
WHY EXCLUDING SAME-SEX COUPLES FROM CIVIL MARRIAGE VIOLATES THE CONSTITUTIONAL LAW OF THE UNITED STATES[†]

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The Constitution protects (1) the right to moral equality, and (2) the right to religious and moral freedom. The former involves the right to not be treated as morally inferior to any other human being; the latter protects the right to live one's life in accord with one's religious and moral convictions.

Excluding same-sex couples from civil marriage arguably violates both of these constitutional protections, but the case that it violates the right to moral and religious freedom is especially strong. Under this right, the government may not impede conduct unless the government has a legitimate objective; the government has selected the least burdensome means to achieve the objective; and the government interest is proportionate to the burden the government has imposed.

As this Lecture explains, excluding same-sex couples from civil marriage fails the legitimacy requirement. The only serious reasons advanced for the belief are sectarian reasons. A sectarian moral rationale, whether religious or secular, is not a permissible basis of law for purposes of the legitimacy requirement.

I am grateful to the faculty of the University of Illinois College of Law for honoring me with the invitation to deliver this Lecture—and I am delighted to be here with all of you this afternoon.

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I. INTRODUCTION

This past June, in the case titled *United States v. Windsor*,¹ the Supreme Court of the United States ruled that the Defense of Marriage Act's ("DOMA") exclusion of same-sex marriage from the federal definition of marriage was unconstitutional. However, the Court's opinion—the majority opinion, written by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan—was far from clear about precisely *why* DOMA's exclusion was unconstitutional.²

In this Lecture, I will explain not only why it is unconstitutional—why it violates the constitutional law of the United States—for the federal government to exclude same-sex marriage from the federal definition of marriage, but also why it is unconstitutional for a state to exclude same-sex couples from civil marriage. At the end of the Lecture, I will explain why the Supreme Court's opinion in *United States v. Windsor* was problematic.

The two constitutional rights that bear most directly on the question of the constitutionality of excluding same-sex couples from civil marriage are the right to moral equality and the right to religious and moral freedom. Both rights, each of which is internationally recognized as a human right, are entrenched in the constitutional law of the United States. The right to moral equality is the core of the constitutional right that we conventionally refer to as the right to equal protection, and a version of the right to religious and moral freedom emerged in the constitutional law of the United States almost fifty years ago, under the name "the right of privacy." I explain all this in my new book, *Human Rights in the Constitutional Law of the United States*.³

1. 133 S. Ct. 2675 (2013).

2. Justice Scalia, speaking in dissent for himself and Justice Thomas, wrote: "The sum of all the Court's nonspecific hand-waving is that this law is invalid . . . maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role . . ." *Id.* at 2707 (Scalia, J., dissenting).

3. See MICHAEL J. PERRY, HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES 105–35 (2013).

The overarching question I will address in my Lecture this afternoon is this: Does what I will call “the exclusion policy”—excluding same-sex couples from civil marriage—violate either the right to moral equality or the right to religious and moral freedom—or both? To answer that question, we need to know what each right forbids.

II. WHAT DOES THE RIGHT TO MORAL EQUALITY FORBID?⁴

The very first article of the foundational human rights document of our time, the Universal Declaration of Human Rights, directs “[a]ll human beings” to “act towards one another in a spirit of brotherhood.”⁵ The right to moral equality is the right of every human being⁶ to be treated by her government—indeed, by every government—as morally equal to every other human being, in this sense: as one who is no less worthy than any other human being of being treated, as the Universal Declaration puts it, “in a spirit of brotherhood.” Put another way, the right to moral equality is the right not to be treated as morally inferior to any other human being, in this sense: as one who is not worthy, or not as worthy as some other human beings, of being treated “in a spirit of brotherhood.”⁷

For government to disadvantage a person, by doing something to her or by not doing something for her, on the basis of the demeaning view that she, or someone with whom she is associated—someone, say, to whom she is married—is morally inferior, in the foregoing sense, is for government to violate the right to moral equality. Government disadvantages a person on the basis of that demeaning if in the absence of that view, government would not be disadvantaging her—if, in other words, that demeaning view is a “but for” predicate of government’s disadvantaging her.

As I said, the right to moral equality is the core of the constitutional right that we conventionally refer to as the right to equal protection.

III. DOES THE EXCLUSION POLICY VIOLATE THE RIGHT TO MORAL EQUALITY?

Excluding same-sex couples from civil marriage obviously disadvantages gays and lesbians, and the more extreme versions of the policy obviously disadvantage gays and lesbians more severely. The most ex-

4. For fuller discussion, see *id.* at 105–11.

5. Article 1 of the Universal Declaration states, in full: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 1 (Dec. 10, 1948).

6. That is, of every born human being. See PERRY, *supra* note 3, at 158–73.

7. Cf. DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENSLAVE, AND EXTERMINATE OTHERS* (2011); Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 112–14 (Stephen Shute & Susan Hurley eds., 1993).

tre version: refusing to grant to same-sex unions any of the legal benefits granted to opposite-sex marriages. A less extreme version: granting to same-sex unions some but not all of the legal benefits granted to opposite-sex marriages. The least extreme version: granting to same-sex unions all of the legal benefits granted to opposite-sex marriages but refusing to honor the unions—refusing to dignify them—with the title “marriage.”⁸

That the exclusion policy disadvantages gays and lesbians, however, does not entail that the policy violates the right to moral equality. The policy violates the right to moral equality if, and only if, the policy is based on the demeaning view that gays and lesbians are morally inferior human beings—“morally inferior” in the sense specified earlier. Is the exclusion policy based on that view? Is that view a “but for” predicate of the policy?

The view that gays and lesbians are morally inferior human beings is sadly familiar. Richard Posner, writing about the “irrational fear and loathing of” homosexuals, has observed that homosexuals, like the Jews with whom they “were frequently bracketed in medieval persecutions[,] . . . are despised more for what they are than for what they do”⁹ The Connecticut Supreme Court has echoed that observation, noting that homosexuals are often “‘ridiculed, ostracized, despised, de-

8. Refusing to honor the unions—refusing to dignify them—with the title “marriage” does disadvantage same-sex couples. See Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184 (2013); Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L. J. 1989, 2004–13 (2012); cf. Govind Persad, *What Marriage Law Can Learn from Citizenship Law (and Vice Versa)*, 22 TUL. J.L. & SEXUALITY 103, 107 (2013). Something Adam Winkler wrote in his review of Dale Carpenter’s *Flagrant Conduct: The Story of Lawrence v. Texas* is relevant here:

There is an obvious linkage between Proposition 8’s ban on same-sex marriage and Texas’s same-sex sodomy ban. Proposition 8 was largely symbolic. Gay couples in California still had essentially all the same rights and privileges of married couples under state law; they just could not call it marriage. Like California’s law, Texas’s sodomy ban was also mostly about symbolism, not sodomy. Lawmakers could never have reasonably expected the ban to stop gay people from having sex. Instead, the law was, like so many anti-gay laws, about branding gays as deviant lawbreakers in order to justify further hostility towards them. “Since sodomy laws, like the one in Texas, were never really about stopping sodomy,” Carpenter writes in what could be the coda for this engaging and important book, “it is fitting that they got their comeuppance in a case in which there was probably no sodomy.”

Adam Winkler, *Law Enforcement’s Flagrant Conduct*, 48 TULSA L. REV. 275, 283 (2012) (reviewing DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012)).

