Civil Marriage for Same-Sex Couples, "Moral Disapproval," and Tensions between Religious Liberty and Equality

Linda C. McClain
Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

Part of the Civil Rights and Discrimination Commons, and the Family Law Commons

Recommended Citation
Available at: https://scholarship.law.bu.edu/faculty_scholarship/2783

This Book Chapter is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.
Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality

Linda C. McClain

DOI:10.1093/acprof:oso/9780190606060.003.0006

Abstract and Keywords

This chapter analyzes tensions between marriage equality and religious freedom in the United States using three organizing frameworks. The first, congruence and conflict, highlights a common premise within religious objections to same-sex marriage: namely, that laws and policies should reflect citizens’ religious virtues, creating a congruence between civil society and government. In contrast, the second framework posits a distinction between civil and religious marriage—“civil marriage” as a secular legal category designating an equally accessible public institution, and “religious marriage” as a feature of private morality without the force of law. By heeding this distinction, the chapter argues, marriage equality and religious liberty become compatible. The third framework addresses the role of moral disapproval in justifying discriminatory laws. Chronicling constitutional jurisprudence on liberty and equality, it is argued that appeals to upholding traditional morality are not sufficient to justify legislative classifications that disadvantage persons on the basis of sexual orientation.

Keywords: religious liberty, equality, same-sex marriage, marriage equality, civil marriage, moral disapproval, DOMA, Prop 8, Supreme Court, law
Introduction

Does access by gay men and lesbians to civil marriage—to use a common term, *marriage equality*—threaten religious liberty? Is marriage equality, along with its consequences for civil law, in direct tension with the religious freedom of persons who oppose it on religious grounds? If so, are exemptions from those civil laws appropriate? Does marriage equality pose a greater or lesser threat depending upon whether it results from successful constitutional litigation brought by same-sex couples or from a state law duly enacted by a democratically elected legislature and signed by an elected governor? Conversely, is it constitutionally problematic if “the people,” through the ballot initiative or referendum process, *(p.88)* take measures to prevent or, in some instances, override this marriage equality? Finally, what role does or should moral disapproval of homosexuality and of same-sex marriage play in public deliberation and decision-making about the quest for marriage equality?

This chapter situates these questions about marriage equality and religious liberty in the context of developments within the United States. I will offer three organizing frameworks for considering these questions. One framework is *congruence and conflict*, that is, the basic tension in the US constitutional order between two important ideas about the relationship between civil society and government: (1) families, religious institutions, and other voluntary associations of civil society are foundational sources or “seedbeds” of virtues and values that undergird—and are congruent with—constitutional democracy, and yet (2) these same nongovernmental entities are independent locations of power and authority that guard against governmental orthodoxy by generating their own distinctive virtues and values, which may conflict with public norms. I will explain how this framework helps to evaluate claims that marriage equality threatens religious liberty.

A second, related framework is the *distinction between civil and religious marriage* in US family law. Claims that marriage equality threatens religious liberty often blur—or reject—the distinction between civil and religious marriage and insist that the two must be congruent. Conversely, recognizing the distinction between civil and religious marriage helps make sense of the claim that marriage equality is compatible with religious liberty.

A third framework is the *role of moral argument* and, more precisely, moral disapproval, in justifying the law concerning civil marriage. This framework requires a grounding in the relevant United States constitutional jurisprudence concerning liberty and equality and its evolution in the last few decades, in the US Supreme Court’s *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003), toward a more critical examination of appeals to upholding traditional morality as a justification for legislative classifications that disadvantage persons based on their homosexuality. The precedents set in *Romer* and *Lawrence* rule out “animus” or a “bare desire to harm” as a rationale for such legislation. This
Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality

...jurisprudence is at the core of litigation over marriage equality in state and federal courts. Another crucial precedent in which the Court limited the role of “moral disapproval of homosexuality” as a justification for legislation is United States v. Windsor (2013), in which the Supreme Court (in a 5-4 opinion) struck down part of the Defense of Marriage Act (DOMA). Although Windsor formally ruled only on the constitutionality of a federal ban on recognizing marriages valid under state law, numerous federal district and appellate courts found Windsor’s reasoning equally applicable and persuasive with respect to state bans on marriage by same-sex couples (p.89) or on the recognition of such marriages, holding that such laws violate the Fourteenth Amendment; only one federal court of appeals—the Sixth Circuit—ruled to the contrary. On June 26, 2015, in Obergefell v. Hodges, the Supreme Court resolved this circuit split and reversed the Sixth Circuit’s ruling. Observing that this case law in the federal appellate courts had “helped to explain and formulate the underlying principles” relevant to the Court’s analysis, the Court (in a 5-4 opinion authored by Justice Kennedy) held that, under the Fourteenth Amendment, same-sex couples “may exercise the fundamental right to marry” in all states and that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”

As requested by this volume’s editors, I apply these three frameworks to particular legal, political, and policy controversies. I offer three examples—corresponding to the three branches of government: the legislative, executive, and judicial—where prominent religious leaders have identified threats to religious liberty. The first example is the New York legislature’s enactment of the Marriage Equality Act, which allows same-sex couples to marry. Religious leaders criticized the law both for its alleged departure from a true understanding of marriage and its purported failure to provide adequate religious exemptions (e.g., for public officials who refuse to take part in same-sex marriage). The second is the decision by the Department of Justice (DOJ) to stop defending DOMA in legal lawsuits challenging its constitutionality, including in the Windsor litigation. A prominent address on religious liberty stated that the DOJ had “attacked DOMA as act of ‘bias and prejudice,’ akin to racism, thereby implying that churches that teach that marriage is between a man and a woman are guilty of bigotry.” I look at arguments made by religious organizations in defense of DOMA and religious liberty in “friend of the court” briefs filed in the Windsor litigation. Windsor itself triggered new warnings about threats to religious liberty, fortified by charges in the strongly worded dissents that the majority had branded supporters for traditional marriage “bigots” and “superstitious fools” who had “hateful hearts” and “acted with malice.”

My third example is the ruling by the federal district court, in Perry v. Schwarzenegger (2010), that Proposition 8 (hereafter Prop 8), a ballot initiative that amended California’s constitution after its high court ruled that same-sex couples must be allowed access to civil marriage, violated the US constitution...
because it lacked any legitimate purpose and instead rested on private moral or religious views. Religious critics sharply criticized both the *Perry* opinion and the Ninth Circuit opinion affirming it. Because the Supreme Court, in *Hollingsworth v. Perry* (2013), declined to reach the merits and instead vacated the Ninth Circuit opinion (for technical reasons discussed later in this chapter), I focus primarily on the federal district court opinion.

All three examples helpfully raise the larger issues of religion in the public square and what religious liberty means in a pluralistic constitutional democracy. These issues are likely to remain at the forefront of public discourse and to arise in new legislative and judicial battles in the post-*Obergefell* landscape, in which all states must allow same-sex couples to marry and recognize those marriages. Even before the Court’s ruling, in the wake of public criticism that “religious freedom restoration acts” passed in Indiana and elsewhere to protect religious business owners from “supporting” same-sex marriages instead protect discrimination and “bigotry,” several prominent religious leaders issued a new statement about the need to “talk about religious liberty.” They argue that “civic harmony” is impossible “when basic moral convictions and historic religious wisdom rooted in experience are deemed ‘discrimination.’” The rhetoric in the *Obergefell* dissents that the majority’s opinion threatens religious liberty and will be used “to vilify Americans who are unwilling to assent to the new orthodoxy” has already featured in recent statements about risks to religious freedom and calls for “constitutional resistance” to *Obergefell* and will likely feature in new controversies. The three frameworks offered in this chapter may provide a helpful way to approach these conflicts.

I. Frameworks
   A. Framework 1: Congruence and Conflict

   Congruence and conflict refers to the tension I noted earlier between two ideas about the relationship between the institutions of civil society and the institutions of government. The first idea envisions a comfortable *congruence* between norms and values fostered by nongovernmental associations and those inculcated by government, or at least that the institutions of civil society are “mediating associations” that cultivate a “whole range of moral dispositions, presumably supportive of political order.” The second contemplates that the values and virtues generated by nongovernmental institutions may *conflict* with political values and virtues. How does this tension apply to the evident clash between religious liberty and marriage equality?

   Some religious opponents of same-sex marriage assert that it will harm the institution of marriage and society if civil law redefines marriage so that it clashes with religious understandings of marriage. For example, on November 20, 2009, a group of prominent Christian clergy, religious leaders, and scholars released “The Manhattan Declaration: A Call of Christian Conscience.” Drafted
Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality

by Professor Robert P. George (a prominent political and constitutional (p.91) theorist at Princeton University), Professor Timothy George (Beeson Divinity School, Samford University), and the late Chuck Colson (Chuck Colson Center for Christian Worldview), it identifies three areas under supposed threat: life, marriage, and religious liberty.

The Declaration invokes congruence when it articulates the religious roots of the correct “objective” understanding of marriage. Citing biblical verses in Genesis (2:23–24) and Ephesians (5:32–33), it contends: “marriage … is the first institution of human society,” the foundation of all other institutions.13 The “impulse to redefine marriage” to recognize same-sex marriage, the Declaration states, “reflects a loss of understanding of the meaning of marriage as embodied in our civil and religious law and in the philosophical tradition that contributed to shaping the law” (5).

It is a mistake, the Declaration asserts, to believe that as a matter of “equality or civil rights,” homosexual relationships should be recognized as marriage: “No one has a civil right to have a non-marital relationship treated as a marriage” (6). Those disposed toward homosexual sexual conduct are entitled to compassion and respect as human beings “possessing profound, inherent, and equal dignity” (5). However, they are not capable of marriage because of its “objective reality” as a “covenanted union of husband and wife” and its “sexual complementarity”: the union of one man and one woman is “sealed, completed, and actualized by loving sexual intercourse in which the spouses become one flesh, not in some merely metaphorical sense, but by fulfilling together the behavioral conditions of procreation” (6). Thus, it is not “animus” or “prejudice” that leads the Declaration’s signatories to “pledge to labor ceaselessly to preserve the legal definition of marriage,” but “love” and “prudent concern for the common good” (7). This statement no doubt was aimed at some state court opinions (such as the Massachusetts high court, in Goodridge v. Department of Human Resources [2003]) rejecting traditional rationales for excluding same-sex couples from civil marriage as, in fact, manifestations of constitutionally impermissible prejudice or animus.14 The Declaration contends that when new definitions of marriage in civil law disturb this congruence between religious and civil law, “genuine social harms follow,” including threats to religious and parental liberty (6). The Manhattan Declaration, as I discuss below, filed a friend of the court brief in the Prop 8 and DOMA litigation.15

In What Is Marriage? Man and Woman: A Defense, Manhattan Declaration author Robert George, along with Sherif Girgis and Ryan Anderson, repeat the same definitional argument that same-sex couples are not capable of achieving the bodily union that is marriage’s “objective reality,” although without an explicit reference to religious beliefs.16 The authors also filed a brief in the Prop 8 and DOMA litigation, to which I return in Section IV.17
B. Framework 2: Distinction between Civil and Religious Marriage

The Manhattan Declaration rests upon an evident congruence between the “civil and religious law” of marriage. Civil and religious understandings of marriage, however, differ in many ways. Most fundamentally, while some religious opponents of same-sex marriage stress that God is not only the creator of the institution of marriage, but also the third party to every marriage, family law students in the United States routinely learn that the state creates the institution of civil marriage, sets the terms, and is a third party to every marriage—and divorce. This state role is vividly clear in the famous Massachusetts same-sex marriage decision, Goodridge, when the Supreme Judicial Court explains:

Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. No religious ceremony has ever been required to validate a Massachusetts marriage.

