sex marriages, Congress quickly responded by passing the federal Defense of Marriage Act (DOMA).56 For purposes of federal law, DOMA defines marriage as "a legal union between one man and one woman as husband and wife."57 It similarly defines spouse as

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54 See ESKRIDGE, supra note 6, at 42–46; WALZER, supra note 51, at 44–45.

55 See ESKRIDGE, supra note 6, at 44–45; WALZER, supra note 51, at 45. The Mattachine Society is said to be "the first public gay organization of the contemporary social movement." MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS 14 (2002).


“a person of the opposite sex who is a husband or a wife.” In order to prevent a state from having to recognize a same-sex marriage performed elsewhere, DOMA also provides that states may refuse “to give effect to any public act, record, or judicial proceeding of any other State... respecting a relationship between persons of the same sex.”

Following DOMA’s lead, states throughout the country began to amend their respective constitutions and promulgate legislation prohibiting the recognition and performance of same-sex marriages within their jurisdictions. By January 2010, twenty-nine states reportedly had provisions in their constitutions banning same-sex marriages, while an additional twelve others relied upon legislation alone for this same purpose. Notwithstanding these efforts to thwart the spread of same-sex marriages, proponents of gay and lesbian rights have successfully secured the right to marry a person of the same-sex in Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia. They have also

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60 WALZER, supra note 51, at 47. Efforts were also made during the first decade of the twenty-first century to amend the federal Constitution so as to uniformly preserve the “traditional” definition of marriage across the country as being the union of one man and one woman. See id. at 48.

61 Statewide Marriage Prohibitions, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009(1).pdf (last updated Jan. 13, 2010). This report lists the following twenty-nine states as having provisions in their constitutions limiting marriage to one man and one woman: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Kansas, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. Id. In addition to these twenty-nine states, this report lists the following twelve states as also having laws restricting marriage to one man and one woman: Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming. Id. On May 8, 2012, the citizens of North Carolina also elected to add a provision to their state’s constitution banning same-sex marriage. Campbell Robertson, Ban on Gay Marriage Passes in North Carolina, N.Y. TIMES, May 9, 2012, at A15.

62 HUMAN RIGHTS CAMPAIGN FOUND., EQUALITY FROM STATE TO STATE 2010: A REVIEW OF STATE LEGISLATION IN 2010 AFFECTING THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMUNITY, AND A LOOK AHEAD TO 2011 13 (2011). These
procured legal recognition in Maryland of same-sex marriages performed in other jurisdictions.\textsuperscript{63} And they have won rights for same-sex couples equivalent to those of married persons in California, Nevada, New Jersey, Oregon, and Washington.\textsuperscript{64} Although people of faith are found on both sides of the modern debate over legalizing same-sex marriages, religious conservatives are frequently seen as the primary opponents of efforts to legally recognize same-sex unions in America.\textsuperscript{65} Many of those in this latter group who oppose same-sex marriage do so as a result of their religious conviction that homosexuality is sinful and that sexual relations are appropriate only between a man and a woman who are joined together in marriage.\textsuperscript{66} Given this reality, much of the contemporary debate over same-sex marriage increasingly seems to touch on matters involving religion and religious liberty.


\textsuperscript{64} HUMAN RIGHTS CAMPAIGN FOUND., supra note 62. Some marriage-like rights have also been awarded to same-sex couples in Colorado, Hawaii, Maine, Maryland, Rhode Island, and Wisconsin. Id.

\textsuperscript{65} See, e.g., Patricia A. Cain, Contextualizing Varnum v. Brien: A “Moment” in History, 13 J. GENDER RACE & JUST. 27, 47-48 (2009) (“There is a high correlation between religious beliefs and opposition to same-sex marriage. People who are very religious find it difficult to separate civil marriage from religious marriage.”) (footnotes omitted).

II. DEFINING MARRIAGE

The legal preservation of the so-called "traditional" meaning of marriage, which defines marriage as the union of only one man and one woman, is considered by many people to be an unlawful establishment of religion in contravention of the intent of the First Amendment of the United States Constitution. The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In addition to restricting the powers of Congress, the two clauses comprising this provision—referred to respectively as the Establishment Clause and the Free Exercise Clause—have also been construed as applying equally to all other branches and systems of government in the United States, including state governments.

Claims that legally restricting marriage to its conventional definition unlawfully establishes religion in contravention of the Establishment Clause of the First Amendment are often based upon the fact that this definition conforms to Christian conceptions of marriage. The historical influence of Christianity in shaping marital norms and forms throughout the United States is well documented and generally undisputed. Given the great diversity of religions and opinions in American society today, continuing to legally define marriage in accordance with customary Christian teachings is seen by many people as being a means of improperly exalting and imposing the religious

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68 U.S. Const. amend. I.

69 See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the First Amendment to the states); see also Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 590 (1989) ("[N]o government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience.").


71 See, e.g., COTT, supra note 6, at 9–23; supra text accompanying notes 10–26.
preferences of one group over and upon all others. This, according to such people, is inconsistent with both the spirit and the letter of the Establishment Clause.