9. RICHARD A. POSNER, *SEX AND REASON* 346 (1992); cf. LOUIS CROMPTON, *HOMOSEXUALITY & CIVILIZATION* (2003). Crompton’s book is discussed in Edward Rothstein, *Annals of Homosexuality: From Greek to Grim to Gay*, N.Y. TIMES (Dec. 13, 2003), <http://www.nytimes.com/2003/12/13/books/shelf-life-annals-of-homosexuality-from-greek-to-grim-to-gay.html>. As history teaches, an “irrational fear and loathing” of any group often has tragic consequences. The irrational fear and loathing of homosexuals is no exception. There is, for example, the horrible phenomenon of “gay bashing.” “The coordinator of one hospital’s victim assistance program reported that ‘attacks against gay men were the most heinous and brutal I encountered.’ A physician reported that injuries suffered by the victims of homophobic violence he had treated were so ‘vicious’ as to make clear that ‘the intent is to kill and maim.’” ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 165 (1996) (footnote omitted). As “[a] federal task force on youth suicide noted[,] because ‘gay youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from families and peers,’ young gays are two to three times more likely than other young people to attempt and to commit suicide.” *Id.* at 149.

monized and condemned' merely for being who they are"¹⁰ Andrew Koppelman has rehearsed some grim examples: "the judge's famous speech at Oscar Wilde's sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, [which] 'treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people.'"¹¹ Koppelman continues: "From this it is not very far to Heinrich Himmler's speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs 'was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and burn them.'"¹²

We should not discount the possibility that some policies that disadvantage gays and lesbians do indeed violate the right to moral equality. An ugly example remains on the books in Florida: "No person eligible to adopt under this statute [the Florida Adoption Act] may adopt if that person is a homosexual."¹³ Under the Florida law, which is fairly described as homophobic, ex-felons of all sorts may adopt a child; even a convicted child abuser may adopt a child. But no homosexual may do so. The Florida courts were right to rule that the statute violates Florida's version of the right to moral equality: the right that "[u]nder the Florida Constitution, each individual person has . . . to equal protection of the laws."¹⁴

But that some policies that disadvantage gays and lesbians violate the right to moral equality does not entail that every policy that disadvantages gays and lesbians violates the right to moral equality. And, as it happens, it is problematic to insist that in contemporary liberal democracies, such as the United States, the view that gays and lesbians are morally inferior human beings is a "but for" predicate of the exclusion policy.

In the United States and other liberal democracies, this is, for most who support the exclusion policy, the dominant and sufficient rationale for the policy: *admitting same-sex couples to civil marriage would tend to legitimize—"normalize"—and thereby incentivize same-sex sexual conduct. This we must not do: same-sex sexual conduct is immoral.* However, the claim that same-sex sexual conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings, any more than the claim that theft is immoral as-

10. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 445–46 (Conn. 2008) (quoting *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 454 (Mont. 2004)).

11. Andrew Koppelman, *Are the Boy Scouts Being as Bad as Racists? Judging the Scouts' Antigay Policy*, 18 PUB. AFF. Q. 363, 372 (2004).

12. *Id.*

13. FLA. STAT. § 63.042(3) (2006).

14. *Fla. Dep't of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 83 (Fla. Dist. Ct. App. 2010). Article I, section 2 of the Florida Constitution states: "SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property" FLA. CONST. art. I, § 2.

serts, implies, or presupposes that those who steal are morally inferior human beings. By contrast, “the very point” of laws that criminalized interracial marriage was “to signify and maintain the false and pernicious belief that non-whites are morally inferior to whites”¹⁵

This is not to deny that some “of the antigay animus that exists in the United States is just like racism, in the virulence of the rage it be-speaks and the hatred that it directs towards those who are its objects.”¹⁶ Again, some policies that disadvantage gays and lesbians violate the right to moral equality. But “[n]ot all antigay views . . . deny the personhood and equal citizenship of gay people.”¹⁷ As Robert Nagel has emphasized, “[t]here is the obvious but important possibility that one can ‘hate’ an individual’s behavior without hating the individual.”¹⁸ The Pope and bishops of the Catholic Church insist that same-sex sexual conduct is immoral and are prominent—indeed, leading—opponents of “legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”¹⁹ Nonetheless, the Pope and bishops also insist that all human beings, gays and lesbians no less than others, are equally beloved children of God. “[Our teaching] about the dignity of homosexual persons is clear. They must be accepted with respect, compassion and sensitivity. Our respect for them means that we condemn all forms of unjust discrimination, harassment or abuse.”²⁰

15. John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501, 509 (2005).

16. Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 145 (2006).

17. *Id.*

18. Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS, May 1998, at 34, 35.

19. ADMIN. COMM., U.S. CONFERENCE OF CATHOLIC BISHOPS, PROMOTE, PRESERVE, PROTECT MARRIAGE 1 (2003), available at http://www.usccbpublishing.org/client/client_pdfs/Marriage.pdf [hereinafter PROTECTING MARRIAGE].

20. *Id.* William Eskridge has also described these views:

The Vatican’s 1975 Declaration *Persona Humana* announced that “homosexual acts” are “disordered,” but also acknowledged the modern distinction between sexual orientation and sexual acts. The next year, the National Conference of Catholic Bishops responded with a more gay-tolerant document, “To Live in Christ Jesus,” which said this: “Homosexuals, like everyone else, should not suffer from prejudice against their basic human rights. They have a right to respect, friendship and justice. They should have an active role in the Christian community.” Different dioceses adopted slightly different readings of these documents. For example, the Church in the state of Washington interpreted the pronouncements to support the conclusion that “prejudice against homosexuals is a greater infringement of the norm of Christian morality than is homosexual orientation or activity.”

. . . [R]eflecting a strong turn in public opinion toward toleration for gay people, the American Catholic Church was subtly readjusting its doctrinal stance toward homosexuality. According to the Vatican, men and women with homosexual tendencies “must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.” After fighting the antidiscrimination law in Massachusetts through the 1980s, Catholic dioceses acquiesced in similar laws adopted by Catholic Connecticut in 1991 and Catholic Rhode Island in 1995. Archbishop John Francis Whealon of Hartford, Connecticut said this in 1991: “The Church clearly teaches that homosexual men and women should not suffer prejudice on the basis of their sexual orientation. Such discrimination is contrary to the Gospel of Jesus Christ and is always morally wrong.” Many Connecticut legislators took the Archbishop’s statement as tacit approval of the antidiscrimination measure (adorned with religious liberty-protective exemptions). The Roman Catholic shift in emphasis—not necessarily a shift in precise doctrine—was representative of organized religion in America, as public opinion shifted strongly toward toleration of gay Americans and same-sex couples.

Predictably, many will be quick to claim that government may not adjudge—that it is no part of government’s legitimate business to adjudge—same-sex sexual conduct to be immoral. However, if it is true that government may not adjudge same-sex sexual conduct to be immoral, it is not because government’s doing so violates the right to moral equality: Again, adjudging same-sex sexual conduct to be immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings. If government may not adjudge same-sex sexual conduct to be immoral—more precisely, if government may not exclude same-sex couples from civil marriage based on the view that same-sex sexual conduct is immoral—it is because government’s doing so violates a right other than the right to moral equality.

So, I am wary about concluding that the exclusion policy violates the right to moral equality.

However, even if one concludes that the moral-equality argument against the exclusion policy—the “equal protection” argument—is less problematic than I think it is—indeed, even if one concludes that the argument is persuasive²¹—the following important question, to which we now turn, remains: does the exclusion policy violate the right to religious and moral freedom—a version of which, again, is entrenched in the constitutional law of the United States under the name “the right of privacy”?

IV. WHAT DOES THE RIGHT TO RELIGIOUS AND MORAL FREEDOM FORBID?²²

Some rights—such as the right not to be subjected to “cruel and unusual” punishment—are unconditional (absolute): they forbid (or require) government to do something, *period*. Some other rights, by contrast, are conditional: they forbid (or require) government to do something *unless certain conditions are satisfied*. The right to religious and moral freedom, which is the right to the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments, is—and as a practical matter, it must be—conditional.²³ Under the right,

William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 697, 704 (2011) (footnotes omitted).

21. See Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1310–15 (2011); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012).