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. While only the parties can mutually assent to marriage, the terms of the marriage—who may marry and what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent [one spouse’s] death or a [void] marriage), the Commonwealth defines the exit terms.

Other state high courts have made similar declarations about civil marriage and the state’s role as a third party. To recognize that civil marriage is a government-regulated institution is not to deny that, historically, Christian teachings about marriage, particularly the ecclesiastical law of England, have shaped family law in the United States (for example, the law of separation and certain grounds for annulment and fault-based grounds for divorce). Thus, the phrase “wholly secular institution” might be misleading to the extent it suggests religious and secular understandings of marriage are wholly distinct. As the late Lee Teitelbaum observed, “for most of American history ... the law of marriage was consistent with and supported—if not created—by the views of dominant religious communities.” For example, “in the middle of the twentieth century,” the Catholic Church’s view “that artificial contraception is immoral” was “enforced or supported by law in some states.” Nonetheless, contemporary family law differs markedly from—indeed conflicts with—certain religious conceptions of marriage (including the conjugal model set forth in the Manhattan Declaration) that stress that marriage must be open to procreative acts, that men and women have complementary roles to play as spouses and parents, and that marriage—a permanent union—may not be dissolved.
Consider just three significant trends in family law: (1) the constitutionalization of family law, beginning with *Griswold v. Connecticut* (1965), which recognized the right of a married couple to use contraceptives; (2) family law’s gender revolution (spurred by the Supreme Court’s equal protection jurisprudence of the 1970s and 1980s), which eradicated state laws requiring different roles for husbands and wives, mothers and fathers, and shifted from a view of marriage as a hierarchical relation rooted in gender complementarity to a partnership of equals rooted in gender neutrality; and (3) the liberalization of divorce law, reflected in the so-called no-fault divorce revolution, which began in California in 1969, but quickly spread to the rest of the country (and, finally, to New York several years ago). All three of these trends are in tension with certain religious conceptions of marriage.

Many other trends in family law and society have shaped marriage law and social practice in directions that are at odds with many religious conceptions of marriage and family. For example, in marriage equality litigation, the US Conference of Catholic Bishops (USCCB) appealed to the “antiquity and near-universality” of marriage laws, attributing the one man–one woman definition to the state’s interest in “channeling the [unique] sexual and reproductive faculties of men and women into the kind of sexual union where responsible childbearing will take place and children’s interests will be protected.”

This argument about the unique role of marriage in channeling heterosexual procreation and parental investment, however, is in tension with the evolution in the law of parentage in many states and in some federal laws, which: (1) recognize parental rights and impose parental responsibilities outside of marriage, both through new formal statuses, such as civil unions and domestic partnerships for same-sex (and sometimes opposite-sex) couples and through doctrines such as de facto parenthood; (2) permit adoption by unmarried individuals and couples (including, in some states, same-sex couples); and (3) allow the use of assisted reproductive technology to create children—and parental status—within and outside of marriage. States vary with respect to how far they have adopted or rejected these trends. However, all these ways of permitting and even supporting non-marital parenthood are pertinent to claims about the unique, channeling role of marriage.

My point here is that secular law already differs sharply in certain respects from religious understandings of marriage, a departure of which conservative religious critics of civil marriage law are keenly aware. One example is covenant marriage. Louisiana legislator Katherine Shaw Spaht felt called to propose “covenant marriage” to instantiate an ideal of marriage in keeping with Christian (p.94) traditions of permanence and mutual sacrifice. Even so, because her new model would still permit divorce (although on a more restricted basis), Spaht found that Louisiana’s Catholic bishops could not support it. A second example comes from marriage equality litigation. In their friend of the court brief submitted in support of Prop 8 and DOMA, George, Anderson, and
Girgis contrasted the “conjugal model” of marriage that these laws rationally advance with the “revisionist” model, acknowledging that “a revisionist view has informed certain marriage policy changes of the last several decades.” They contend that “[e]nacting same-sex marriage” would be “finishing what policies like no-fault divorce began”; this would “finally replace the conjugal view with the revisionist” and “multiply the marriage revolution’s moral and cultural spoils, and make them harder than ever to recover.”

As state definitions of marriage change to permit same-sex couples to marry, the conflict between religious liberty and marriage equality arises in significant part due to underlying disagreement over the “nature” of marriage: as law and religion scholar Douglas Laycock explains, marriage simultaneously may be “a personal relationship, a legal relationship, and a religious relationship.” While “the secular side” sees marriage primarily as a “legal relationship” or “committed personal relationship between the spouses,” “[c]ommitted religious believers see the religious relationship as primary.” Accordingly, such believers “see same-sex marriage legislation as the state interfering with the sacred, changing a religious institution,” and, consequently, “[t]hey reject the change, and they reject the state’s authority to make the change.” This rejection is evident, as discussed later in this chapter, in some religious objections to New York’s Marriage Equality Law.

C. Framework 3: The Role of Moral Argument and Moral Disapproval

Political philosopher Michael Sandel famously criticizes liberalism for exalting choice without regard for the moral good for what is chosen. He contends that liberalism leads to a public square denuded of religious arguments and convictions. The issue of same-sex marriage, he contends, cannot be resolved within the bounds of public reason but requires “recourse to controversial conceptions of the purpose of marriage and the goods it honors.” While I disagree with Sandel’s critique of liberalism, I agree with his valuable insight that arguments about purposes and goods are key to the marriage equality issue. However, as James Fleming and I explain elsewhere, arguments about individual rights and about the goods and purposes of marriage both play a role in judicial opinions recognizing marriage equality and are compatible with the constitutional liberalism we support.

One alleged threat to religious liberty is that judges and the executive have ruled out moral disapproval as a legitimate reason to uphold laws excluding same-sex couples from civil marriage and have conflated moral disapproval with bias, prejudice, and animus. How, religious critics ask, can this possibly be correct? Isn’t law, as the Supreme Court once put it, constantly based on morality? Later in this chapter, I will discuss the role of moral disapproval in the federal constitutional challenges to DOMA and Prop 8. In this section, I preview the relevant US Supreme Court jurisprudence. Religious
critics have sharply criticized that jurisprudence from the outset, sometimes anticipating its possible future use to support same-sex marriage.

*Romer v. Evans* (1996) held that an amendment to the Colorado Constitution (Amendment 2), which had the effect of repealing several local laws that banned discrimination on the basis of sexual orientation and prohibited “any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures,” violated the Equal Protection Clause of the US Constitution. Justice Kennedy’s opinion in *Romer* contains several key phrases that surface again and again in the constitutional challenges to Prop 8 and DOMA, as well as to restrictive state marriage laws. Justice Kennedy states that Amendment 2 “withdraws from homosexuals, but not others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies”; that it imposes a “broad and undifferentiated disability on a single named group”; and that its “sheer breadth” is “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects” (631–633). In another often-quoted passage, he states: “Laws of the kind now before us raised the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected” (634). Quoting an earlier Supreme Court case, *Department of Agriculture v. Moreno* (1973), he explains that equal protection means, at minimum, that “a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest” (634). In a formulation that he draws from *Louisville Gas & Electric Co. v. Coleman* (1928) and repeats in *Windsor*, Kennedy states, “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision” (633).

This formulation suggests a more searching form of rational basis review, even though *Romer* declined to find that homosexuality was a suspect classification, triggering intermediate or strict scrutiny. Even so, it stressed that the legislative classification must “bear a rational relationship to an independent and legitimate end” to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law” (633). Amendment 2, Kennedy (p.96) concludes, “confounds” this test—singling out a group of persons based on a single trait and then disqualifying them from protection “across the board” is “unprecedented in our jurisprudence” (633). The state of Colorado’s primary rationale for Amendment 2 was “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality” (635); another rationale was “conserving resources to fight discrimination against other groups” (635).

However, Kennedy concludes, the amendment’s breath is too far divorced from these justifications to be credited. It “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado
cannot do. A State cannot so deem a class of persons a stranger to its laws” (635).

In a memorable dissent, Justice Scalia accuses the majority of mistaking “a Kulturkampf for a fit of spite,” countering that Amendment 2 is surely constitutional as a “modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws” (636). Colorado long ago had decriminalized sodomy. By contrast, Scalia points out that just ten years earlier in Bowers v. Hardwick—a case the majority nowhere mentions, let alone overrules—the Supreme Court upheld a state law imposing criminal punishment on homosexuals for sodomy. In Scalia’s words: “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct” (641, emphasis in original). What’s more: “Surely … the only sort of ‘animus’ at issue here [is] moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers” (644). Amendment 2, he contends, is an example of how a society that eliminated criminal punishment can nonetheless continue to express “moral and social disapprobation” of homosexuality, and, in doing so at the state level, counter successfully the “disproportionate political power” of homosexuals who reside in “disproportionate” numbers in urban areas (645–647). Scalia paints a picture of Coloradan voters exposed to “homosexuals’ quest for social endorsement,” which is happening not just in places like New York, Los Angeles, and San Francisco but right there in the cities of Colorado. Finally, Scalia accuses the majority of taking sides in the culture wars with the Knights Templar (that is, with the views and values of the lawyer class) rather than with the “villeins” (evidently, the people of Colorado who passed Amendment 2 “to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans” [652]).