Regardless of what the "original intent" of the Establishment Clause may have once been, the United States Supreme Court has repeatedly interpreted it as erecting "a wall of separation between Church and State." This wall, however, has not been rendered completely impregnable. Given that a certain degree of interaction between church and state is generally considered inevitable, the Court has declared that the Establishment Clause does not mandate absolute separation between government and religion. With that said, the precise amount of separation that the Establishment Clause does require has not been—and probably cannot ever be—conclusively determined. As a result, the Court has simply provided some "helpful signposts" to guide those who may seek to chart the difficult course of church-and-state (ir)relations. Included among the markers that the Court has given to indicate the constitutionality of a statute under the Establishment Clause are inquiries into whether the statute has a "secular... purpose," whether its principal or primary effect "neither advances nor inhibits religion," and whether it fosters "an excessive government entanglement with religion." The general principle underlying each of these questions often seems to be the need to maintain governmental "neutrality" between religions and with respect to believers and non-believers.

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72 See supra note 67.
74 See Zorach v. Clauson, 343 U.S. 306, 312–14 (1952). But see Bd. of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting) (arguing that the Court should "keep the wall of separation between church and state high and impregnable").
77 Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) ("the factors identified in Lemon serve as "no more than helpful signposts" (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).
78 Lemon, 403 U.S. at 612–13 (quoting Walz, 397 U.S. at 674) (citations omitted).
79 See Gillette v. United States, 401 U.S. 437, 449 (1971) ("The purpose of ensuring governmental neutrality in matters of religion" is "perhaps the central purpose of the Establishment Clause."); Walz, 397 U.S. at 669–70 (mandating
Although each of these principles and "signposts" are relevant to the present discussion, they shall be addressed in greater detail at later points throughout this Article. For now, observe that other factors may also be relevant to the issue at hand, such as the relative antiquity and ubiquity of sex-based limitations on marriage in American history. Male-female marriage was the general legal standard in America long before the Establishment Clause came into being. And it continued to be so until about nine years ago, when Massachusetts became the first state in the country to authorize the performance of same-sex marriages. While the longevity of a practice alone is rarely sufficient to establish its constitutionality, the fact that legally limiting marriage to persons of the opposite sex predates the Establishment Clause and has been widespread throughout the nation's history "is not something to be lightly cast aside." For as Justice Holmes observed nine decades ago, "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." This is undoubtedly no less true with respect to the First Amendment, which is, in any event, only rendered applicable to the states via the Fourteenth Amendment.

Reliance upon history, however, may be a two-edged sword. If, for instance, the argument is that conventional sex-based limitations on marriage establish religion because they historically conform to and are a product of Christian theology and teachings, then relying upon the history of marriage may

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See COTT, supra note 6, at 9–23.

See supra notes 56–64 and accompanying text.

See Walz, 397 U.S. at 678 ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside."); see alsoCnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 602–05 (1989).


See Walz, 397 U.S. at 678–79 (quoting from and relying upon Holmes's statement in an Establishment Clause context).
end up actually supporting this contention. This contention is, after all, premised upon the history of marriage. Further reliance upon history is, therefore, unlikely to weaken or refute it.

Be that what it may, even if the argument that traditional limitations on marriage conform to religious tenets is unassailable, that does not mean that they violate the Establishment Clause. As the Supreme Court explained almost fifty years ago in *McGowan v. Maryland*, a law is not invalid simply because its purpose or effect conforms with religious teachings:

> [The 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. . . . Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.]

Like laws related to adultery and polygamy, laws limiting marriage to one man and one woman do not violate the Establishment Clause simply because they are consistent with religious teachings.

Nor do traditional limitations on marriage offend the Establishment Clause simply because they can trace their origins to religion. Many other aspects of American society also have roots in religion, although they are not necessarily considered to be religious today. Hence, while the Sunday Closing Laws at issue in *McGowan* "had their genesis in religion" several centuries ago," the Court found them to be constitutional because their "present purpose and effect . . . is to provide a uniform day of rest for all citizens" which is "wholly apart from their original purposes or connotations." And while the celebrations of Chanukah and Christmas historically began as religious holy days, the Court in *County of Allegheny v. ACLU* held that they are now also commonly seen as secular holidays.