22. For a fuller discussion, see PERRY, *supra* note 3, at 112–35; see also Michael J. Perry, *Freedom of Conscience as Religious and Moral Freedom*, 29 J. L. & RELIGION 124 (2014).

23. The right to the free exercise of religion entrenched in the constitutional law of the United States is conditional; it permits government to prohibit some religious practices. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1879) (upholding the constitutionality of a law banning polygamy):

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it

government may not ban or otherwise impede conduct protected by the right, thereby interfering with one's freedom to live one's life in accord with one's religious and/or moral convictions and commitments, unless each of three conditions is satisfied:

1. The legitimacy condition: the government action at issue must serve a legitimate government objective.
2. The least burdensome alternative condition: the government action must be necessary to serve the legitimate government objective, in the sense that it serves the objective significantly better than would any less burdensome government action.
3. The proportionality condition: the legitimate objective served by the government action must be sufficiently weighty to warrant the burden imposed by the government action.

In the context of this Lecture, it is the first of the three conditions—the legitimacy condition—that is relevant.

The right to religious and moral freedom sensibly—and, in most articulations, explicitly—allows government to act for the purpose of protecting “public safety, order, health, or morals or the fundamental rights and freedoms of others.”²⁴ So, “protecting public morals” is undeniably a legitimate government objective under the right to religious and moral freedom. But what morals count as *public* morals under the right? If in banning or otherwise impeding conduct *purportedly* in pursuit of a “protecting public morals” objective, government is acting based on—“based on” in the sense that government would not be regulating the conduct “but for”—either a religious belief that the conduct is immoral or a sectarian nonreligious belief that the conduct is immoral, government is not truly acting to protect *public* morals. It is acting, instead, to protect *sectarian* morals, and *protecting sectarian morals is not a legitimate government objective under the right to religious and moral freedom.*

was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

By its very terms, the free exercise right forbids government to prohibit, not the exercise of religion, but the “free” exercise of religion—that is, the freedom of religious exercise (The First Amendment states, in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend I). Just as government may not abridge “the freedom of speech” or “the freedom of the press,” so too it may not prohibit the freedom of religious exercise. The right to freedom of religious exercise is not an unconditional right to do, on the basis of religious belief or for religious reasons, whatever one wants. One need not concoct outdated hypotheticals about human sacrifice to dramatize the point. One need only point, for example, to the refusal of some Christian Science parents to seek readily available lifesaving medical care for their gravely ill child. See, e.g., *Lundman v. McKown*, 530 N.W.2d 807, 817–18 (Minn. 1995); see also Caroline Frasier, *Suffering Children and the Christian Science Church*, ATLANTIC (Apr. 1995), <http://www.theatlantic.com/past/docs/unbound/flashbks/xsci/suffer.htm>. Just as the right to freedom of speech does not privilege one to say, and right to the freedom of the press does not privilege one to publish, whatever one wants wherever one wants whenever one wants, the right to freedom of religious exercise does not—because it cannot—privilege one to do, on the basis of religious belief or for religious reasons, whatever one wants wherever one wants whenever one wants.

24. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI), art. 18, ¶ 3 (Mar. 23, 1976) (“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).

In a religiously and morally pluralistic democracy such as our own, a religious belief that X (a type of conduct) is immoral is, *qua* religious, sectarian. But when is a *nonreligious* belief that X is immoral sectarian? Consider what the celebrated American Jesuit John Courtney Murray wrote, in the mid-1960s, in his “Memo to [Boston’s] Cardinal Cushing on Contraception Legislation”:

[T]he practice [contraception], undertaken in the interests of “responsible parenthood,” has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence²⁵

We may generalize Murray’s insight: in a religiously and morally pluralistic democracy, a nonreligious belief that X is immoral is sectarian if the claim that X is immoral is widely contested—and in that sense sectarian—among the citizenry.

Although it will not always be obvious which side of the line a particular nonreligious moral belief falls on—sectarian or nonsectarian—often it will be obvious. As Murray understood and emphasized to Cardinal Cushing, the Church’s nonreligious belief that contraception is immoral had clearly become sectarian (The Church’s belief that contraception is immoral *is* a nonreligious belief: a belief—a conclusion—based solely on secular (nonreligious) premises: premises that do not assert, imply, or presuppose that God—or any other transcendent reality—exists).²⁶ By contrast, certain moral beliefs—certain moral norms—are now clearly ecumenical, rather than sectarian, in religiously and morally pluralistic democracies. Consider, in that regard, what Jocelyn Maclure

25. John Courtney Murray, *Memo to Cardinal Cushing on Contraception Legislation*, WOODSTOCK THEOLOGICAL CENTER (1960s), available at <http://woodstock.georgetown.edu/library/murray/1965f.htm> (last visited Mar. 21, 2014) [hereinafter Murray, *Memo*]; see also John Courtney Murray, *Toledo Talk*, WOODSTOCK THEOLOGICAL CENTER (1967), available at <http://woodstock.georgetown.edu/library/murray/1967g.htm> (last visited Mar. 19, 2014). Murray’s influence on Boston’s Archbishop, Richard Cardinal Cushing, and Cushing’s influence on the repeal of the Massachusetts ban on the sale of contraceptives, is discussed in Seth Meehan, *Legal Aid*, BOSTON COLLEGE MAG. (Spring 2011), http://bcm.bc.edu/issues/spring_2011/features/legal-aid.html, and in Seth Meehan, *Catholics and Contraception: Boston, 1965*, N.Y. TIMES CAMPAIGN STOPS BLOG (Mar. 15, 2012, 9:17 PM), http://campaignstops.blogs.nytimes.com/2012/03/15/catholics-and-contraception-boston-1965/?_php=true&_type=blogs&_r=0; see also Joshua J. McElwee, *A Cardinal’s Role in the End of a State’s Ban on Contraception*, NAT’L CATHOLIC REP. (Feb. 28, 2012), <http://ncronline.org/news/politics/cardinals-role-end-states-ban-contraception>. For the larger context within which Father Murray wrote and spoke, see LESLIE WOODCOCK TENTLER, *CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY* (2004). For a recent reflection on Murray’s work by one of his foremost intellectual heirs, see David Hollenbach, *Religious Freedom, Morality and Law: John Courtney Murray Today*, 1 J. MORAL THEOLOGY 69 (2012).

26. See Michael J. Perry, *Right Decision, Wrong Reason: Same-Sex Marriage & the Supreme Court*, COMMONWEAL, (Aug. 5, 2013), <https://www.commonwealmagazine.org/right-decision-wrong-reason/> (“[T]he bishops insist that their condemnation of same-sex sexual conduct is not based on revelation but on natural law reasoning, and in that sense it is not a sectarian religious belief.”).

and Charles Taylor have said, in their recent book, about “popular sovereignty” and “basic human rights”:

[They] are the *constitutive* values of liberal and democratic political systems; they provide these systems with their foundation and aims. Although these values are not neutral, they are legitimate, because it is they that allow citizens espousing very different conceptions of the good to live together in peace. They allow individuals to be sovereign in their choices of conscience and to define their own life plan while respecting others’ right to do the same. That is why people with very diverse religious, metaphysical, and secular convictions can share and affirm these constitutive values. They often arrive at them by very different paths, but they come together to defend them.²⁷

As said, and as I explain in my new book, a version of the right to religious and moral freedom emerged in the constitutional law of the United States, under the name “the right of privacy,” almost fifty years ago—at about the very time, as it happened, that John Courtney Murray was delivering his memo to Cardinal Cushing.