Romer drew sharp criticism from conservative critics for usurping the political process, limiting the use of law to preserve traditional morality, and possibly opening the door to judicial imposition of same-sex marriage. In 1996, in a famous symposium in the journal First Things, Charles Colson, subsequent coauthor of the Manhattan Declaration, warned of “kingdoms in conflict” and that “the Court in Romer v. Evans effectively branded a bigot any citizen who considers homosexuality immoral.” He predicted that, under Romer, the Court would “easily find no compelling interest in confining marriage to a man and a woman.” He also, as in the Declaration, discussed the problem of what Christians should do when facing unjust laws. In the same First Things symposium, Hadley Arkes, a key Congressional witness in support of DOMA, passed in 1996, warned that Romer opened the door to judges imposing gay marriage, which went contrary to the “natural teleology of the body.” Amendment 2 simply sought to ensure that “coercions of the law would not be
used to punish those people who bore moral objections to homosexuality,” which the Court now characterized as animus or blind prejudice.\textsuperscript{44} Romer, Arkes argued, pronounced “the traditional moral teaching of Judaism and Christianity, as empty, irrational, unjustified.”\textsuperscript{45} This rhetoric about branding defenders of traditional marriage as bigots and prejudiced recurs, as I later discuss, in the dissenting opinions in \textit{Windsor} and \textit{Obergefell}.

In \textit{Lawrence v. Texas} (2003), in another opinion by Justice Kennedy, the Court officially overruled \textit{Bowers v. Hardwick} and held that Texas’ law making same-sex sodomy a crime was unconstitutional. This ruling implicitly invalidated any remaining state anti-sodomy statutes. \textit{Lawrence} is another critical component of the Court’s jurisprudence concerning the weight of moral disapproval and features in Kennedy’s subsequent opinions in \textit{Windsor} and \textit{Obergefell}. Romer’s invalidation of class-based legislation born of animus features in \textit{Lawrence}, in which the Court emphasizes the “stigma” that the criminal statute imposes on homosexuals. It concludes that the state “cannot demean [homosexual persons’] existence or control their destiny by making their private sexual conduct a crime.”\textsuperscript{46} The Court acknowledges—as \textit{Bowers} did—“that for centuries there have been powerful voices to condemn homosexual conduct as immoral” (571), shaped in part by religious beliefs and respect for the traditional family. Nonetheless, while “for many persons these are not trivial concerns but profound and deep convictions,” Justice Kennedy (invoking \textit{Planned Parenthood v. Casey}’s famous language) states: “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code’ ” (571). The Court said that it was not addressing whether homosexual intimate relationships warranted official recognition (impliedly, marriage).

Justice O’Connor, in her concurrence, is even more explicit about the import of \textit{Romer} and about distinguishing the present case from a challenge to marriage laws. First, invoking \textit{Romer}, she states: “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause” (583).\textsuperscript{(p.98)} To Texas’ law she applies \textit{Romer}’s conclusion about “rais[ing] the inevitable inference” of “disadvantage … born of animosity toward” (583) homosexual persons. By contrast to the statute upheld in \textit{Bowers} (which she did not join in overruling), the Texas law—on its face—only criminalized sodomy by same-sex couples. Second, she distinguishes Texas’ law, which brands “one class of persons as criminal based solely on the State’s moral disapproval of that class” and conduct associated with it from a legitimate interest, “such as … preserving the traditional institution of marriage” (585). In a crucial passage, she says: “Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group” (585). Both proponents and opponents of DOMA cited frequently to Justice O’Connor’s concurrence,
albeit to argue different positions as to whether that law rested on more than “moral disapproval.”

Justice Scalia, in a fierce dissent, famously predicts the end of all morals legislation in the wake of overruling Bowers. The Court in Bowers had stated: “The law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process clause, the courts will be very busy indeed.” He also warns readers not to believe the majority or O’Connor’s disclaimers about the marriage issue: after all, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s moral disapproval of same-sex couples.” He asks: if “moral disapprobation of homosexual conduct” does not suffice as a “legitimate state interest,” then on what basis could a state deny homosexuals the benefits of marriage? “Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” This last assertion has been cited in support of marriage equality, since encouraging “responsible procreation” features prominently as an asserted rationale for limiting marriage to opposite-sex couples, who (unlike same-sex couples) can procreate accidentally.

As with Romer, conservative critics of Lawrence debated whether the likelihood of a Supreme Court ruling favoring same-sex marriage “appeared to increase exponentially.” They pondered whether O’Connor or Scalia would prove to have the better argument with respect to whether the constitutionally legitimate interest in preserving the traditional institution of marriage would be viewed in later cases as something other than the constitutionally impermissible mere “moral disapproval of same-sex relations.”

Romer, in the context of Equal Protection, and Lawrence, in the context of Due Process, exemplify what constitutional commentators describe as a more careful or searching form of rational basis review, or, rational basis “plus” or “with bite.” Such review, however, often does not expressly use the language of fundamental rights, suspect classifications, and strict scrutiny. Romer and Lawrence, (p.99) as I discuss later, provide a template for Justice Kennedy’s opinion in Windsor. In turn, Lawrence and Windsor are both building blocks for Justice Kennedy’s majority opinion in Obergefell, which holds that same-sex couples have a fundamental right to marry in every state and that states must recognize their valid out-of-state marriages.

With these three frameworks in mind, I now turn to three examples of an evident conflict between religious liberty and marriage equality.

II. New York’s Marriage Equality Act
My first illustration of an evident conflict between religious liberty and marriage equality is the New York legislature’s voting, in June 2011, to allow same-sex couples to marry. My first two frameworks are pertinent. Religious critics charge that the Marriage Equality Act (the Act) wrongfully departed from a
religious conception of marriage and failed to afford adequate religious exemptions. By contrast, some legislators who supported the bill did so after wrestling with the relationship between religious and civil marriage and their obligations as lawmakers.

A. Analysis of Arguments

The New York legislature passed the Act without any judicial ruling that it must do so. Indeed, in *Hernandez v. Robles* (2006), the New York Court of Appeals ruled that the state’s constitution did not require opening up civil marriage to same-sex couples because encouraging heterosexuals to procreate responsibly supplied a rational basis for providing the benefits and protections of civil marriage to opposite-sex, but not same-sex, couples. However, the legislature was free to do so if it chose.54

When the legislature approved the Act, the positive votes of Republican lawmakers who had opposed previous bills were critical. I will offer some illustrative examples of how these legislators articulated the relationship between civil and religious marriage.55

Republican Senator Stephen Saland characterized the Act as addressing the “dual issues of religious freedoms” and marriage equality.56 He explained that he reasoned through the conflict between religious teachings about marriage and his conviction about the “right thing” to do. He emphasized his own “rather traditional background,” including his marriage of 46 years, as well as “being raised by parents who preached to me the importance of tolerance, respect, and acceptance of others” and “always to do the right thing.” His “intellectual and emotional journey” ended with him defining “the right thing as treating all persons (p.100) with equality, [including] within the definition of marriage.” After the vote, he stressed that he appreciated that both “those for marriage equality and those who support the traditional view of marriage” have a “deep and passionate interest” in the issue. He explained that “as a traditionalist, I have long viewed marriage as a union between a man and a woman” and, as a believer in equal rights, he initially thought “civil unions for same-sex couples would be a satisfactory conclusion.” However, he came to believe that equality required equal treatment as to marriage itself and that religious exemptions in the Act would protect religious freedom (as discussed later).58

A second example is Republican Senator Mark Grisanti. Initially, he simply opposed same-sex marriage, but felt obliged—as a lawmaker—to investigate: “As a Catholic I was raised to believe that marriage is between a man and a woman. I’m not here, however, as a Senator who is just Catholic. I’m also here with a background as an attorney, through which I look at things and I apply reason.” After much research and thought, he concluded: “I cannot legally come up with an argument against same-sex marriage.” He made a rights-based argument: “Who am I to say that someone does not have the same rights that I have with
my wife, who I love, or that have the 1,300-plus rights that I share with her? ... I cannot deny a person, a human being, a taxpayer, a worker, or people in my district and across ... the State of New York, and those people who make this the great state it is, the same rights that I have with my wife.” Like Saland, he concluded that civil unions “do not work,” but cause “chaos.”60 At the same time, the bill’s religious protections for religious organizations were important to him, as a Catholic.

The distinction between civil and religious marriage also featured in some speeches by sponsors of the Act. Assembly-member Deborah Glick stated: “everybody is entitled to their religious belief. But they are not, according to our Constitution, entitled to impose those religious beliefs on others.” She quipped: “when you take your oath of office, and declare, perhaps, by placing your hand on a Bible, that you will uphold the constitution, you don’t place your hand on the Constitution of the State of New York and swear to uphold the Bible.”

Stressing the personal cost to her and her same-sex partner of being denied various benefits by the “civic institutions of this state,” Glick described civil marriage as “the recognized and consistent shorthand that we all use to recognize and acknowledge committed, loving relationships and the families that exist within them.”61 This description helpfully identifies marriage’s role in signaling that relationships deserve public recognition; that it is civic recognition stresses the distinction between civil and religious marriage.

In responding to the argument by opponents of the bill that “we shouldn’t be changing the institution of marriage, ‘which had existed for millennia,’” Assemblyman Richard Gottfried noted the continual evolution of the institution (p.101) of marriage and the sharp distinctions between marriage practices that are part of “our own religious heritage” (such as polygamy) and contemporary civil marriage. Indeed, adhering to certain biblical commandments concerning marriage—such as taking a deceased brother’s wife as one’s second, third, or fourth wife—“would be a criminal act in this state and ... in every state.”62

By contrast, opponents of the Act warned that its new definition of marriage departed from—and lacked congruence with—religious understandings of marriage. Democratic Senator Ruben Diaz asserted: “[W]e are trying to redefine marriage .... I agree with Archbishop Timothy Dolan when he said that God, not Albany, has settled the definition of marriage a long time ago.”63 Diaz referred to the “great truth[]” that “marriage is and should remain the union of husband and wife” and asserted: “Same-sex marriage is a government takeover of an institution that government did not create and should not define.”64

After passage of the Act, Archbishop Dolan, joined by his fellow bishops of New York, reiterated the Catholic Church’s teaching that “we always treat our homosexual brothers and sisters with respect, dignity, and love,” but “we just as strongly affirm that marriage is the joining of one man and one woman in a
lifelong, loving union that is open to children, ordered for the good of children and the spouses themselves.” He asserted that “this definition cannot change,” expressing worry that “both marriage and the family will be undermined by this tragic presumption of government in passing this legislation that attempts to redefine these cornerstones of civilization.” He urged a societal return to a “true understanding of the meaning and the place of marriage, as revealed by God, grounded in nature, and respected by America’s foundational principles.”