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67 Id. at 445.
which government may celebrate. Why customary limitations on marriage should be treated any differently from the Sunday laws in McGowan or the holiday celebrations in County of Allegheny is not readily apparent, for they too can plausibly be attributed to secular purposes wholly unrelated to their religious origins even though they may continue to have religious significance for some people in society. Simply having religious origins, significance, or aspects should not alone render them inconsistent with the Establishment Clause.89

Numerous secular purposes have been alleged in support of laws limiting marriage to male-female relationships. Some claim, for instance, that conjugal marriages promote mental and physical health, while same-sex relationships "place [their] participants at risk for mental illness and physical disease."90 Others likewise argue that traditional marriages benefit women and children, while same-sex unions harm women, children, and father-child relationships.91 And still others contend that

89See Van Orden v. Perry, 545 U.S. 677, 690 (2005) (plurality opinion) ("Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." (emphasis added)); Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) ("Lemon requires first that the law at issue serve a 'secular legislative purpose.' This does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' and the Establishment Clause has never been so interpreted." (emphasis added) (citations omitted)).
conventional marriages benefit society, while same-sex marriages destabilize family structures, decrease birth and marriage rates, and diminish social morality.92

Each of these arguments defending traditional concepts of marriage is, obviously, extremely controversial and open to debate. Whether or not they are persuasive or accurate is irrelevant for purposes of this Article, and this Article takes no position on any of them. What is important for purposes of this Article is to note that entirely secular bases can be reasonably asserted in support of laws seeking to preserve customary legal conceptions of marriage. Given this reality, the religious origins and aspects that some people attribute to traditional limitations on marriage should not diminish their constitutionality under the Establishment Clause because wholly secular purposes can also be reasonably attributed to them.93

III. SOLEMNIZING MARRIAGE

Unlike many places in the world, statutes in every state of the United States authorize religious leaders to solemnize or perform legally binding marriages.94 In doing this, many


93 See Mueller v. Allen, 463 U.S. 388, 394–95 (1983) (noting the Court’s “reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute”); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (“A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”).

94 ALA. CODE § 30-1-7 (2011); ALASKA STAT. ANN. § 25.05.261 (West 2010); ARIZ. REV. STAT. ANN. § 25-124 (2011) (West); ARK. CODE ANN. § 9-11-213 (West 2011); CAL. FAM. CODE § 400 (West 2011); COLO. REV. STAT. ANN. § 14-2-109 (West 2011); CONN. GEN. STAT. ANN. § 46b-22 (West 2011); DEL. CODE ANN. tit. 13, § 106 (West 2011); D.C. CODE § 46-406 (2011); FLA. STAT. ANN. § 741.07 (West 2011); GA. CODE ANN. § 19-3-30 (West 2011); HAW. REV. STAT. § 572-12 (West 2011); IDAHO CODE ANN. § 32-303 (West 2011); 750 ILL. COMP. STAT. ANN. 5/209 (West 2011); IND. CODE ANN. § 31-11-6-1 (West 2011); IOWA CODE ANN. § 595.10 (West 2011); KAN. STAT. ANN. § 23-104a (West 2010); KY. REV. STAT. ANN. § 402.050 (West 2011); LA. REV. STAT. ANN. § 9:202 (2011); ME. REV. STAT. ANN. tit. 19-A, § 655 (2011), amended by
statutes use relatively broad language, such as the statute in Colorado that permits a marriage to be solemnized “in accordance with any mode of solemnization recognized by any religious denomination.”

Several other statutes, on the other hand, use more detailed and specific terminology, such as the statute in Indiana which allows all of the following to solemnize marriages:

(1) A member of the clergy of a religious organization (even if the cleric does not perform religious functions for an individual congregation), such as a minister of the gospel, a priest, a bishop, an archbishop, or a rabbi.

(6) The Friends Church, in accordance with the rules of the Friends Church.

(7) The German Baptists, in accordance with the rules of their society.

(8) The Bahai faith, in accordance with the rules of the Bahai faith.

(9) The Church of Jesus Christ of Latter Day Saints, in accordance with the rules of the Church of Jesus Christ of Latter Day Saints.

(10) An imam of a masjid (mosque), in accordance with the rules of the religion of Islam.


56 IND. CODE ANN. § 31-11-6-1 (West 2011). Oklahoma’s statute is similar. It allows “an ordained or authorized preacher or minister of the Gospel, priest or other ecclesiastical dignity of any denomination who has been duly ordained or
A few statutes, however, use language that may be considered less tolerant, such as the statute in South Carolina that states: “Only ministers of the Gospel, Jewish rabbis, . . . and the chief or spiritual leader of a Native American Indian entity recognized by the South Carolina Commission for Minority Affairs . . . are authorized to administer a marriage ceremony in this State.”99 According to this statute, it may be argued that Buddhists, Hindus, Muslims, and other religions which officials in South Carolina may not see as being “ministers of the Gospel” are not legally eligible to solemnize marriages in the Palmetto State.98

While the particular language of an individual state’s solemnization statute—such as South Carolina’s—may be constitutionally questionable, some people believe that the very practice of allowing religious authorities to solemnize legally binding marriages is an unconstitutional entanglement of government with religion.99 In analyzing this contention, it is