V. DOES THE EXCLUSION POLICY VIOLATE THE RIGHT TO RELIGIOUS AND MORAL FREEDOM?

A core part of the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments—which is the freedom protected by the right to religious and moral freedom—is the freedom to live one’s life in a marriage of one’s choosing, if one chooses to live one’s life in a marriage. So the exclusion policy clearly implicates the right to religious and moral freedom: the policy interferes with same-sex couples’ freedom to live their lives in a marriage of their choosing. But that the exclusion policy *implicates* the right does not entail that the policy *violates* the right. The right to religious and moral freedom is not absolute, but conditional: a policy that implicates the right violates the right if, and only if, the policy fails to satisfy the legitimacy condition, the least burdensome alternative condition, or the proportionality condition. As it happens, the exclusion policy fails to satisfy the legitimacy condition—the policy fails to serve a legitimate government objective—and therefore violates the right to religious and moral freedom.

The government objectives that have been asserted in defense of the exclusion policy are of two sorts: *morality-based* objectives, by which I mean objectives whose pursuit by government presupposes that same-sex sexual conduct is immoral, and *non-morality-based* objectives, by which I mean objectives whose pursuit by government does not presuppose that same-sex sexual conduct is immoral.

27. JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 11 (2011) (footnote omitted).

The two principal non-morality-based government objectives that have been asserted in defense of the exclusion policy are (1) protecting the health of the institution of traditional (i.e., opposite-sex) marriage, and (2) protecting the welfare of children. Both objectives are undeniably legitimate government objectives; indeed, both are undeniably weighty government objectives. However, no credible argument supports the proposition that the exclusion policy serves either objective.²⁸ Put another way, no credible argument supports the proposition that all the several states in the United States and all the several countries in the world that have thus far admitted same-sex couples to civil marriage²⁹ have thereby acted either to the detriment of the health of the institution of traditional marriage or to the detriment of the welfare of children.³⁰

28. See generally Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431 [hereinafter Koppelman, *Judging*].

29. In the United States, as of March 2014, seventeen states and the District of Columbia (2010) grant access to civil marriage to same-sex couples: Massachusetts (2003), Connecticut (2008), Iowa (2009), New Hampshire (2009), Vermont (2009), New York (2011), Maine (2012), Maryland (2012), Washington (2012), California (2013), Delaware (2013), Hawaii (2013), Illinois (2013), Minnesota (2013), New Jersey (2013), New Mexico (2013), and Rhode Island (2013). Four more states, as of March 2014, grant to same-sex unions all or some of the legal benefits granted to opposite-sex marriages, but without calling the unions “marriage”: Colorado, Nevada, Oregon, and Wisconsin.

As of March 2014, seventeen countries grant access to civil marriage to same-sex couples: the Netherlands (since 2000), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2009), Sweden (2009), Argentina (2010), Portugal (2010), Iceland (2010), Denmark (2012), Brazil (2013), France (2013), New Zealand (2013), the United Kingdom (England and Wales) (2013), Uruguay (2013), and Scotland (2014). In April 2013, the Pew Forum on Religion and Public Life reported:

In December 2009, the government of Mexico City legalized same-sex marriage within its jurisdiction. The decision was challenged in court, but the law was upheld by Mexico’s Supreme Court, which in August 2010 ruled that same-sex marriages performed in Mexico City were valid and that they must be accepted throughout the country. Since 2011, the southern Mexican state of Quintana Roo also has allowed gay marriages.

Gay Marriage Around the World, PEW RES. RELIGION & PUB. LIFE PROJECT, <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/> (last updated June 19, 2014). Many more countries—or parts of countries—grant to same-sex unions all or some of the legal benefits granted to opposite-sex marriages, but without calling the unions “marriage”: Andorra, Australia, Austria, Colombia, Croatia, the Czech Republic, Ecuador, Finland, Germany, Greenland, Hungary, Ireland, Isle of Man, Israel, Lichtenstein, Luxembourg, part of Mexico (Coahuila), Slovenia, and Switzerland. I may have overlooked one or more countries.

30. If you are skeptical about my “no credible argument” claim, I recommend that you read this material: JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* (2012); Maggie Gallagher et al., *Discussion*, 58 DRAKE L. REV. 913 (2010); Maggie Gallagher, *Prepared Statement of Maggie Gallagher*, 58 DRAKE L. REV. 889 (2010); Andrew Koppelman, *Prepared Statement of Andrew Koppelman*, 58 DRAKE L. REV. 905 (2010); Tobias Barrington Wolff, *Collegiality and Individual Dignity*, 81 FORDHAM L. REV. 829, 831 n.2 (2012). For excellent commentary on the Corvino/Gallagher book, see Matthew Lister, *John Corvino and Maggie Gallagher: Debating Same-Sex Marriage*, CRIM. L. & PHIL. (Nov. 2013), available at <http://link.springer.com/article/10.1007%2Fs11572-013-9281-2>; Mark Strasser, Book Review, 2012 NOTRE DAME PHIL. REV. 7 (reviewing JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* (2012)), available at <http://ndpr.nd.edu/news/32246-debating-same-sex-marriage/>; see also Koppelman, *Judging*, *supra* note 28.

In his letter “to Congress on Litigation Involving the Defense of Marriage Act,” U.S. Attorney General Eric Holder stated: “As the [U.S.] Department [of Justice] has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.” Eric Holder, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, U.S. DEP’T OF JUSTICE (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>; see also Car-

Indeed, excluding same-sex couples from civil marriage disserves—and admitting them to civil marriage serves—the welfare both of the many children who are now being raised, or in the future will be raised, by same-sex couples.³¹

The argument that the exclusion policy serves one or both of the aforementioned two objectives—the aforementioned two *non-morality-based* objectives—is taken seriously mainly by persons who already oppose admitting same-sex couples to civil marriage for a different reason, namely, that same-sex sexual conduct is immoral.

Indeed, the argument that excluding same-sex couples from civil marriage serves one or both of the two non-morality-based objectives is attractive to those who, when in the public square, so to speak, opposing the admission of same-sex couples to civil marriage, want to defend their oppositional stance without putting any weight—or, at least, much weight—on the claim that same-sex sexual conduct is immoral. Supporters of the exclusion policy, when in the public square, want to put as little weight as possible on the claim that same-sex sexual conduct is immoral, given that the claim is taken seriously by fewer and fewer persons with the passing of each season.

Consider, in the context of what I have just said, the book titled *What Is Marriage? Man and Woman: A Defense*, by Sherif Girgis, Ryan T. Anderson, and Robert P. George. Andrew Koppelman, in a forthcoming issue of your *Law Review*, has described the book as “the leading statement of the case against same-sex marriage”³²

In the book, the authors argue that we should steadfastly adhere in our law to a particular understanding of “marriage”, which they call “[t]he *conjugal* view of marriage.”³³ According to the conjugal view, as the authors explain:

1. A couple is truly “married” if and only if their relationship satisfies certain conditions, one of which is that the couple is capable of engaging in sexual conduct that, as the Catholic bishops have described it, is “inherently procreative.”

los A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 WM. & MARY BILL RTS. J. 691, 699–701 (2013).

31. “[A]ccording to the 2010 census, one-quarter of same-sex households are raising children.” Kenji Yoshino, *For Obama, It’s About the Children*, N.Y. TIMES CAMPAIGN STOPS BLOG (May 12, 2012, 4:43 PM), <http://campaignstops.blogs.nytimes.com/2012/05/12/for-obama-its-about-the-children/>; see also Frank Bruni, *2 Dads, 2 Daughters, 1 Big Day*, N.Y. TIMES (July 20, 2011), <http://www.nytimes.com/2011/07/21/opinion/21bruni.html>; Sabrina Tavernise, *Adoptions Rise by Same-Sex Couples, Despite Legal Barriers*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14adoption.html?pagewanted=all>.

32. Or, more precisely, as one of the two leading statements, “together with Maggie Gallagher’s half of *Debating Same-Sex Marriage* (coauthored with John Corvino).” Andrew Koppelman, *More Intuition than Argument*, COMMONWEAL (Mar. 25, 2013), <http://www.commonwealmagazine.org/more-intuition-argument> [hereinafter Koppelman, *Intuition*]. For Koppelman’s critique of the book—which is an expanded version of Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J. L. & PUB. POL’Y 245 (2011)—see Koppelman, *Judging*, *supra* note 28; see also Koppelman, *Intuition*, *supra*.