This stance assumes a necessary congruence between religious and civil definitions of marriage. Further, it illustrates Laycock’s argument that religious opponents of “same-sex marriage legislation” view it as “interfering with the sacred” and “reject the state’s authority to make the change.”

Subsequent to the enactment of this law, for example, the USCCB released a statement that “[m]arriage is a fundamental good that must be protected in every circumstance. Exemptions of any kind never justify redefining marriage.”

It merits mention that religious clergy and institutions were active on both sides of the debate over the Act. Strong opposition by the Catholic Church contributed to the defeat of prior bills. Commentators who analyzed the factors contributing to the success, in 2011, of the Act found that one factor was the “concerted, sustained efforts by liberal Christian and Jewish clergy to advocate for [same-sex marriage] in the language of faith, to counter the language of morality voiced by foes.” The fact that there was religious support for the bill made it “easier [for legislators] to counteract the claim of religious conservatives who say there is only one answer to this question.” Such supporters drew analogies to the critical role of religious support in passing the Civil Rights Act of 1964.

B. The New York Act and the Religious Exemptions

The supporting statement for the Act provides a helpful clarification of the relationship between civil and religious marriage: “[T]his bill grants equal access to the government-created legal institution of civil marriage, while leaving the religious institution of marriage to its own separate, and fully autonomous, sphere.” The Act protects that sphere through expansive exemptions, including not only the “well-established constitutional and statutory principles that no member of the clergy may be compelled to perform any marriage ceremony,” but also the freedom of religious institutions and benevolent organizations to “choose who may use their facilities and halls for marriage ceremonies and celebrations, to whom they rent their housing accommodations, or to whom they provide religious services, consistent with their religious principles.” They would enjoy exemptions from providing “accommodations, advantages, facilities or privileges related to the solemnization or celebration of a marriage.” These exemptions evidently were critical to passage of the Act, particularly for certain religious lawmakers supporting the bill.
Whether or not religious exemptions are constitutionally required (beyond the obvious clerical exemption) or should be provided through state religious freedom restorations acts are matters of current controversy, as Robin Fretwell Wilson elaborates in Chapter 6 of this volume. In other writing, I have argued that exemptions may be justified as a prudential remedy, rooted in recognition of religious and moral objections to extending marriage to same-sex couples.  

Such exemptions may prove to be a ladder to full, equal citizenship through acceptance of same-sex marriage, particularly given the generational divide concerning same-sex marriage. Even otherwise conservative young people support same-sex marriage. As Laycock observes: “Support for same-sex marriage is growing with extraordinary rapidity.” Tellingly, Laycock and Wilson, both of whom have teamed with other legal scholars to write a series of letters to urge the legislatures to include robust protection for religious liberty—“marriage conscience protection”—argue that now is the time to “lock in” exemptions because the next generation is likely to be willing to pass marriage equality laws without them.  

Even so, for those who insist on congruence between civil and religious definitions of marriage, lest government undermine marriage and the family, religious exemptions are unlikely to be an acceptable solution. For example, the 2012 “open letter” from religious leaders, “Marriage and Religious Freedom: Fundamental Goods That Stand or Fall Together,” declares that, because of the “grave consequences” that follow from altering the definition of marriage, including threats to religious freedom, public officials should “support laws that uphold the time-honored definition of marriage.” An accompanying document prepared by the USCCB poses this question: “Let’s say religious freedom could be fully or mostly protected by an exemption … would that then justify the redefinition of marriage?” The USCCB explains why the answer must be no:  

In practice, such exemptions either address genuine concerns but do so inadequately or address “red herring” concerns that are unlikely ever to arise. However, no religious exemption—no matter how broadly worded—can justify a supportive or neutral position on legislation to redefine legal marriage. Such “redefinition” is always fundamentally unjust, and indeed, religious exemptions may even facilitate the passage of such unjust laws.  

This approach strongly resists any change in civil law and does not view the route of religious exemption as wise or defensible. By contrast, some law and religion scholars—such as Wilson and Laycock—urge that the focus should not be on a “total win” by either supporters or opponents of same-sex marriage. Instead, religious conservatives should no longer seek to regulate other people’s relationships, but instead secure protection of their own religious liberty. At the same time, advocates of marriage equality should deem it more important “to protect their own liberty than to restrict the liberty of religious conservatives”
by insisting those with moral objections to their unions provide them goods and services.\textsuperscript{83}

New York’s law did not go as far as the robust “marriage conscience protection” proposed by Laycock and Wilson. For example, it did not relieve public servants of their duty to provide a license to applicants of the same sex who meet New York’s eligibility requirements on the grounds that such marriages offend their religious beliefs.\textsuperscript{84} Nonetheless, an elected town clerk’s refusal to issue marriage licenses to same-sex couples because “God doesn’t want me to do this”—and one couple’s formal objection to this refusal—have featured in warnings of how redefining marriage threatens religious liberty (as in Bishop Lori’s address).\textsuperscript{85} In this volume and elsewhere, Wilson argues that such public servants should receive religious accommodation provided it does not impose a hardship on same-sex couples seeking licenses.\textsuperscript{86} I do not believe a public servant has a “right” to a general exemption, although she might decide as a matter of conscience to resign rather than enforce what she views as an unjust law. However, I do not object to Wilson’s idea of an office voluntarily organizing itself—if it has the staffing to do so—to accommodate such religious beliefs without persons seeking a license experiencing a direct refusal of service.\textsuperscript{87}

\textbf{(p.104)} As this volume goes to press, the issue of whether public officials may refuse to issue marriage licenses due to religious convictions is in the news afresh, as prominent opponents of marriage by same-sex couples are legally representing a Kentucky county clerk who was found in contempt of court—and briefly jailed—for steadfastly refusing to issue \textit{any} marriage licenses at all or to permit her clerks to do so.\textsuperscript{88} Illustrating the perspective that civil and religious definitions of marriage should be congruent, the clerk, Kim Davis, an Apostolic Christian, has asserted that, “To issue a marriage license which conflicts with God’s definition of marriage, with my name affixed to the certificate, would violate my conscience…. [T]his is about marriage and God’s word.”\textsuperscript{89} Clerks in other states similarly assert that “natural marriage cannot be redefined by government.”\textsuperscript{90} Moral disapproval of such marriages is also a theme in such appeals to conscience. Moreover, since \textit{Obergefell}, some states have passed laws expressly permitting public officials to refuse to perform marriage ceremonies if they have “sincerely held religious objections.”\textsuperscript{91} Legal challenges brought to those laws will likely provide a further context in which to examine the issue of congruence and conflict.\textsuperscript{92}

Returning to New York’s Act, it also does not exempt for-profit businesses involved in providing goods and services (considered public accommodations) from serving same-sex couples if the owners believed doing so violated their religious or moral beliefs. This exemption survived challenge when the owners of a farm advertised as open to the public for wedding ceremonies and receptions declined a lesbian couple’s request to hold their wedding there because the owners were Christian and “do not hold same-sex marriages ... at the barn.”\textsuperscript{93}
The couple brought a complaint under New York’s Human Rights Law, alleging that the farm was a “public accommodation” that unfairly discriminated against them on the basis of sexual orientation. The owners countered that they were an exempt “private business.” In 2014, an administrative law judge (ALJ) rejected that argument, pointing to the farm’s “widespread marketing to the general public,” encouraging members of the public to lease their facilities and use their services. The fact that the owners resided in part of the farm did not render the farm private, since the other areas were used “solely” for contracted events, like weddings and receptions. The ALJ (recently affirmed on appeal) concluded the owners were subject to the law and, had discriminated on the basis of sexual orientation, and awarded a fine of $10,000 and $1,500 to be paid to each individual woman.94

Some commentators view this outcome as too high a cost for religious persons engaged in commerce to pay; the farm owners subsequently stopped holding any weddings and receptions. Laycock, for example, argues that religious believers engaged in providing goods and services who have “deep moral objections” to same-sex marriage should not have to provide those goods and services so long as their refusal does not significantly burden a same-sex couple’s ability to obtain such goods and services (p.105) for example, if there are no or few other providers of that service in the area).95 In the New York case, the couple alleged the denial of service caused them “mental anguish,” they stopped looking for a location for several months, and even then they were uncertain about looking in the same area lest they encounter similar reactions.96 On the other hand, some commentators (in my view, correctly) argue that this type of ruling helps to ensure that businesses treat “all patrons with the dignity and respect they deserve” and that the “cost” of opening up one’s business to the public is “that you can’t discriminate.”97 This seems to be a strong sentiment in the firestorm of reactions to Indiana’s recently proposed religious freedom restoration law, which included a “wave of boycotts and criticisms by business, sports and political leaders and other states.”98

III. DOMA
My second example of an evident conflict between religious liberty and marriage equality concerns DOMA. Religious leaders criticized the decision by the Department of Justice of the Obama Administration to cease defending DOMA against constitutional challenges, stepping aside for Congress to do so, if it wished. For example, Bishop Lori described this change of position as an “attack” on DOMA that treated it “as an act of ‘bias and prejudice,’ akin to racism, thereby implying that churches, which teach that marriage is between a man and a woman, are guilty of bigotry.”99 Religious groups subsequently filed friend of the court (amicus curiae) briefs in support of DOMA in United States v. Windsor, in which the Supreme Court ruled in favor of Edith Windsor’s challenge to DOMA. In this section, I recap the circumstances leading to the enactment of DOMA and the arguments made in support of it. I recount the Obama
administration’s stance of ceasing to defend it, using my third proposed framework—the Supreme Court’s jurisprudence about the role of moral disapproval. I then highlight themes made in friend of the court briefs by religious organizations in support of DOMA. I briefly discuss the Supreme Court’s decision in *Windsor*, both Justice Kennedy’s majority opinion and the dissenting opinions.

A. The Enactment of DOMA

In 1996, Congress passed (and President Clinton signed) DOMA “to defend the institution of traditional heterosexual marriage” in response to a “very particular development in the State of Hawaii”—that “state courts in Hawaii appear[ed] to be on the verge of requiring that State to issue marriage licenses to same-sex couples.” The purpose of Section 2 of DOMA was to “protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions,” and, thus, not be compelled to recognize any out-of-state marriage between same-sex couples. Section 3 defined “marriage” and “spouse” for purposes of federal law as referring “exclusively to relationships between persons of the opposite sex.”