98 See, e.g., Shanah D. Glick, The Agunah in the American Legal System: Problems and Solutions, 31 U. LOUISVILLE J. FAM. L. 885, 888–89 (1992) (“By allowing religion to enter the civil arena when a marriage is performed, “the state is . . . violating the Establishment Clause. . . . The state’s framework of marriage . . . regulation fails both the second and third prong of the Lemon test and is therefore unconstitutional. . . . [T]he framework fosters an excessive entanglement with religion by drawing the religious into the civil sphere. The state is entangled because it grants secular power and authority to those with authority under religious laws.”); Janet R. Jakobsen, Queer Relations: A Reading of Martha Nussbaum on Same-Sex Marriage, 19 COLUM. J. GENDER & L. 133, 149–52 (2010); Harry D. Krause, Marriage for the New Millennium: Heterosexual, Same Sex—or Not at All?, 34 FAM. L.Q. 271, 283–84 (2000); Scott, supra note 67, at 551–54; see also Mary Anne Case, A Lot To Ask: Review Essay of Martha Nussbaum’s From Disgust to Humanity: Sexual Orientation and Constitutional Law, 19 COLUM. J. GENDER & L. 89, 122–24 (2010).
helpful to note that those who perform religious marriage ceremonies are not themselves either actual or apparent agents of the state. They do not, for instance, act on behalf of the state or subject to its control. Instead, they act solely on behalf of their private religious affiliations and subject to the respective dictates of each. The state, furthermore, does not manifest any particular desire that religious leaders solemnize marriages on its behalf; on the contrary, it simply agrees to recognize those marriages which religious leaders solemnize as a result of the independent choices of individual couples. By way of analogy, just as private parties who create legally binding contracts do so in their individual capacities and not as agents of the state, so too do religious leaders who participate in the creation of legally binding marital contracts act by virtue of their own authority and without any semblance of state power. Consequently, a state's recognition and enforcement of the actions of private parties does not mean that the state somehow participated in or was involved with those actions.

100 See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

101 See id. § 2.01 ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

102 This matter is, therefore, distinguishable from the facts at issue in Larkin v. Grendel's Den, Inc., where governmental power was bestowed upon religious organizations. See 459 U.S. 116, 127 (1982) (holding that delegating the power to veto liquor licenses to religious organizations violated the Establishment Clause).

103 Many states have provisions in their solemnization statutes which, if strictly enforced, could conceivably entangle the state with religion in an unconstitutional manner. Alabama's statute, for instance, states: "Marriage may . . . be solemnized by the pastor of any religious society according to the rules ordained or custom established by such society." ALA. CODE § 30-1-7(b) (2011) (emphasis added). North Dakota's permits marriages to be solemnized by "any person authorized by the rituals and practices of any religious persuasion." N.D. CENT. CODE ANN. § 14-03-09 (West 2009) (emphasis added); see also 23 PA. CONS. STAT. ANN. § 1503(b) (West 2011) ("according to the rules and customs of the society"). Tennessee's provides: "In order to solemnize the rite of matrimony, any such minister, preacher, pastor, priest, rabbi or other spiritual leader must be ordained or otherwise designated in conformity with the customs of a church, temple or other religious group or organization; and such customs must provide for such ordination or designation by a considered, deliberate, and responsible act." TENN. CODE ANN. § 36-3-301(a)(2) (West 2011) (emphasis added). And West Virginia's states: "A religious representative
Nor does it mean that the state endorsed or sponsored those actions. As already noted, whether a marriage is religiously solemnized depends entirely upon the private choices of individual couples. No state requires a civil marriage to be religiously solemnized.\footnote{104} Instead, each state permits parties to choose to have their marriage religiously solemnized.\footnote{105} The religious solemnization of a civil marriage can, therefore, be reasonably attributed to private individuals rather than to the government.\footnote{106}

Given that the religious solemnization of a civil marriage does not unavoidably signify state endorsement of religion or require “excessive entanglement” of government with religion, it

\begin{verbatim}
authorized to celebrate the rites of marriage shall perform the ceremony of marriage according to the rites and ceremonies of his or her religious denomination, church, synagogue, spiritual assembly or religious organization and the laws of the State of West Virginia.” W. VA. CODE ANN. § 48-2-403 (West 2011) (emphasis added). Many similar examples could be given. See, e.g., ARIZ. REV. STAT. ANN. § 25-124(A)(1) (2011) (“Duly licensed or ordained clergymen.”); FLA. STAT. ANN. § 741.07(1) (West 2011) (“All regularly ordained ministers of the gospel or elders in communion with some church . . . .”); IND. CODE ANN. § 31-11-6-1 (West 2011) (“The Friends Church, [*German Baptists,* ‘Bahai faith,’ ‘Church of Jesus Christ of Latter Day Saints,’ or ‘imam of a masjid (mosque),’] in accordance with the rules” pertaining to said “Church,” “society,” “faith,” or “religion”); MASS. GEN. LAWS ANN. ch. 207, § 38 (West 2011) (“a duly ordained minister of the gospel in good and regular standing with his church”). If a state were to begin interpreting religious doctrines so as to ensure that the officiant at a marriage ceremony was actually “duly ordained,” “in good standing,” or performed the ordinance “according to the rules ordained” by a religion, then the state would likely be seen as excessively entangling itself in religion. For more on state supervision of religious practices, see generally Elijah L. Milne, Protecting Islam’s Garden from the Wilderness: Halal Fraud Statutes and the First Amendment, 2 J. FOOD L. & POL’Y 61 (2006).
\end{verbatim}
is unlikely that the mere practice of allowing states to solemnize legally binding marriage is, without more, inconsistent with the Establishment Clause. Not only does the history of this practice predate the Establishment Clause, but the United States Supreme Court has repeatedly held that government may accommodate religious practices and that "[a] law is not unconstitutional simply because it allows churches to advance religion." To say that the government may choose to accommodate religious practices, however, is not to suggest that it necessarily must always do so. For, as the Court noted in Locke v. Davey, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."