33. SHERIF GIRGIS ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 1 (2012).

2. No same-sex couple is capable of engaging in inherently procreative sexual conduct.
3. Therefore, no same-sex couple is truly “married” (according to the conjugal view).

Others, however, argue that we should now accept in our law what a growing number are accepting outside our law, namely, a different understanding of “marriage”—a revised understanding—according to which:

1. A couple is truly “married” if and only if their relationship satisfies certain conditions: the same conditions that are part of the conjugal view, except for the “capable of engaging in inherently procreative sexual conduct” condition.
2. Some same-sex couples—like some opposite-sex couples—satisfy all of the specified conditions.
3. Therefore, some same-sex couples—and some opposite-sex couples—are truly “married” (according to the revised understanding).

So, two different understandings—two different conceptions—of “marriage.”³⁴ What is there to say in support of the proposition that we should not accept in our law the revised understanding of “marriage” but should instead adhere to the conjugal understanding, according to which no same-sex couple is, or can be, truly “married”? These are the three principal things that have been said in support of that proposition:

1. Same-sex sexual conduct is immoral.
2. Admitting same-sex couples to civil marriage would imperil the health of the institution of traditional marriage.
3. Admitting same-sex couples to civil marriage would imperil the welfare of children.

As I said, propositions two and three are attractive to those who, when in the public square opposing the admission of same-sex couples to civil marriage, want to defend their oppositional stance without putting much if any weight on the claim that same-sex sexual conduct is immoral. In their book, Girgis, Anderson, and George say, among the other things they say, both two and three. And they studiously avoid saying one,³⁵ notwithstanding that one of the three authors, Princeton professor Robert George, is, like his mentor John Finnis, a prominent defender of the proposition that same-sex sexual conduct is immoral.³⁶

34. Cf. Strasser, *supra* note 30 (“The American family has undergone a transformation because of the availability of assisted reproductive technologies, the acceptance of adoption, the number of children born to unmarried parents, and the number of married couples who are intentionally childless. In part because of the frequency of divorce and in part because of the increased number of children living with only one or perhaps neither of their biological parents, we now have a much more complicated and diverse array of families that simply cannot be captured by the pictures of marriage and family that [Maggie] Gallagher paints.”).

The “picture[] of marriage and family” Maggie Gallagher paints is substantially the same picture the authors of *What Is Marriage?* paint. See CORVINO & GALLAGHER, *supra* note 30, at 91–178 (2012).

35. See GIRGIS ET AL., *supra* note 33, at 10.

36. Ryan T. Anderson, *Robert P. George on the Struggle over Marriage*, PUB. DISCOURSE (July 3, 2009), <http://www.thepublicdiscourse.com/2009/07/381/>.

Let's move on.

As I said, the government objectives that have been advanced in support of excluding same-sex couples from civil marriage are of two sorts: *morality-based* objectives—objectives whose pursuit by government presupposes that same-sex sexual conduct is immoral—and *non-morality-based* objectives—objectives whose pursuit by government does not presuppose that same-sex sexual conduct is immoral.

The dominant rationale for the exclusion policy—as is well known—involves a morality-based government objective: *Admitting same-sex couples to civil marriage would tend to legitimize—“normalize”—same-sex sexual conduct. This we must not do: same-sex sexual conduct is immoral.*³⁷ For example, in 2003, the Vatican—specifically, the Congregation for the Doctrine of the Faith, whose Prefect at the time, Joseph Cardinal Ratzinger, later became Pope Benedict XVI—argued that admitting same-sex couples to civil marriage would signal “the approval of deviant behaviour, with the consequence of making it a model in present-day society”³⁸

Excluding same-sex couples from civil marriage obviously serves the government objective of not taking a step that would tend to legitimize conduct that many believe to be immoral: same-sex sexual conduct. The serious question is whether that government objective—that *morality-based* government objective—qualifies as a *legitimate* government objective under the right to religious and moral freedom. The answer depends on the reason or reasons lawmakers (and those they represent) have for believing that same-sex sexual conduct is immoral. If the only reason lawmakers have is a religious reason—for example, and in the words of one evangelical minister, “[same-sex sexual conduct is] in direct opposition to God’s truth as He has revealed it in the Scriptures”³⁹—then the

37. In his letter “to Congress on Litigation Involving the Defense of Marriage Act,” U.S. Attorney General Eric Holder stated: “[T]he legislative record underlying DOMA’s passage contains . . . numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships” In a note attached to that sentence—note vii—the Letter states:

See, e.g., H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”); *id.* at 16 (same-sex marriage “legitimizes a public union, a legal status that most people . . . feel ought to be illegitimate” and “put[s] a stamp of approval . . . on a union that many people . . . think is immoral”); *id.* at 15 (“Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality”); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are “in accord with nature and hence have a moral component”); *id.* at 31 (favorably citing the holding [of *Bowers v. Hardwick*, 478 U.S. 186 (1986),] that an “anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable”); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in [*Romer v. Evans*, 517 U.S. 620 (1996),] that “[t]his Court has no business . . . pronouncing that ‘animosity’ toward homosexuality is evil”).

Holder, *supra* note 30.

38. 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 [hereinafter CONSIDERATIONS].

39. So said the Rev. Ron Johnson, Jr., on September 28, 2008. Peter Slevin, *33 Pastors Flout Tax Law With Political Sermons*, WASH. POST (Sept. 29, 2008), <http://www.washingtonpost.com/wp->

government objective is clearly not legitimate. As I explained earlier in this Lecture, although government's acting to protect *public* morals is undeniably a legitimate government objective under the right to religious and moral freedom, government's acting to protect *sectarian* morals is not a legitimate government objective. *The right to religious and moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct based on sectarian belief that the conduct is immoral.*

A religious reason, however, is not the only reason lawmakers have for believing that that same-sex sexual conduct is immoral. Indeed, the path of reasoning runs in the opposite direction for many religious believers, whose position is not that same-sex sexual conduct is immoral because it is contrary to the will of God, but that same-sex sexual conduct is contrary to the will of God because it is immoral.⁴⁰

The Pope and bishops of the Roman Catholic Church—the Magisterium of the Church—are leading opponents of “legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”⁴¹ The Magisterium's reason—its rationale—for believing that same-sex sexual conduct is immoral is a nonreligious

dyn/content/article/2008/09/28/AR2008092802365_pf.html; see also John Frank, *Churches Speak Up on Gay Marriage*, NEWS & OBSERVER (Raleigh, N.C.) (Sept. 18, 2011), <http://www.newsobserver.com/2011/09/18/1497957/churches-speak-up-on-gay-marriage.html>.