At the time Congress enacted DOMA, no state in the United States allowed same-sex couples to marry. In 2004, Massachusetts became the first state to do so, after the Supreme Judicial Court of Massachusetts, in *Goodridge*, ruled in favor of a state constitutional challenge to Massachusetts’s marriage law brought by several same-sex couples. Issued just months after *Lawrence* overruled *Bowers*, the *Goodridge* opinion frequently drew on *Lawrence* in articulating how human dignity, respect, liberty, and equality are at stake in matters of sexual intimacy, marriage, and family. Within several more years, several more states would allow same-sex marriage, as a result of either constitutional litigation or legislative enactment. Yet more states (such as New York) indicated they would recognize such marriages, even if they did not (yet) allow them. Because of DOMA, same-sex couples and states encountered practical problems when marriages, valid under state law, were not recognized for purposes of federal law. Spouses or surviving spouses were ineligible for the numerous federal benefits linked to marital status, such as, in *Windsor*, the exemption from estate tax a surviving spouse enjoys. Lawsuits filed by same-sex couples, surviving spouses, and the states themselves challenged Section 3 as unconstitutional.

B. The DOJ’s Changed Stance on DOMA’s Constitutionality

The Department of Justice initially defended DOMA, even though (as did President Obama) it urged Congress to repeal it. On February 2011, the DOJ changed direction, a shift criticized by some religious leaders as a threat to religious liberty, because Attorney General Eric Holder attributed the motive for DOMA to “bias and prejudice.” By letter, Holder informed the Speaker of the House, Hon. John A. Boehner, that “after careful consideration, ... the President...
of the United States has made the determination that Section 3 of [DOMA] ... as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment,” and accordingly, that the DOJ will not defend DOMA in the “new lawsuits” brought in the federal district courts of Connecticut and New York. Holder and President Obama had concluded that “classifications based on sexual orientation warrant heightened (p.107) scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional” (2). If, however, the district courts in the Second Circuit concluded that rational basis should be the applicable standard for reviewing DOMA, the DOJ would “state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard” (6). However, it would leave it to Congress to make any such defense. Subsequently, Congress did so, through the Bipartisan Legal Advisory Group (BLAG) of the US House of Representatives.108

Why does Holder conclude that DOMA reflects “stereotype-based thinking and animus” of the sort that the Equal Protection Clause guards against, and suggests that it cannot survive the heightened scrutiny that is appropriate? Holder turns to prior Supreme Court precedents identifying four factors109 that indicate whether a higher level of scrutiny than rational basis is appropriate for a classification. He finds that all four “counsel in favor of being suspicious of classifications based on sexual orientation,” particularly “a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today” (2). He refers to Lawrence, noting that “until very recently, states have ‘demean[ed] the[ ] existence’ of gays and lesbians ‘by making their private sexual conduct a crime’ “ (2).110 With respect to the fourth factor —“whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual’s ‘ability to perform or contribute to society’ “ (2)111—he observes that “recent evolutions in legislation” (such as the repeal of Don’t Ask, Don’t Tell), “community practices,” “case law” (such as Romer and Lawrence), and social science “all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives” (3). Further, “there is a growing acknowledgment that sexual orientation ‘bears no relation to ability to perform or contribute to society’ “ (3).112 Although many circuit courts had concluded that only rational basis review is necessary for sexual orientation, he notes that many reasoned from analogy from Bowers, a line of argument no longer available since Lawrence.

Holder identifies “moral disapproval” as a primary purpose of DOMA, contending that “the legislative record underlying DOMA’s passage ... contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard
against” (4). The House of Representatives’ Report accompanying DOMA (House Report) similarly emphasizes moral disapproval, for example, that DOMA properly reflects a moral conviction that traditional heterosexual marriage better comported with “traditional [especially Judeo-Christian] morality,” while same-sex (p.108) marriage “puts a stamp of approval … on a union that many people … think is immoral” (4, n. 7).

He noted that the DOJ—when it was defending DOMA—had already disavowed, in “numerous” legal filings, two rationales as “unreasonable”: responsible procreation and child-rearing (3–4, n. 5).113 With respect to the latter, “as the Department has explained … 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” (3–4, n. 5).

In support of his conclusion that DOMA fails intermediate scrutiny because the Equal Protection Clause guards against the “stereotype-based thinking and animus” it reflects, Holder refers to Romer (where the Court, without explicitly using heightened scrutiny, rejected “the rationale that Amendment 2 was supported by the ‘liberties of landlords or employers who have personal or religious objections to homosexuality’”); Cleburne (which ruled that “‘mere negative attitudes, or fears’ are not permissible bases for discriminatory treatment”); and Palmore v. Sidoti (which, in explaining why a court could not award custody based on racial bias, stated: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect”) (5).114

Many religious leaders have decried Holder’s decision not to defend DOMA and his underlying analysis that DOMA’s stated purposes—including “moral disapproval”—reflect animus and “stereotype-based thinking.” I believe, however, that Holder’s critical evaluation of these rationales is sound, especially given the evolution of the Court’s Equal Protection jurisprudence and its overruling of Bowers, of the social science consensus about child outcomes and family forms, and developments in state law about evolving understandings of civil marriage. Holder’s evaluation says nothing to religious congregations about having to perform or recognize such marriages. Instead, it is a conclusion that the federal government lacks a sufficient reason, under a heightened scrutiny standard, for not treating civil marriages that are valid under state law as valid marriages under federal law. The only threat to religious liberty that I perceive here is that religious opponents of extending civil marriage to same-sex couples may no longer carry the day in terms of having their convictions about marriage reflected in federal law.
In *Windsor v. United States*, Edith Windsor, the widow of Thea Spyer, successfully challenged Section 3 of DOMA in federal district court because, under it, she did not qualify for the unlimited marital deduction from federal estate tax and had (p.109) to pay $363,053 when, “according to her last will and testament, Spyer’s estate passed for Windsor’s benefit.” Windsor and Spyer had been in a “committed relationship” since shortly after they met in 1963, and, as Spyer’s health deteriorated, they married in Canada in 2007 (397). Spyer died in 2009 and, after paying the estate taxes, Windsor sued in federal court, seeking a refund of the federal tax paid and a declaration that Section 3 “violates the Equal Protection Clause of the Fifth Amendment” (397). At the time they married, New York did not permit same-sex couples to marry, but by 2009, the relevant year for tax purposes, “all three statewide elected executive official[s]—the Governor, the Attorney General, and the comptroller—had endorsed the recognition” of marriages by New York same-sex couples (such as Spyer and Windsor) who validly married in other jurisdictions (398). As discussed earlier, in 2011 the New York legislature passed the Marriage Equality Act.

In 2012, the United States Court of Appeals for the Second Circuit affirmed the district court, becoming the second federal appellate court to strike down Section 3. It did so applying intermediate scrutiny, the standard of review urged by the DOJ and Edith Windsor (if the court did not move all the way to strict scrutiny). While the federal district court (following the First Circuit) read the Court’s precedents, particularly *Romer*, to support a “more exacting rational basis review for DOMA,” the Second Circuit observed that the Supreme Court “has not expressly sanctioned such modulation in the level of rational basis review,” and that intermediate scrutiny was the more appropriate standard.

**D. Friend of the Court Briefs before the Supreme Court: Marriage, Moral Disapproval, and Religious Liberty**

On December 7, 2012, the Supreme Court granted certiorari in *Windsor* and *Hollingsworth v. Perry* (the Prop 8 case). These intensely watched cases generated numerous amicus curiae briefs filed on both sides by states, members of Congress, medical and psychological organizations, bar associations, professors, individuals, and, most significantly for this chapter, religious organizations and leaders. In other writing, I have analyzed these briefs. In this chapter, I highlight themes in briefs filed by religious amici relevant to the relationship between civil and religious marriage and the evident conflict between marriage equality and religious liberty.
1. Arguments in Favor of DOMA and BLAG

(a) Defending Traditional Marriage: Congruence of Civil and Religious Law

Several amici who filed briefs in support of BLAG framed the litigation over Section 3 as improperly shifting from the democratic to the judicial arena a societal debate over what marriage is and should be. They further argued that the Constitution does not require one vision or the other and that is all the more reason “the people,” not the judiciary, should decide. These arguments stress the congruence between civil and religious understandings of marriage and the importance of the polity getting marriage “right,” that is, of having a truthful conception of marriage embodied in law.

Robert George, Sherif Girgis, and Ryan Anderson framed the debate over the definition of marriage as between the “conjugal view” of marriage as a “comprehensive union” of spouses “begun by commitment and sealed by sexual intercourse…. by which new life is made,” and a “revisionist view,” in which “marriage is essentially an emotional union, accompanied by any consensual activity” and seen “as valuable while the emotion lasts.” They contended that while the conjugal view “has long informed the law,” the revisionist view “has informed certain marriage policy changes of the last several decades.” (As noted earlier in this chapter, this suggests recognition of a growing lack of congruence between civil and religious conceptions of marriage.) They warned that the consequences of striking down DOMA, which affirms the conjugal view, are serious. While prior legal developments in the direction of the revisionist view (such as liberalizing divorce law) have already undermined marriage as an institution, “[r]edefining civil marriage will obscure the true nature of marriage as a conjugal union,” uniquely linked to procreation and childrearing, and, thus, undermine—rather than strengthen—marriage’s “stabilizing norms,” to the detriment of “spouses, children, and others.”

The amicus brief filed by the National Association of Evangelicals (NAE) and several other prominent religious denominations similarly framed the issue as a high-stakes debate over models of marriage. They explained their interest in the litigation: “Faith communities have the deepest interest in the legal definition of marriage and in the stability and vitality of that time-honored institution” (1). The NAE brief elaborated two contrasting conceptions of marriage:

The age-old, traditional understanding conceives of marriage as a union between a man and a woman that is inherently oriented toward procreation and childrearing and in which society has a profound stake. A more recent conception views marriage as primarily a vehicle for affirming and supporting intimate adult relationship choices, a vision that is not inherently oriented toward uniting the sexes for the bearing and rearing of children.
The brief further asserted that the newer conception is a “radical break from all human history,” because “gender itself is irrelevant. What matters most is public endorsement of the adults’ chosen relationship, obtaining official status for (p. 111) that relationship, and the official approval that comes with such endorsement and status” (11).

NAE further argued that Congress may act to protect a “valued moral norm” and that “many congressional enactments reflect unmistakable moral and value choices” (19). NAE also warned that “declaring DOMA void because it adheres to traditional moral and religious beliefs would fly in the face of this Court’s teaching that the Constitution ‘does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.’” (20). NAE argued for a form of neutrality toward religion: “DOMA is entitled to be judged on its merits according to settled rules of law—not on a more demanding standard born of suspicion toward religion, religious believers, or their values” (21).