Although a state may permit religious authorities to solemnize legal marriages without violating the Establishment Clause, a state could conceivably offend the Establishment Clause if it only allowed, say, leaders of majoritarian Christian faiths to solemnize civil marriages. For a state to prefer one religion over another in this manner would seem to be a classic violation of the principle of neutrality which the Court has held to be central to the meaning of the Establishment Clause. See sources cited supra note 79. It would also likely violate the Equal Protection Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV, §1. This is why the South Carolina statute which was mentioned earlier may potentially be problematic, for it appears on its face to prefer "ministers of the Gospel, Jewish rabbis," and the "spiritual leader" of recognized "Native American Indian entities" over and above the leaders of all other faiths. See supra text accompanying notes 97–98. It appears, in other words, to be something other than "neutral."

Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987); see Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."); see also supra notes 24–26, 80–83 and accompanying text. This reference to the longevity of the practice of allowing religions to perform legally binding marriages should not be understood as suggesting that antiquity alone ought to render a practice constitutional. As has already been noted, that is rarely, if ever, the case. See supra note 83. Indeed, the history of the United States is replete with examples of practices that were once widely established but which today cannot be constitutionally countenanced, the most deplorable example of this undoubtedly being human slavery.

See Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted.").
As mentioned earlier, the Court first directly addressed the Free Exercise Clause in *Reynolds v. United States*, the late-nineteenth century case regarding the prohibition of polygamy in the territories.\(^{111}\) Relying upon the dichotomy between opinions and actions, the Court in that case interpreted the Free Exercise Clause as stripping the government of power over "mere religious belief and opinions" while concurrently leaving it "free to reach actions" and practices.\(^{112}\) Over a century later, the Court refined this initial interpretation in the case of *Employment Division v. Smith*, wherein it held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."\(^{113}\) Just three years after *Smith*, the Court further explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* that "[n]eutrality and general applicability are interrelated," and that if a law fails to satisfy this standard it must satisfy "strict scrutiny," which requires a law to "be justified by a compelling governmental interest and [to be] narrowly tailored to advance that interest."\(^{114}\) As the Court also noted in *City of Hialeah*, if a law "targets religious conduct... or advances legitimate governmental interests only against conduct with a religious motivation [it] will survive strict scrutiny only in rare cases."\(^{115}\)

Given the Court's increasingly narrow interpretation of the Free Exercise Clause, some people fear that a state could force religions opposed to same-sex unions to solemnize same-sex marriages.\(^{\text{116}}\) Several additional people fret that a state could

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\(^{111}\) 98 U.S. 145 (1878).

\(^{112}\) Id. at 164, 166.

\(^{113}\) *Emp't. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). Although the Court's distinction between beliefs and actions is understandable, it seems difficult to square with the actual text of the Free Exercise Clause, which admittedly seeks to protect the free exercise of religion. The noun "exercise" does not appear to have ever been defined, interpreted, understood, or used at anytime anywhere in the history of the English language as referring to something unrelated to action. See *Oxford English Dictionary* (online ed. 2011), http://www.oed.com/viewEntry/66088.

\(^{114}\) 508 U.S. 520, 531-32 (1993).

\(^{115}\) Id. at 546.

\(^{116}\) See, e.g., Erin N. East, Comment, *I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 Emory L.J. 259, 268–70 (2009) ("To date, no U.S. court has dealt with the issue of whether ministers and public officials are required to solemnize same-sex marriages against their religious beliefs. The dearth of case law in this area could be due to the
condition its recognition of religiously solemnized marriages upon, say, a religion’s willingness to perform or recognize same-sex marriages and similar unions.\textsuperscript{117} And many more people worry that anti-discrimination laws and other regulations could impose various sanctions upon religions that refuse to recognize same-sex unions or condone “nontraditional lifestyles.”\textsuperscript{118} While each of these concerns may theoretically be possible, some appear either more or less likely than others to be realized anytime soon, if ever. To demonstrate this, a brief analysis regarding each of these concerns in the free-exercise context follows.

First, as to the fear that a state could directly mandate that religions perform same-sex marriages, the probability of this occurring appears relatively low at present under the Court’s current, albeit somewhat debile, interpretation of the Free

\textsuperscript{117} See, e.g., East, supra note 116, at 270 (“It is also possible that, since members of the clergy are licensed to solemnize marriages on behalf of the state, state legislatures could require them to perform same-sex marriages in order to keep their licenses.”); see also JONATHAN GOLDBERG-HILLER, THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS 244 n.32 (2002) (“One petitioner . . . wrote, ‘[M]y biggest concern of all is that [legalized same-sex marriage in Hawai’i] will lead to forcing churches to perform these ceremonies or lose their [tax-exempt] status.’”) (alteration in original); Erwin Chemerinsky, Judicial Opinions as Public Rhetoric, 97 CALIF. L. REV. 1763, 1763 (2009).