For many Christians, even many evangelical Christians, the belief that same-sex sexual conduct is contrary to the will of God is no longer credible. See, e.g., DAVID G. MYERS & LETHA DAWSON SCANZONI, *WHAT GOD HAS JOINED TOGETHER?: A CHRISTIAN CASE FOR GAY MARRIAGE* (2005); see also PATRICIA BEATTIE JUNG & RALPH F. SMITH, *HETEROSEXISM: AN ETHICAL CHALLENGE* 61–88 (1993); Brian K. Blount, *Reading and Understanding the New Testament on Homosexuality*, in *HOMOSEXUALITY AND CHRISTIAN COMMUNITY* 28, 30 (Choon-Leong Seow ed., 1996); Victor Paul Furnish, *The Bible and Homosexuality: Reading the Texts in Context*, in *HOMOSEXUALITY IN THE CHURCH* 18, 31–33 (Jeffrey S. Siker ed., 1994); Daniel A. Helminiak, *The Bible on Homosexuality: Ethically Neutral*, in *SAME SEX* 81, 92 (John Corvino ed., 1999); Bruce J. Malina, *The New Testament and Homosexuality?*, in *SEXUAL DIVERSITY AND CATHOLICISM: TOWARD THE DEVELOPMENT OF MORAL THEOLOGY* 150, 168 (Patricia Beattie Jung & Joseph Andrew Coray eds., 2001); Choon-Leong Seow, *A Heterotextual Perspective*, in *HOMOSEXUALITY AND CHRISTIAN COMMUNITY*, *supra*, at 14, 24; Jeffrey S. Siker, *Homosexual Christians, the Bible, and Gentile Inclusion: Confessions of a Repenting Heterosexualist*, in *HOMOSEXUALITY IN THE CHURCH*, *supra*, at 178, 191. I have explained elsewhere why Christians, as Christians, have good reason to be wary about relying on the biblically-based argument that same-sex sexual conduct is contrary to the will of God as a ground for supporting the exclusion policy. See MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 55–80 (2003); cf. Nicholas D. Kristof, *Lovers Under the Skin*, N.Y. TIMES (Dec. 3, 2003), <http://www.nytimes.com/2003/12/03/opinion/lovers-under-the-skin.html> (“A 1958 poll found that 96 percent of whites disapproved of marriages between blacks and whites In 1959 a judge justified Virginia's ban on interracial marriage by declaring that ‘Almighty God . . . did not intend for the races to mix.’”).

40. It is not always clear which of two different positions one is espousing when one says that X is contrary to the will of God: (1) X is contrary to the will of God and *therefore* immoral, or (2) X is contrary to the will of God *because* X is immoral. According to the first position, the reason for concluding that X is immoral is theological: “X is contrary to the will of God.” But according to the second position, the reason for concluding that X is immoral is unstated and not necessarily theological, even though the “therefore”—“X is immoral and therefore contrary to the will of God”—is a theological claim.

41. PROTECTING MARRIAGE, *supra* note 19. It bears repetition that the Pope and bishops also insist that all human beings, gays and lesbians no less than others, are equally beloved children of God. See Eskridge, Jr., *supra* note 20, at 697.

reason: a reason that does not assert, imply, or presuppose that God—or any other transcendent reality—exists.

According to the Magisterium, it is immoral not just for same-sex couples but for anyone and everyone—even a man and a woman who are married to one another—to engage in (i.e., pursuant to a knowing, uncoerced choice to engage in) any sexual conduct that is “inherently nonprocreative,” and same-sex sexual conduct—like contracepted male-female sexual intercourse,⁴² masturbation, and both oral and anal sex—is inherently nonprocreative. Because “[w]hat are called ‘homosexual unions’ . . . are inherently non-procreative,” declared the Administrative Committee of the U.S. Conference of Catholic Bishops, they “cannot be given the status of marriage.”⁴³ As Joseph Cardinal Ratzinger stated in 2003, speaking for the Congregation for the Doctrine of the Faith: because they “close the sexual act to the gift of life,” “homosexual acts go against the natural moral law.”⁴⁴

42. See TENTLER, *supra* note 25, at 1–3.

43. PROTECTING MARRIAGE, *supra* note 19; see also CONSIDERATIONS, *supra* note 38.

For anyone who rejects the Church’s argument about the immorality of engaging in “inherently nonprocreative” sexual conduct,

it is no longer possible to argue that sex/love between two persons of the same sex cannot be a valid embrace of bodily selves expressing love. If sex/love is centered primarily on communion between two persons rather than on biologicistic concepts of procreative complementarity, then the love of two persons of the same sex need be no less than that of two persons of the opposite sex. Nor need their experience of ecstatic bodily communion be less valuable.

Rosemary Ruether, *The Personalization of Sexuality*, in FROM MACHISMO TO MUTUALITY: ESSAYS ON SEXISM AND WOMAN-MAN LIBERATION 70, 83 (Eugene C. Bianchi & Rosemary R. Ruether eds., 1976); cf. Edward Collins Vacek, *The Meaning of Marriage: Of Two Minds*, COMMONWEAL, Oct. 24, 2003, at 17, 18–19 (“When, after Vatican II, Catholics began to connect sexual activity more strongly with expressing love than with making babies, it became harder to see how homosexual acts are completely different from heterosexual acts.”). However, to reject the Church’s argument about the immorality of “inherently nonprocreative” sexual conduct does not entail acceptance of the proposition that when it comes to sexual conduct, anything goes. As Margaret Farley, a Catholic sister and formerly Stark Professor of Christian Ethics at Yale University, has explained:

My answer [to the question of what norms should govern same-sex relations and activities] has been: the norms of justice—those norms which govern all human relationships and those which are particular to the intimacy of sexual relations. Most generally, the norms are respect for persons through respect for autonomy and rationality; respect for relationality through requirements of mutuality, equality, commitment, and fruitfulness. More specifically one might say things like: sex between two persons of the same sex (just as two persons of the opposite sex) should not be used in a way that exploits, objectifies, or dominates; homosexual (like heterosexual) rape, violence, or any harmful use of power against unwilling victims (or those incapacitated by reason of age, etc.) is never justified; freedom, integrity, privacy are values to be affirmed in every homosexual (as heterosexual) relationship; all in all, individuals are not to be harmed, and the common good is to be promoted.

Margaret A. Farley, *An Ethic for Same-Sex Relations*, in A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH 93, 105 (Robert Nugent ed., 1983). Farley then adds that “[t]he Christian community will want and need to add those norms of faithfulness, of forgiveness, of patience and hope, which are essential for any relationships between persons within the Church.” *Id.*; see also MARGARET A. FARLEY, JUST LOVE: A FRAMEWORK FOR CHRISTIAN SEXUAL ETHICS 293–94 (2006); TODD A. SALZMAN & MICHAEL G. LAWLER, SEXUAL ETHICS: A THEOLOGICAL INTRODUCTION 178 (2012).

44. CONSIDERATIONS, *supra* note 38; see also Hollenbach, *supra* note 25 (“The United States Catholic Bishops have adopted particularly pointed public advocacy positions on . . . resistance to gay marriage and public acceptance of the legitimacy of same sex relationships. The Bishops’ 2007 statement *Forming Consciences for Faithful Citizenship* was a formal instruction by the U.S. hierarchy covering the full range of the public dimensions of the Church’s moral concerns. In this document, . . . echoing the affirmation by the Catechism of the Catholic Church that homosexual acts ‘are contrary to

The Pope and bishops' position that inherently nonprocreative sexual conduct is, as such—as inherently nonprocreative—immoral is a sectarian moral position; indeed, it is a conspicuously sectarian moral position. It bears emphasis, in that regard, that the position is extremely controversial *even just among Catholic moral theologians*,⁴⁵ not to mention among the larger community of religious ethicists.⁴⁶

It seems clear that in the United States today, the exclusion policy is based on—in the sense that the policy would not remain on the books in those states where it remains on the books “but for”—the affirmation by many citizens of the biblical rationale and/or the bishops' nonreligious rationale for holding fast to the belief that same-sex sexual conduct is immoral. But, again, the right to religious and moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct based on sectarian moral belief.

Recall what John Courtney Murray wrote, in the mid-1960s, in his “Memo to [Boston's] Cardinal Cushing on Contraception Legislation”:

[T]he practice [contraception], undertaken in the interests of “responsible parenthood,” has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence⁴⁷

Father Murray did not explain in his memo what he meant by “the point of view of law and jurisprudence.” Nonetheless, what Murray said was “decisive from the point of view of law and jurisprudence” *is* decisive; it is decisive from the point of view of *the right to religious and moral freedom*. And we may say about the anti-same-sex-marriage policy much the same thing Father Murray said to Cardinal Cushing about Massachusetts' anticontraception policy:

the natural law' and that 'under no circumstances can they be approved,' the bishops oppose[d] 'same-sex unions or other distortions of marriage.'" (footnotes omitted).