Amici often anchored their marriage-based arguments for DOMA to Justice O’Connor’s statement, in Lawrence, that “‘other reasons exist to promote the institution of marriage beyond mere moral disapproval of the law.’” For example, the Manhattan Declaration brief, after invoking Justice O’Connor’s Lawrence concurrence, asserted that their position is not rooted in animus, but on “sincere belief and sound public policy considerations,” since heterosexual marriage “encourages and supports responsible procreation and childrearing,” and “redounds to the health and well-being of societies in general.” The Coalition for the Protection of Marriage similarly asserted that the “overwhelming international consensus” that marriage should be reserved to “opposite-sex couples while supporting same-sex couples through other rights and legal mechanisms” was based “not on irrationality, ignorance, or animus toward gays and lesbians but on considered judgments about the unique nature and needs of same-sex couples and children.”

The insistence on congruence is evident in the briefs of some amici who appealed to religious and Biblical understandings of marriage in support of Section 3’s preserving “traditional” marriage and warned of consequences if the civil law of marriage departs sharply from religious conceptions of marriage. Some amici resisted the very idea that civil and religious understandings of marriage could or should be distinct. For example, the Coalition for the Protection of Marriage asserted: “Although interacting with and influenced by other institutions such as law, property, and religion, marriage in our society is a distinct, unitary social institution and does not have two separate, independent existences, one ‘civil’ and one ‘religious.’” The Manhattan Declaration brief argued that the concept that societies give legal recognition to marriage to “encourage and support responsible procreation and childrearing” is
“remarkably similar to the Christian belief that through marriage man and woman cooperate conjugally in the creative act of God Himself.”

Some amici also insisted that Congress could enact DOMA to defend traditional notions of morality, including disapproval of homosexuality. For example, Westboro Baptist Church argued at length that homosexuality (along with adultery, abortion and the like) is such a serious sin that it will motivate God to punish the United States by destroying it, similar to the Flood in Noah’s time. The Foundation for Moral Law asserted: “From Biblical law and other ancient law, through English and American common law and organic law, to recent times, homosexual conduct has been abhorred and opposed; the idea of a ‘marriage’ based on such conduct never even entered the legal mind until very recent times.” Thus, not only did “Congress’s passage of the federal definition of marriage in DOMA [have] the force of that history behind it,” but it also rested on “several present-day interests”—as “traditional marriage … began to come under attack through the courts in 1993”—such as “defending marriage and … traditional notions of morality.”

(b) Protecting Religious Liberty and Avoiding a Clash of Rights

Amici supporting DOMA warned that as civil laws changed their definitions of marriage, religious persons and groups adhering to traditional definitions would face threats to their religious liberty. New civil marriage laws would create a clash of rights. Thus, the Becket Fund for Religious Liberty argued that “because so many major religious groups center their teachings regarding sexual morality around opposite-sex marriage, changing the definition of marriage itself … triggers a distinct set of religious liberty concerns.” For example, “being forced to call a same-sex relationship a ‘marriage’ creates a conflict of conscience for many religious organizations where ‘civil union’ or ‘domestic partnership’ would not” (29). DOMA, therefore, was a rational response to two religious liberty conflicts caused by marriage equality laws:

First, objecting religious institutions and individuals will face an increased risk of lawsuits under federal, state, and local anti-discrimination laws, subjecting religious organizations to substantial civil liability if they choose to continue practicing their religious beliefs. Second, religious institutions and individuals will face a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits (4).

The Becket Fund asserted that “DOMA and Prop 8 were rational responses to court decisions that gave legal recognition to same-sex marriage without addressing the significant church-state conflicts that would result” (2) from “burdens imposed by … supposedly neutral, generally applicable laws” (29).
marriage equality through the legislative process and included religious exemptions.

The Christian Legal Society, joined by Catholic Answers and the Catholic Vote Education Fund, warned that classifying homosexuals as a suspect or quasi-suspect class would compromise religious liberties, and “necessarily diminish the ability of our nation’s religious individuals and communities to live according to their faith.” If the Court created a “new suspect classification for sexual orientation,” it would “take sides” in an already “broad and intense conflict between the gay rights movement and religious liberty regarding marriage, family, and sexual behavior” and “place millions of religious believers and organizations at a potentially irreversible disadvantage in their efforts to consistently live out their faith.”

The Chaplain Alliance for Religious Liberty asserted that repealing DOMA would impair “military religious liberty,” since “it is very likely that service members who hold traditional religious beliefs on marriage and family will face, for the first time, military policies and duties that sharply [sic] hostile to their beliefs.” The brief predicted that chaplains and service members who belonged to “faith groups that support traditional marriage” would face a stark, forced choice between “their duty to obey God” and “their chosen vocation of serving their country” if laws “affirming marriage as the union of one man and one woman are invalidated as irrational and unconstitutional.”

Other amici warned that a civil regime recognizing same-sex marriage would create a new governmental orthodoxy at odds with religious liberty. For example, the Manhattan Declaration brief asserted that “redefining marriage imperils religious liberty and oftentimes requires that freedom of conscience be sacrificed to the newly regnant orthodoxy.” A new marriage regime that recognized same-sex marriage would “circumscribe[] the ability of the Christian faithful to put their beliefs into practice” (15). The brief included various examples, such as Christian adoption agencies shutting down because of their refusal to place children with same-sex couples, religious parents’ inability to remove their children from public school classes advocating marriage equality, and Christian organizations having to end all medical insurance for employees’ spouses because they do not want to cover same-sex spouses (15–19). The brief further contended that Christians would be limited in how they could educate their children (17).

Some religious amici contended that their religious objections to same-sex marriage were not animus and that for government to fail to give credence to those objections infringed upon their religious liberty. For example, the Liberty, Life and Law Foundation and North Carolina Values Coalition warned that marriage equality would infringe upon the “moral code of behavior” typical of religions, including the regulation of sexual conduct, with the result...
that “[a] state mandate to affirm same-sex marriage would have an explosive impact on religious persons who could easily treat all individuals with equal respect and dignity but cannot in good conscience endorse or facilitate same-sex marriage.”\textsuperscript{141} The Foundation further argued that “[a] person’s religiously motivated refusal to recognize same-sex unions is not tantamount to unlawful discrimination, nor is it irrational animosity,” and that, “[t]o hold otherwise would exhibit callous disregard for religion.”\textsuperscript{142} The evident logic of the Foundation’s argument is that the Constitution protects religious beliefs and conduct, and, thus, morality based on religion provides a valid rationale for opposing same-sex marriage. The Foundation analogized to case law crediting conscientious religious beliefs in other contexts, concluding: “[t]he government must avoid showing hostility to religion by refusing to acknowledge religious motivation.”\textsuperscript{143}

2. Arguments for Windsor’s Challenge to DOMA

Some religious amici filing in support of Windsor emphasized the distinction between civil and religious marriage and that redefining the former did not unconstitutionally burden the latter. They further pointed out that religious exemptions were a means of ensuring religious liberty. For example, the brief submitted by the Bishops of the Episcopal Church in California, New York, and several other states, the Jewish Theological Seminary, and numerous other religious groups noted a growing affirmation by religious faiths of the “dignity” of same-sex relationships and family life:

The American religious panorama embraces a multitude of theological perspectives on lesbian and gay people and same-sex relationships. A vast range of religious perspectives affirms the inherent dignity of lesbian and gay people, their relationships, and their families. This affirmation reflects the deeply rooted belief, common to many faiths, in the essential worth of all individuals and, more particularly, the growing respect accorded within theological traditions to same-sex couples.\textsuperscript{144}

The brief insists on the constitutional importance of the distinction between civil and religious marriage:

Certain \textit{amici} supporting reversal have argued that civil recognition for the marriages of same-sex couples would alter a longstanding “Christian” definition of “marriage.” But this and other religiously based arguments for limiting civil recognition of marriage to different-sex couples cannot constitutionally be given weight by this Court. (p.115) Crediting such arguments would improperly both enshrine a particular religious belief in the law—itself prohibited under the Establishment Clause—and implicitly privilege religious viewpoints that oppose marriage equality over those that favor it (5).
The brief then argues that “[e]liminating discrimination in civil marriage will not impinge upon religious doctrine or practice,” since “[a]ll religions would remain free—as they are today with nine states and the District of Columbia permitting same-sex couples to marry—to define religious marriage in any way they choose” (4). The brief first points out that “[t]he types of conflicts forecast by certain other amici already can and sometimes do arise under public accommodation laws whenever religiously affiliated organizations operate in the commercial or governmental spheres,” and “[c]ourts know how to respond if enforcement of civil rights laws overreaches to infringe First Amendment rights” (4). “In any event,” the brief concluded, “the issue largely is irrelevant here, because the couples affected by [DOMA] already are lawfully married under state law” (4).

Other amici stressed that, under the Establishment Clause, religious groups do not have “the right to have their religious views written into law so that others may be compelled to follow them.” Addressing claims by amici that “their ‘religious liberty’ … would be violated if this Court confirms a right to legal equality for gays and lesbians,” because of “their Bible’s condemnation of homosexuality,” the American Humanist Association asserted that, “[b]ecause the First Amendment forbids, rather than requires, any law solely grounded in or codifying a religious ‘moral’ commandment, such objections can be accorded no weight.”

Other amici stressed the insufficiency of moral disapproval, even if rooted in religious belief. Thus, the Anti-Defamation League acknowledged the importance of religion in American life and that religious beliefs undoubtedly guided many lawmakers. It explained, however, that, “under a line of cases including this Court’s decision in Lawrence v. Texas, a law must be rationally related to a legitimate government interest beyond the desire to disadvantage a group on the basis of moral disapproval.”