\textsuperscript{118} See, e.g., Daniel Avila, To Wed & Let Wed? The Intrusive Impact on Dissenting Religious Belief & Practices Created by Same-Sex Marriages, 38 NEW ENG. L. REV. 621, 621–24, 627–28 (2004) (“State intrusion on religious employment and other non-ritual policies will likely occur in the same-sex marriage context . . .”); Cain, supra note 65, at 48 (“The first advertisement that opponents of same-sex marriage launched [in California] was one that said same-sex marriage threatened to take away the tax-exempt status of California churches.”); James M. Donovan, Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage, 29 N. KY. L. REV. 521, 532, 534 (2002) (“If by this Arkes means that allowing same-sex marriage will force contrary believing religionists to tolerate and recognize such marriages, he is right. That is the price of living in a pluralistic society . . . When (not if) gays and lesbians are recognized as citizens fully entitled to the panoply of state protections offered to heterosexuals, then Catholics, by their own terms, will be bound to respect those rights.”); Fredric J. Bold, Jr., Comment, Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws, 158 U. PA. L. REV. 179, 180–86 (2009); see also Jennifer Gerarda Brown, Peacemaking in the Culture War Between Gay Rights and Religious Liberty, 95 IOWA L. REV. 747, 750–51 (2010).
Exercise Clause. The religious solemnization of marriage is, after all, a religious act, notwithstanding the fact that it may have legal consequences. To require a religion to solemnize a same-sex marriage could, then, be seen as tantamount to requiring it to perform a religious act, such as baptism, confirmation, communion, penance, unction, and ordination. Laws compelling the performance of a religious act have typically not fared well before the Supreme Court, while those which have merely burdened the performance of such an act have often done better. Thus it is that in Smith the Court once again reaffirmed the general principle that “government may not


compel affirmation of religious belief."\textsuperscript{121} To compel a religion to perform a same-sex marriage, however, would seem to do just that, for the very performance of this act could reasonably be seen as expressing a belief in its religious propriety.

While a law directly targeting the performance of religious marriages is unlikely to survive constitutional scrutiny, a law placing conditions upon the state’s recognition of a religiously solemnized marriage may have better prospects of survival.\textsuperscript{122} As explained earlier, the government is not necessarily required to bestow legal recognition upon religiously solemnized marriages.\textsuperscript{123} Given this reality, a state could conceivably enact a neutral law of general applicability that states, for example: “Notwithstanding any other provision in this statute, a person who discriminates on the basis of sex, gender, or sexual orientation is prohibited from solemnizing any marriage in this state.” Similarly, a state such as Louisiana, which permits an “officiant” to “perform marriage ceremonies only after he registers to do so” with a court clerk, might be able to enact a neutral law of general applicability prohibiting or invalidating the registration of any person who discriminates on the basis of sex, gender, or sexual orientation.\textsuperscript{124} To the extent laws such as these are found to be neutral and of general applicability, they are unlikely to run afoul of the Free Exercise Clause.\textsuperscript{125} But even should they fail to be both neutral and of general applicability, they may still be found constitutional under the Free Exercise Clause if prohibiting discrimination on the basis of sexual orientation is held to be a “compelling governmental interest.”\textsuperscript{126}

\textsuperscript{121} Emp’t Div., 494 U.S. at 877; see Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (plurality opinion) (“Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden.”).

\textsuperscript{122} That is not, however, to say that such a law is likely to be actually enacted any time soon given the presently prevailing political situation in the United States.

\textsuperscript{123} See supra text accompanying notes 106–110.

\textsuperscript{124} LA. REV. STAT. ANN. § 9:204 (2011).

\textsuperscript{125} See supra note 113 and accompanying text. To state that such laws may not violate the Free Exercise Clause is not to suggest that they may not violate other provisions of the Constitution or that they should—or are likely to be—enacted. This Article expresses no opinion on the advisability of banning or embracing same-sex marriages.

\textsuperscript{126} See supra note 114 and accompanying text. As already noted, this Article expresses no opinion on the merits of laws banning or embracing same-sex marriages. Nor does it express an opinion on what constitutes a “compelling governmental interest” in this context.
In order to prevent scenarios such as those referred to in the last two paragraphs from coming about, most jurisdictions in the United States that perform same-sex marriages have enacted statutes shielding and protecting religions and religious leaders.\textsuperscript{127} A statute in Connecticut, for example, states: "No member of the clergy authorized to join persons in marriage ... shall be required to solemnize any marriage .... No church ... shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church ...."\textsuperscript{128} Likewise, a law in the District of Columbia provides: "No ... official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage. Each religious society has exclusive control over its own theological doctrine, teachings, and beliefs regarding who may marry within that particular religious society's faith."\textsuperscript{129} While statutes like these may provide a degree of comfort to those religions that oppose same-sex unions, the fact that such statutes might be necessary to secure religious liberty in the first place may very well cause additional discomfort to some.