45. See, e.g., SALZMAN & LAWLER, *supra* note 43, at 170–71; Stephen J. Pope, *The Magisterium's Arguments Against 'Same-Sex Marriage': An Ethical Analysis and Critique*, 65 THEOLOGICAL STUD. 530, 544 (2004). Moreover, a report by the Washington-based Public Religion Research Institute found that “74 percent of Catholics favor legal recognition for same-sex relationships, either through civil unions (31 percent) or civil marriage (43 percent). That figure is higher than the 64 percent of all Americans, 67 percent of mainline Protestants and significantly higher than 48 percent of black Protestants and 40 percent of evangelicals.” Jamie Manson, *Majority of American Catholics Support Transgender Rights*, NAT'L CATHOLIC REP. (Nov. 11, 2011), <http://ncronline.org/blogs/ncr-today/majority-american-catholics-support-transgender-rights>. “What's more, 'even among Catholics who attend services weekly or more, only about one-third (31%) say there should be no legal recognition for a gay couple's relationship, a view held by just 13% of those who attend once or twice a month and 16% of those who attend less often.’” Nick Sementelli, *New Poll: Nuance on Same-Sex Unions Drives up Catholic Support*, FAITH IN PUBLIC LIFE (Mar. 22, 2011, 11:05AM), http://www.faithinpubliclife.org/blog/new_poll_highlights_catholic_sl/.

46. See Perry, *supra* note 26.

47. Murray, *Memo*, *supra* note 25.

Same-sex marriage has received official approval by various religious groups within the community.⁴⁸ It is difficult to see how the state can refuse to countenance, as contrary to public morality, a relationship that numerous religious leaders and other morally upright people approve as morally good. The stand taken by these religious groups and others may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of the right to religious and moral freedom.

In her book, *Ministers of the Law: A Natural Law Theory of Legal Authority*, Jean Porter, a Catholic theologian on the faculty of the University of Notre Dame and a scholar of natural law, has explained and contended, against the kind of argument mounted by Girgis, Anderson, and George:

[M]arriage is always expressed through some set of conventional practices which will inevitably serve a range of other purposes proper to the kinship structures and personal interactions of the complex social primates that we are. This being the case, I think we should be very hesitant to rule out unconventional forms of marriage too quickly on the grounds that these are contrary to the natural purposes of the institution. What seems from one perspective to be contrary to natural purposes might appear on longer experience as a legitimate expansion of those purposes, which does not undermine, and may well strengthen, the central purposes which the institution must serve if society is to continue at all. For this reason, I would support the legal recognition of same-sex unions as marriages⁴⁹

In a growing number of countries, the state of affairs endorsed by Porter—“the legal recognition of same-sex unions as marriages”—is supported by a growing number of persons. One such country is our neighbor to the north, Canada, where in 2005 the Parliament enacted legislation granting same-sex couples access to civil marriage.⁵⁰ This is not to say that Canadians are now all of one mind; of course, they are not. This statement by Martin Cauchon, made in 2002 when he was the Minister of Justice and Attorney General of Canada, remains accurate:

Not just in Canada but around the world, individuals and their governments have debated whether marriage has a continuing value to society, and if so whether and how the state should recognize mar-

48. See Eskridge, Jr., *supra* note 20, at 707–08; see also Maggie Astor, *Illinois Clergy Members Support Same-Sex Marriage in Letter Signed by 260*, N.Y. TIMES (Dec. 23, 2012), http://www.nytimes.com/2012/12/24/us/260-in-illinois-clergy-call-for-legal-gay-marriage.html?_r=0; Laurie Goodstein, *Unions That Divide: Churches Split over Gay Marriage*, N.Y. TIMES (May 13, 2012), http://www.nytimes.com/2012/05/14/us/gay-marriage-issue-divides-churches.html?_r=0; cf. Samuel G. Freedman, *How Clergy Helped a Same-Sex Marriage Law Pass*, N.Y. TIMES (July 15, 2011), <http://www.nytimes.com/2011/07/16/us/16religion.html?pagewanted=all>.

49. JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 286–87 (2010). Porter adds, where I have put the ellipsis: “and I would grant legal recognition to some forms of plural marriages as well.” *Id.* at 287.

50. Kevin Bourassa & Joe Varnell, *It's a Quiet Thing: Equal Marriage is Law*, EQUAL MARRIAGE FOR SAME-SEX COUPLES (July 21, 2005), <http://www.samesexmarriage.ca/legal/qui210705.htm>.

ried relationships in law. The Canadian public, like those in many other countries, are divided on this question. Some feel strongly that governments should continue to support marriage as an opposite-sex institution, since married couples and their children are the principal social unit on which our society is based. Others believe that, for reasons of equality, governments should treat all conjugal relationships—opposite-sex and same-sex—identically. Still others believe that in a modern society, governments should cease to recognize any one form of relationship over another and that marriage should be removed from the law and left to individuals and their religious institutions.⁵¹

As Cauchon's statement indicates, some have suggested that it would be better if government were to get out of the business of awarding the title "marriage" and instead create civil unions for couples, both opposite-sex and same-sex, who satisfy certain conditions. For example, Martha Nussbaum has written that it would be preferable, "as a matter of both political theory and public policy, if the state withdrew from the marrying business, leaving the expressive domain to religions and to other private groups, and offering civil unions to both same- and opposite-sex couples."⁵²

51. Martin Cauchon, *Marriage and Legal Recognition of Same Sex Unions*, DEP'T OF JUSTICE OF CANADA 1 (2002), available at <http://www.mcctoronto.com/wp-content/uploads/images/justice.pdf>.

52. Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 672 (2010); see *id.* at 695; see also ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW 156 (2012); TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE 14 (2010); Carolyn McConnell, *What's in a Name? The Case for the Disestablishment of Marriage* (2012), available at <http://ssrn.com/abstract=2006785>; Charles J. Reid, Jr., Book Review, 53 J. CHURCH & ST. 132 (2011) (reviewing TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010)). For a skeptical view, see Laurie Shrage, *The End of 'Marriage'*, N.Y. TIMES OPINIONATOR BLOG (Nov. 4, 2012), http://opinionator.blogs.nytimes.com/2012/11/04/the-end-of-marriage/?_php=true&_type=blogs&_r=0; cf. Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697 (2010); Martha C. Nussbaum, *Reply*, 98 CALIF. L. REV. 731, 731–34 (2010) (responding to Karlan).

My esteemed colleague (and dear friend) at Emory University School of Law, Martha Fineman, has developed a more radical argument, according to which we should end "the legal status for marriage, which is what would and has justified massive economic and social subsidy for marriage (or 'sexual affiliations'—which also could include civil partnerships) and reallocating that subsidy to the caretaker/dependent relationship (the one society should seek to protect and foster)." E-mail from Martha Fineman to Michael Perry (Sept. 12, 2013) (on file with author); see MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995). Nancy Polikoff's description of Fineman's work is instructive:

[E]quality and choice[] dominate the rhetoric surrounding the push for same-sex marriage. In contemporary feminist legal theory, it is Martha Fineman whose work goes farthest in illuminating the deficiencies in this approach. Professor Fineman is renowned for her critique of how the equality model has hurt divorced women with respect to both economic consequences and custody determinations. She has also written eloquently of continuing inequality between husbands and wives in spite of the fiction of equality facilitated by the gender neutral language of today's family law. In her book *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, Fineman brought her analysis to another plane by re-envisioning the legal construction of family relationships. In *The Neutered Mother*, Fineman introduces the concepts of inevitable and derivative dependencies . . . She criticizes custody, paternity, support, and welfare laws that elevate the importance of the father, while simultaneously denigrating the work of mothering done overwhelmingly by women. She rejects the incantation of gender neutrality in the face of overwhelming evidence that gendered lives continue unabated and that acknowledgment of such reality is necessary 'to remedy socially and culturally imposed harms.' Thus, she advocates the

I am presently agnostic about whether “the state [should withdraw] from the marrying business” But I am not agnostic about whether the exclusion policy violates the constitutional law of the United States: I have explained, in this Lecture, why so long as government remains in “the marrying business”—why so long as government remains in the business of honoring, of dignifying, opposite-sex unions with the title “marriage”—the exclusion policy fails the legitimacy condition and therefore violates the right to religious and moral freedom.