Some amici emphasized the civil nature of marriage law to assert that “the humanity of gay citizens can be reconciled with respect for religious freedom." Utah Pride and many other statewide equality organizations contended: “the Constitution guarantees both the right of gay people to be treated as equals under civil law and the right of individuals and organizations to hold beliefs about homosexuality in accordance with their own consciences.” Appealing to the “secular context” and the “importance of neutrality,” Utah Pride asserted that, “by affirming that all people—whether gay or straight—are entitled to equal (p.116) treatment under the Constitution, this Court can unify the country around our shared values of liberty and justice for all.”
The American Jewish Committee (AJC) supported the state’s authority to redefine civil marriage, but urged that broad protections of religious liberty were necessary if the state did so.\(^{151}\) It voiced concerns similar to some amici supporting DOMA, “agree[ing] that significant religious liberty issues will follow in the wake of same-sex civil marriage” (10). It urged, however, that the issues could be remedied if “each claim to liberty in our system … [is] defined in a way that is consistent with the equal and sometimes conflicting liberty of others” (11). Thus, there would be “no burden on religious exercise when the state recognizes someone else’s civil marriage,” but there would be if “the state demands that religious organizations or believers recognize or facilitate a marriage in ways that violate their religious commitments” (3). The AJC saw parallels between the gay rights movement and its own assertion of the need for religious liberties:

Both same-sex couples and religious dissenters also seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged … Religious believers … claim a right to follow their faith not just in worship services, but in charitable services provided through their religious organizations and in their daily lives (15).

As did some religious amici supporting BLAG, the AJC identified a variety of situations in which religious liberty might be compromised, including marriage counseling by clergy and housing in religious colleges (23–25). As one way to address these conflicts, the AJC also proposed that the Court reconsider its controversial (5-4) decision \textit{Employment Division v. Smith} (1990), so that religious actors would be exempt from generally applicable laws that infringe on their freedoms unless application of the statute can survive heightened scrutiny (32–34). In my conclusion, I will return to this conflicting liberty framework, which views exemptions as a way to accommodate the liberty at stake on both sides.

E. United States v. Windsor: Justice Kennedy Completes a New Trio

On June 26, 2013, the Supreme Court announced its ruling in \textit{United States v. Windsor}. In a 5-4 split, the majority, in an opinion authored by Justice Kennedy, held that Section 3 of DOMA was an unconstitutional deprivation of liberty of the person protected by the Fifth Amendment of the Constitution. The opinion was quickly hailed as a landmark by some and decried as judicial overreaching (p. 117) by others. Justice Kennedy said nothing explicit about the various religious liberty arguments made by amici, but he did discuss the role of moral disapproval. \textit{Romer} and \textit{Lawrence} provided a template for his opinion. \textit{Windsor} joined those two cases to make a trio of landmark rulings by the Court, all authored by Justice Kennedy, about the status of gay men and lesbians. His majority opinion struck down Section 3 without moving to the intermediate scrutiny urged by the DOJ and the Second Circuit and instead confirmed—as the district court in \textit{Windsor} and the First Circuit discerned—that \textit{Romer} supports a
more searching form of rational basis review when there are “discriminations of an unusual character.”

In explaining the injury that Section 3 inflicts, Justice Kennedy contrasts New York’s attempt to confer dignity and respect on a class by changing its marriage laws to allow same-sex couples to marry (and, prior to that, recognizing Edith Windsor’s out-of-state marriage) with DOMA’s denial of such dignity and respect. Indeed, Justice Kennedy concludes that “interference with the equal dignity of same-sex marriages, ... conferred by the States in the exercise of their sovereign power” was DOMA’s “essence.”152 In support of this conclusion, he cites the House Report, which appeals to defending “the institution of traditional heterosexual marriage” and states that “DOMA expresses ‘both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality’ ” (2693).153 Citing Romer on the need for attentiveness to “discriminations of an unusual character,” the majority states that DOMA’s “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” is “strong evidence of a law having the purpose and effect of disapproval of that class” (2693). Section 3’s “avowed purpose and practical effect” are “to impose a disadvantage, a separate status, and so a stigma” on same-sex couples lawfully married under the “unquestioned authority of the States” (2693).

Justice Kennedy concludes that BLAG’s arguments “are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married” (2693). Moreover, Section 3’s constitutionally problematic purpose was to treat “as second-class marriages for purposes of federal law” any same-sex marriages that states decided to recognize (2693-2694). By contrast to the lower courts in Windsor, Justice Kennedy does not mention, let alone evaluate, rationales such as “caution,” consistency and uniformity of benefits, and responsible procreation and optimal childrearing. He emphasizes a different aspect of uniformity that DOMA rejects: “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next” (2692).

Evaluating DOMA’s effect, Justice Kennedy stresses its sweep: it controls “over 1,000 statutes and numerous federal regulations” (2694). Given this broad scope of federal regulations bearing on marriage, “DOMA touches many aspects of married and family life, from the mundane to the profound” (2694). Articulating an aspect of marriage that I have elaborated elsewhere, the opinion explains that marriage entails rights and responsibilities, both of which “enhance the dignity and integrity of the person” (2694).154 Yet DOMA deprives same-sex couples lawfully married under state law of such “rights and responsibilities” (2694). DOMA’s creation of “two contradictory marriage regimes within the same State” diminishes “the stability and predictability of
basic personal relations the State has found it proper to acknowledge and protect,” and tells those same-sex couples that “their otherwise valid marriages are unworthy of federal recognition” (2694). Without explicitly addressing whether such couples have a federal constitutional right to marry, Justice Kennedy appeals to Lawrence: “the differentiation demeans the couple, whose moral and sexual choices the Constitution protects ... and whose relationship the State has sought to dignify” (2694).155 Several times, Justice Kennedy repeats that DOMA “demeans” persons in “a lawful same-sex marriage” (2695). In a passage frequently quoted in post-Windsor federal challenges to state laws, he states that DOMA also “humiliates tens of thousands of children now being raised by same-sex couples” (2695). He concludes: “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State by its marriage laws, sought to protect in personhood and dignity” (2696). In a sentence that receives much parsing in the dissents, he further adds: “This opinion and its holding are confined to those lawful marriages” (2696).

F. The Windsor Dissents: Taking Sides and Branding Defenders of Traditional Marriage “Bigots”

The dissenting justices in Windsor did not explicitly address arguments made about the threat to religious liberty by striking down Section 3 of DOMA. They did, nonetheless, criticize the majority in language that has fueled further warning by religious leaders about threat to religious liberty if definitions of civil marriage change. In dissent, Justice Alito argued that Edith Windsor was asking the Court to “intervene” in a debate about the nature of marriage—namely, between the “conjugal” view and the “consent-based view.” The Constitution, he insisted, said nothing about the matter, and so it should be left to “the people.” While he did not cite to any specific amicus briefs for these models, he referred to George, Girgis, and Anderson’s book, What Is Marriage? (mentioned earlier) for a “philosophical” account of the basis for the “conjugal” view (2718–2719). Justice Alito warned that analogizing the one man–one woman requirement for marriage to race or sex discrimination would “cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools” (2717–2718).

In dissent, Chief Justice Roberts asserted that “without some more convincing evidence that the Act’s principal motive was to codify malice, and that it furthered no legitimate governmental interests, I would not tar the political branches with the brush of bigotry” (2696). Justice Scalia deployed the strongest language, arguing that, instead of letting “the People decide” the marriage debate, the Court had armed one side, and branded DOMA’s supporters as “enemies of the human race,” “enem[i]es of human decency,” “members of a wild-eyed lynch mob,” who had “hateful hearts,” and “acted with malice” (2708–2710). He used racially inflected rhetoric, evident not only in the “lynch mob” reference, but also in suggesting the majority’s inappropriate “condemnation” of
Congress’s motive in enacting DOMA was akin to the Courts’ “scorn” directed at “the legislature of some once-Confederate Southern state” (2707).

Justice Scalia also reiterated his view stated in dissent in *Lawrence* that “the Constitution does not forbid the government to enforce traditional moral and sexual norms”; thus, moral disapproval was certainly a sufficient basis for DOMA, since the Constitution neither required nor forbade approval of same-sex marriage (2707). Finally, expressing disbelief at the majority’s statement that the Court’s opinion and holding were “confined to those lawful marriages,” that is, marriages permitted or recognized under state law but denied federal recognition, Justice Scalia countered that the majority opinion, with a few simple alterations, provided a template that those challenging state marriage laws could easily use to assert that those state laws, like DOMA, were also motivated by the “bare … desire to harm” (2709–2710).

As readers of this chapter may know, Scalia has proven to be correct on the frequent invocation of *Windsor*—including his dissent—by federal courts striking down state marriage laws, although not all courts have gone the route of animus or harm as a basis for such a ruling. Subsequent to *Windsor*, the focus is acute on characterizing the position of defending the one man–one woman definition of marriage and on whether and how motivation even matters. Some legal commentators, for example, charge the *Windsor* majority with engaging in a “jurisprudence of denigration” that attributes “malevolence” to Congress and—by implication—to the “millions of Americans” who support state laws defending traditional marriage and that “peremptorily dismisses and marginalizes” the losers in the controversy over marriage “with unsubstantiated (and in their own knowledge false) charges of hatefulness.”

The *Obergefell* dissents, as noted earlier, echo the *Windsor* dissents in using the rhetoric of bigotry to warn of threats to religious liberty. They do so even though Justice Kennedy seemingly avoided a “jurisprudence of denigration” by emphasizing that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.” Thus, dissenting Chief Justice Roberts charges that Justice Kennedy’s majority opinion portrays any who do not “share” the Court’s evolved “understanding” that the fundamental right to marry extends to same-sex couples as “bigoted” (2626). Justice Scalia’s dissent characterizes the majority as contending that the age-old one man–one woman definition of marriage “cannot possibly be supported by anything other than ignorance or bigotry” (2630). Justice Alito warns that, despite the majority’s “reassurances” about protecting conscience, those who dissent publicly from the new “orthodoxy” will “risk being labeled as such and treated as such by governments, employers, and schools” (2642–2643). It is beyond the scope of this chapter to offer a full analysis of how the *Obergefell* opinion and the several dissents address the evident clash between the...
fundamental right to marry and religious liberty. A critical point for this chapter is simply that Justice Kennedy follows the above statement about the sincerity of those who oppose marriage by same-sex couples with a caveat about translating those beliefs into civil laws that exclude such couples from the public institution of marriage. It is not the religious beliefs themselves but the unequal treatment by the state based on such beliefs that offends the Constitution. As Justice Kennedy explains:

[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right (2602).  

In stressing the harm that comes from exclusion, Justice Kennedy emphasizes marriage as a great public institution, a uniquely important “two-person union” that the states and the federal government support by attaching to it “an expanding list of governmental rights, benefits, and responsibilities” (2601).