As noted a moment ago, neutral laws of general applicability imposing limitations or sanctions upon those who discriminate on the basis of sex, gender, or sexual orientation are not likely to run afoot of the Free Exercise Clause.\textsuperscript{130} For this reason, many people justly worry that anti-discrimination laws and other regulations could conceivably serve as an indirect means of compelling religious objectors to recognize same-sex unions or condone homosexuality. They fear, for instance, that a religion could lose its tax-exempt status for opposing a same-sex

\textsuperscript{127} The only apparent exceptions are Iowa and Massachusetts. \textit{But see} Goodridge v. Dept of Pub. Health, 798 N.E.2d 941, 965 n.29 (Mass. 2003) ("Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons."). In fact, Iowa's marriage statute still states, "Only a marriage between a male and a female is valid." \textsc{iowa code} Ann. § 595.2(1) (West 2011), \textit{invalidated} by Varnum v. Brien, 763 N.W.2d 862 (2009).

\textsuperscript{128} \textsc{conn. gen. stat. ann.} § 46b-22b (West 2011). The statutes in New York and Vermont are similar. \textit{See} \textsc{n.y. dom. rel. law} § 11(1) (McKinney 2011); \textsc{vt. stat. ann. tit. 18, § 5144(b)} (West 2011).

\textsuperscript{129} \textsc{d.c. code} § 46-406(c)-(d) (2011). The statute in New Hampshire is similar. \textit{See} \textsc{n.h. rev. stat. ann.} § 457:37 (2011).

\textsuperscript{130} Whether or not they are permissible under other provisions of the Constitution is beyond the scope of this Article.
initiative, that a religious school could be liable for expelling a student for homosexual conduct, that a church could be sanctioned for firing an employee in a same-sex relationship, and that a religious organization could face legal consequences for excluding a same-sex couple from its property.\textsuperscript{131} While these fears may or may not be realistic, and while such anti-discrimination measures may or may not be constitutional, so long as the relevant law is neutral and of general applicability, it would seem unlikely to run afoul of the Court’s current interpretation of the Free Exercise Clause.\textsuperscript{132}

IV. RECOGNIZING MARRIAGE

While one might get the impression from the discussion thus far that the contemporary debate over marriage is divided between the religious and the non-religious, nothing could be further from the truth. As was previously mentioned, people of deep religious faith can be found in support of either side of the controversy.\textsuperscript{133} In fact, several religious organizations in the United States provide varying degrees of support for same-sex marriage rights, including the American Baptist Churches (USA), the Christian Church (Disciples of Christ), the Episcopal Church, the Evangelical Lutheran Church in America, the Metropolitan Community Church, the Presbyterian Church (USA), the Religious Society of Friends (Quakers), the United


\textsuperscript{132} That is not, however, to suggest that it may not offend other provisions of the Constitution, such as the rights to freedom of speech and association under the First Amendment. See generally Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

\textsuperscript{133} See supra text accompanying note 65.
Church of Christ, the Unitarian Universalist Association, the Reform Jewish movement, and the Reconstructionist Jewish movement.\textsuperscript{134}

Given that many religions and people of religious faith support same-sex unions, some people claim that a state's refusal to recognize same-sex marriages violates the free-exercise rights of those individuals and religious organizations who support same-sex marriage.\textsuperscript{135} As has already been discussed, however, the government is not necessarily required to validate religiously-solemnized marriages, and where the relevant law is neutral and of general applicability, it is unlikely to be found wanting under the Free Exercise Clause.\textsuperscript{136} In any event, a state's refusal to legally recognize same-sex marriages does not mean that it prohibits religions from performing extralegal marriage ceremonies. Nor does it mean that anyone is compelled to perform a religious act. Instead, it simply means that the state is itself unwilling to perform an act, namely, to recognize same-sex marriages. This being the case, a state's refusal to recognize same-sex marriages is not likely to violate the Free Exercise Clause, because, as the Supreme Court has held, "[t]he


\textsuperscript{135} See, e.g., Mark Strasser, On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads 122–24 (2002); Ariel Y. Graff, Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans, 29 U. HAW. L. REV. 23, 24, 39 (2006) ("the refusal to validate religious same-sex marriages under state laws constitutes a burden on religious exercise"); Kubasek & Glass, supra note 67, at 25; Mark Strasser, The Alleged Harms of Recognizing Same-Sex Marriage, in WHAT'S THE HARM?, supra note 90, at 27, 37; Mark Strasser, Book Review, Same-Sex Marriage and Religious Liberty: Emerging Conflicts, 25 J.L. & RELIGION 305, 307 (2009) (reviewing a book about LBGT issues including same-sex marriage); see also Isaak, supra note 67 ("In recognizing opposite-sex religious unions as valid marriages, but declining to extend the same recognition to same-sex religious unions, the state discriminates against those religions that perform same-sex marriages."). In response to the argument that prohibitions of same-sex marriage violate the Establishment Clause, see supra Part II.