VI. CONCLUSION: *UNITED STATES V. WINDSOR*

Let’s now return to the case with which we began: *United States v. Windsor*. I said that the Supreme Court’s ruling was correct but that its opinion was problematic. Let me explain.

The Court told us, and the record in the case amply confirmed, that the basis of DOMA’s exclusion—the “but for” predicate, as I have called it, of DOMA’s exclusion—was that same-sex marriage is “second-class”,⁵³ that it lacks the “dignity”⁵⁴ of traditional (i.e., opposite-sex) marriage. That “differentiation [between traditional marriage and same-sex marriage],” said the Court, “demeans the . . . relationship the State has sought to dignify.”⁵⁵ The Court then added that “[t]he law in question makes it even more difficult for the [tens of thousands of children now being raised by same-sex couples] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”⁵⁶

But the Court then failed to take the next step and tell us why Congress was not constitutionally free to enact DOMA’s exclusion on the basis of the view that same-sex marriage is immoral. The Court failed to

abolition of marriage as a *legal* category and its replacement with protection for the Mother-Child Dyad as the core, legally privileged, family connection. Fineman is careful to limit her proposal to abolition of marriage as a legal category. Ceremonies, secular or religious, could continue if they suited a couple's desire for public or sacred affirmation. But such ceremonies would have no legal consequences. With this, the state would lose its interest in bolstering one form of family intimacy, and voluntary adult sexual relationships would be none of the state's business. To Fineman, there is no good reason to elevate a monogamous, adult, sexual relationship to an institution with a privileged position in the law. As long as such an institution exists, she writes:

It will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant. Instead of seeking to eliminate the stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual?

On the other hand, the relationship that needs the resources and protection of society is the relationship between inevitable dependents, paradigmatically children, and their caretakers. As she says in her article in this issue, ‘without [this type of] caretaking in the aggregate, there could be no society.’ As Fineman envisions it, the social and economic subsidies now provided to the marital unit would be reallocated and redistributed to the unit consisting of inevitable dependents and their caretaker.” (footnotes omitted).

Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 167, 172–75 (2000).

53. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

54. *Id.*

55. *Id.* at 2694.

56. *Id.*

explain why Congress, in deciding who shall be entitled to receive the various federal benefits at stake, was not constitutionally free to proceed on the basis of its rejection of the position, affirmed by some states, that same-sex marriage is equal in “dignity” to traditional marriage.

I have supplied that explanation in this Lecture: our lawmakers are not constitutionally free to proceed on the basis that same-sex marriage is immoral, because in doing so, they proceed on the basis of a sectarian moral belief, thereby failing to satisfy the legitimacy condition and, so, violating the right to religious and moral freedom, a.k.a. “the right of privacy.”

That the Court failed to tell us why Congress is not constitutionally free to proceed on the basis of the view that same-sex marriage is immoral is only the first of two large problems with the Court’s opinion. The second large problem: the Court made several statements that at the very least are suggestive of the proposition that DOMA’s exclusion was based on the demeaning view that gays and lesbians are morally inferior human beings—and that supporters of DOMA’s exclusion are therefore, like supporters of antimiscegenation laws, bigots. Listen to some of what the Court said:

1. DOMA’s exclusion was “designed to injure”;⁵⁷
2. “DOMA seeks to injure”;⁵⁸
3. DOMA was animated by “a bare congressional desire to harm a politically unpopular group”;⁵⁹
4. DOMA was “motivated by an improper animus or purpose”;⁶⁰
5. “The avowed purpose and practical effect of [DOMA] . . . are to impose . . . a stigma”;⁶¹
6. “[T]he principal purpose and the necessary effect of [DOMA] are to demean”;⁶²
7. “[T]he purpose and effect [of DOMA are] to disparage and to injure those whom the State . . . sought to protect in personhood and dignity.”⁶³

Given those statements, it was not surprising that Justice Scalia, speaking in dissent for himself and Justice Thomas, accused the Court of concluding “that only those with hateful hearts could have voted ‘aye’ on [DOMA].”⁶⁴ The Court’s opinion, complained Scalia, treated DOMA’s “supporters as unhinged members of a wild-eyed lynch mob . . . , [as] an enemy of human decency”⁶⁵ “In the majority’s telling,” lamented

57. *Id.* at 2692.

58. *Id.* at 2693.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 2695.

63. *Id.* at 2696.

64. *Id.* at 2707 (Scalia, J., dissenting).

65. *Id.* at 2708, 2710 (Scalia, J., dissenting).

Scalia, “this story is black-and-white: Hate your neighbor or come along with us.”⁶⁶

The Court’s opinion would not have been vulnerable to Scalia’s interpretation of it, an interpretation shared by many others—the Court’s opinion would have been clearer and certainly less insulting to DOMA’s many supporters—had the opinion been written to emphasize that the constitutionally fatal problem with DOMA’s exclusion of same-sex marriages was not that the exclusion was based on the demeaning view that gays and lesbians are inferior human beings. There is no good reason to conclude that DOMA’s exclusion was based on—that the exclusion would not have been enacted “but for”—that demeaning view. The constitutionally fatal problem with DOMA’s exclusion of same-sex marriages, as the Court’s opinion should have gone out of its way to make crystal clear, was that DOMA’s exclusion, as the record in the case amply confirmed, was based on the belief that same-sex sexual conduct is immoral—a moral belief that, as I have explained in this Lecture, is sectarian and that, because sectarian, rendered the exclusion policy contrary to the right to religious and moral freedom.

66. *Id.* at 2711 (Scalia, J., dissenting).

APPENDIX

Varnum v. Brien

As I have explained in this lecture, the right to religious and moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct based on—“based on” in the sense that government would not be regulating the conduct “but for”—sectarian moral belief, such as “this conduct is contrary to the will of God.” Consider, in that regard, the following passages from *Varnum v. Brien*,⁶⁷ in which the Iowa Supreme Court ruled that Iowa constitution requires Iowa to admit same-sex couples to civil marriage:

Now that we have addressed and rejected each specific interest advanced by the County to justify the classification drawn under the statute, we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County’s silence reflects, we believe, its understanding this reason cannot, under our Iowa Constitution, be used to justify a ban on same-sex marriage.

While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling. Consequently, we address the religious undercurrent propelling the same-sex marriage debate as a means to fully explain our rationale for rejecting the dual-gender requirement of the marriage statute.

It is quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly. Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation. The belief that the “sanctity of marriage” would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief.

Yet, such views are not the only religious views of marriage. As demonstrated by amicus groups, other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion.

This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa’s same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government *avoids* them. See Iowa Const.

67. 763 N.W. 2d 862, 904-06 (2009).

art. I, § 3 (“The general assembly shall make no law respecting an establishment of religion . . .”). The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, “Marriage is a civil contract” and then regulates that civil contract. Iowa Code § 595A.1. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.

We, of course, have a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman. *See* Iowa Const. art. I, § 3 (“The general assembly shall make no law . . . prohibiting the free exercise [of religion] . . .”). This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation. This proposition is the essence of the separation of church and state.

As a result, civil marriage must [not] be judged . . . under religious doctrines or the religious views of individuals. This approach does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union, but considers, as we must, only the constitutional rights of all people, as expressed by the promise of equal protection for all. We are not permitted to do less and would damage our constitution immeasurably by trying to do more.

The only legitimate inquiry we can make is whether [the statute] is constitutional. If it is not, its virtues . . . cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.

In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage-religious or otherwise-by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person’s religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.