\textsuperscript{136} See supra text accompanying notes 109–110, 123–132. Whether it may violate the Equal Protection Clause or any other provision of the Constitution besides the Religion Clauses is beyond the scope of this Article.
Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.  

V. PRIVATIZING MARRIAGE

Over nine hundred years ago, the Catholic Church officially declared marriage to be one of seven holy sacraments. Throughout the ensuing centuries, this vision of marriage has become increasingly unpopular, as more and more individuals and societies have come to see marriage as a mere mortal contract. With the decline of the sacramental model of marriage and the corresponding ascent of the "contractarian" model of marriage, the wants and wishes of individual adults—as opposed to those of their country, community, companion, and children—have seemingly become what matters most for many. It should come as no surprise, then, that as personal privacy, passions, and "private parts" gain greater legal protection, a movement has also begun to privatize marriage.

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137 Bowen v. Roy, 476 U.S. 693, 699 (1986) (emphasis added); see Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (“Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.”). Elsewhere this author has argued that laws banning polygamy may be distinguished from laws banning same-sex marriage in that anti-polygamy laws often punish polygamists who enter into purely private religious marriages which do not purport to be legally binding under civil, as opposed to religious, laws. See Milne, supra note 41, at 274–76, 285–86. In the wake of the Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating anti-sodomy laws), laws punishing those who enter into purely private same-sex marriages are unlikely to be upheld, while anti-polygamy laws continue to encompass even individuals who enter into extralegal polygamist unions. As a result, "laws forbidding polygamy can also prevent polygamists from practicing their religious beliefs," while laws forbidding same-sex marriages may not necessarily do so. Milne, supra note 41, at 285–86. But see Mark Strasser, Marriage, Free Exercise, and the Constitution, 26 LAW & INEQ. 59, 102–03 & n.317 (2008).


139 WITTE, supra note 12, at 25–26; see supra Part II.

140 See generally MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006) (containing several articles advocating the privatization of marriage).
Efforts to privatize marriage are, in essence, efforts to abolish civil marriage and replace it with something more starkly contractual, such as a civil union.\(^1\) Given that civil unions are considered to be both genderless and wholly secular, some people believe that replacing civil marriages with civil unions would, among other things, decrease controversy over same-sex marriage, ensure the separation of church and state, and provide individuals with greater freedom to define and customize their private relationships.\(^2\) While the government would no longer perform civil marriages, private individuals and religions would remain free to define the term “marriage” however they want and to perform “marriages” however they wish.\(^3\) The government would leave the meaning and regulation of “marriage” entirely in private hands and focus its attention on regulating and enforcing civil unions and other legal contracts.\(^4\)

Although the privatization of marriage might bring about some positive results, it does not appear that one of those would be to strengthen families.\(^5\) Regardless of whether a family consists of a same-sex couple, an opposite-sex couple, or any other conceivable arrangement, the abolition of legal marriage intuitively seems likely to lead to more sexual infidelity, more familial instability, more single-parent families, more fatherless children, and more moral meaninglessness. While it has been argued that privatizing marriage would protect religious liberty, religious beliefs and values seem unlikely to be effectively transmitted to future generations where already-tottering family structures are necessarily rendered even less sturdy when their underlying foundations are essentially blasted out from underneath them. In addition, as “family circles” are forced to fit into “contractarian” “square holes,” their natures are likely to be further transformed and commodified—turned into commodities


\(^{2}\)See, e.g., Scott, supra note 67, at 553–54; Crane, supra note 141; Zelinsky, supra note 141, at 1179–80.

\(^{3}\)Crane, supra note 141, at 1250–52; Zelinsky, supra note 141, at 1175.

\(^{4}\)Crane, supra note 141, at 1250–52; Zelinsky, supra note 141, at 1163.

\(^{5}\)A full analysis of proposals to privatize marriage is beyond the scope of this Article.
or conceived of in market terms—so as to more appropriately conform to the essential purposes of most mere contracts.\textsuperscript{146} Thus, in the end (of marriage), it may be that neither religion nor society is likely to prosper as a result of marriage’s demise.

\textbf{CONCLUSION}

The history of marriage in America, like that of religion, has frequently involved controversy, division, and transformation. It should be no surprise, then, that the modern debate over same-sex marriage and religious liberty has frequently divided, as well as transformed, many of the nation’s homes, temples, and public places. As this debate and its accompanying drama continue to unfold, one can only hope that its final end will not be the wreckage of many more families and relationships than those which each side is apparently seeking to create and protect. For, regardless of what may or may not ultimately be considered constitutional, the deterioration of the family unit and the weakening of the home are unlikely to strengthen many churches or states.

\textsuperscript{146} For further readings on the theory of commodification, see generally \textit{RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE} (Martha M. Ertman & Joan C. Williams eds., 2005).