IV. The Fate of Prop 8 in Perry v. Schwarzenegger
My third example is the claim that Perry v. Schwarzenegger, a federal district court ruling that Prop 8 (a ballot initiative that amended the California constitution to enshrine the one man–one woman definition of marriage) violates the federal constitution, threatens religious liberty, and precludes religious citizens from bringing their beliefs into the public square. A procedural note will be helpful: In Perry v. Brown, the Ninth Circuit affirmed the federal district court, drawing more criticism from religious leaders. The Supreme Court granted review of the Ninth Circuit’s ruling, but ultimately, in the much-anticipated decision of Hollingsworth v. Perry (2013), declined to reach the merits of whether Prop 8 offended the federal constitution; instead, it concluded that Prop 8’s proponents were private parties who lacked standing (under Article III) to appeal the federal district court opinion and vacated the Ninth Circuit opinion.  

The impact of Hollingsworth was to leave the lower federal court ruling intact. Notably, Justice Kennedy (a Californian), in dissent, did not say how he would have resolved the case on the merits, but he strongly disagreed with the majority’s ruling on standing, arguing that “the very object of the initiative system is to establish a law-making process that does not depend upon state officials.” Shortly after the Court issued its opinion, California state officials resumed issuing marriage licenses to same-sex couples.

All three of my frameworks inform my analysis of Perry.
A. The Enactment of Prop 8

What led to Prop 8 and the constitutional challenge to it? In 1999, California became the first state to enact a domestic partnership law. By referendum in a 2000 election, California voters adopted Prop 22, which provides that “[o]nly marriage between a man and a woman is valid or recognized in California.” The California legislature steadily expanded California’s domestic partnership law, culminating in the Domestic Partner Rights and Responsibilities Act of 2003. Beginning in 2005, when the Act took effect, domestic partners had nearly all the legal incidents of civil marriage, without the name.

In re Marriage Cases (2008) decided the question of whether, under California’s constitution, the state must provide same-sex couples with access to civil marriage. In a lengthy opinion, the California Supreme Court concluded that (1) the fundamental right to marry protected by the state constitution’s due process clause includes the right to marry a person of the same sex and (2) reserving the status of marriage for heterosexuals, while limiting gays and lesbians to the second-class domestic partnership status, constitutes unconstitutional discrimination on the basis of sexual orientation in violation of the state constitution’s equal protection clause. The court ruled that denying same-sex couples official recognition of their intimate, committed relationships as marriages denied them equal dignity and respect.

Instead of resolving the matter, the high court’s opinion was a catalyst for the campaign for Prop 8, a ballot initiative to amend California’s constitution by defining marriage as the union of one man and one woman. Money poured into California from outside the state on both sides of the issue. Religious organizations mobilized to support the ballot initiative. An instructive example is the Church of Jesus Christ of Latter-day Saints, where leaders called upon Mormons to donate time and money to the campaign. “During the 2008 election season,” the First Presidency of the Church issued a statement “to be read by bishops over the pulpit in California wards,” which explained:

The Church will participate with this coalition in seeking [the initiative’s] passage. Local Church leaders will provide information about how you may become involved in this important cause. We ask that you do all you can to support the proposed constitutional amendment by donating of your means and times to assure that marriage in California is legally defined as being between a man and a woman. Our best efforts are required to preserve the sacred institution of marriage.

This move by religious leaders, as Robert Putnam and David Campbell put it, to “draw a clear connection between theology and politics, and then issue a directive to congregant, was exceptional and almost wholly unexpected, according to many Mormons.” Nonetheless, given that “the preservation of
the traditional family is a major focus of modern Mormonism,” the surprise was not the church’s “stance” on Prop 8, but “how explicit and official that stance became.” ¹⁷⁰ I offer this anecdote because it suggests the high stakes that religious groups perceived in Prop 8, and the quoted appeal reflects a view of a necessary congruence between civil and religious marriage.

B. Perry v. Schwarzenegger: The Inadequacy of Private Moral Views as a Basis for Prop 8

When “super lawyer” team David Boies and Ted Olsen challenged Prop 8 in federal district court on behalf of same-sex couples, they submitted extensive expert testimony and documentary evidence during a lengthy trial. The State of California declined to defend Prop 8 in court, and the Supreme Court of California advised that the proponents of Prop 8 were allowed to defend it. They put on only a few witnesses. Following the trial, Chief Judge Vaughn Walker issued a lengthy opinion, concluding that Prop 8 violated the Due Process Clause and the Equal Protection Clause of the US Constitution. ¹⁷¹ His opinion contains many findings of fact, citing to specific evidence, in support of his conclusions of law (see 953–991, 993).

Most pertinent to this chapter are (1) Judge Walker’s findings about the role of religious views about homosexuality in the campaign for Prop 8 and (2) his legal conclusion that a “private moral view that same-sex couples are inferior (p. 123) to opposite-sex couples” is “not a proper basis” (1002) for Prop 8’s restricting same-sex couples from access to civil marriage. On the first point, Walker invoked testimony by expert witness Segura, who “identified religion as the chief obstacle to gay and lesbian political progress” (985) and noted the “sheer breadth” (955) of the coalition of religious groups forming the basis of Protect Marriage (the group seeking to pass Prop 8). The Prop 8 proponents’ own expert witness Paul Nathanson, who was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945). Segura noted that Katherine Young, a second expert for the Prop 8 proponents who, again, was deposed but did not testify, stated that “religion lies at the heart of the hostility and violence directed at gays and lesbians” (945).

In support of his findings that religious opposition to homosexuality fueled the Prop 8 campaign, Walker cited an advertisement, which asserted that “the 98% of Californians who are not gay should not have their religious freedoms and freedom of expression be compromised to afford special legal rights for the 2% of Californians who are gay.” ¹⁷²

Turning to my second point, Walker found that the evidence shows conclusively that “Prop 8 enacts a moral view that there is something ‘wrong’ with same-sex couples.” ¹⁷³ The campaign, Walker found, appealed to the moral superiority of opposite-sex couples. By contrast, in litigation, the Prop 8 proponents reframed
their arguments because, he infers, they recognized that Prop 8 “must advance a secular purpose to be constitutional” (931). Citing Lawrence, he stated that “the state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose” (930–931). In the litigation, proponents defended Prop 8 on these four grounds:

1. Maintains California’s definition of marriage as excluding same-sex couples;
2. Affirms the will of California citizens to exclude same-sex couples from marriage;
3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and
4. Promotes “statistically optimal” child-rearing households; that is, households in which children are raised by a man and a woman married to each other (931).

The third argument is the responsible procreation argument, so central to other attempts to defend state marriage laws (including in Obergefell) as well as DOMA (as discussed earlier in this chapter). The optimal childrearing argument also featured in the campaign.

(p.124) In assessing these arguments, Walker asked “whether any evidence supports California’s refusal to recognize marriage between two people because of their sex” and “whether any evidence shows California has an interest in differentiating between same-sex and opposite-sex unions.” To both of these questions, based on extensive testimony and documentary evidence, he answered no: same-sex and opposite-sex couples were similarly situated with respect to California’s interest in encouraging stable households and optimal child-rearing. Thus, with those possible bases for Prop 8 ruled out, he framed the remaining legal question: “whether the evidence shows Proposition 8 enacted a private moral view without advancing a legitimate government interest” (932, 936, 973). His answer to and analysis of this final question generated intense criticism by religious leaders for its approach to the role of religion in public life and, in particular, in controversies over marriage.

What does Judge Walker mean by a “private moral view”? How does he distinguish between a private moral view and legitimate governmental interest? I will first focus on his evaluation of the irrelevance of gender to marriage and child well-being and then turn to his lengthy focus on the campaign for Prop 8.

First, Walker reasons that the conviction that marriage must be between one man and one woman turns on notions of gender complementarity rooted in religious views. Thus, “Prop 8 amends the California Constitution to codify distinct and unique roles for men and women in marriage” (975). Walker cites
statements by Prop 8 supporters, contained in voter kits about God as the author of gender difference and gender complementarity (975, paragraph 61). Are such appeals as such out of bounds in the democratic process? The bigger problem, I believe, is that this message does not fit California’s marriage law, which had “eliminated all legally-mandated gender roles except the requirement that marriage consist of one man and one woman” (998). The court bluntly states: “the evidence shows” that the gender restriction that Prop 8 now “enshrines in the California Constitution” is “nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life” (998).

Second, the irrelevance of gender to child well-being is central to Walker’s conclusion that Prop 8 rests only on a private moral view. The court makes several affirmative findings about the factors contributing to child well-being, declaring that “the gender of a child’s parent is not a factor in a child’s adjustment,” that “children do not need to be raised by a male parent and a female parent to be well-adjusted,” and that “having both a male and a female parent does not increase the likelihood that a child will be well-adjusted” (980–981). He observes that California law supports parenthood by gay men and lesbians. His implicit argument is that while Prop 8 proponents assert, based on personal and religious beliefs, that children need a mother and father, with distinct gender roles, in order for children to flourish, neither social science literature nor California’s law of parentage supports this belief. Therefore, it cannot be a legitimate interest for California to restrict marriage premised on a view about gender complementarity as a precondition for optimal child adjustment.

Third, he turns to the role of religion in the campaign and to the substance of the campaign messages themselves. Religious critics charge that Walker impugned the motives of California voters. Instead, Walker focuses on the role of religious beliefs about homosexuality in proposing and campaigning for Prop 8, that is, the public messages, not voters’ private motives. First, he finds: “Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians” (985). In support, he appeals both to deposition testimony by Prop 8 proponents’ experts as to the history of religious prejudice against gay men and lesbians and its role in homophobia and prejudice, as well as to many doctrinal statements by religious traditions about homosexuality as a sin (e.g., that homosexual behavior is “a perversion of God’s created order” and “a distortion of the image of God”) (985–987, paragraph 77).

The court relates the historical role of “stereotypes and misinformation” about gays and lesbians in bringing about social and legal disadvantages. Walker cites expert testimony noting parallels between historical campaigns against gay rights and the campaign for Prop 8 (986–991). Experts for plaintiffs testified about the difficulty of making progress in the legislative process if a group is “envisioned as being somehow ... morally inferior, a threat to children, a threat
to freedom” (987, paragraph 78[h]). The Prop 8 campaign, the court repeats, “relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships” (990, paragraph 80). He identifies messages about the lesser value of same-sex relationships, the lack of similarity between same-sex and opposite-sex couples, and that the former “do not deserve the full recognition of society.” This, he says, is Prop 8’s “social meaning.” Prop 8 “places the force of law behind stigmas behind gays and lesbians” (973, paragraph 58) and “reserves the most socially valued form of relationship (marriage) for opposite-sex couples” (974, paragraph 60).

Prop 8 relied especially on “fears that children exposed to the concept of same-sex marriage may become gay or lesbian” (988, paragraph 79) and that public schools would instruct children about same-sex marriage, including the idea that it is okay to think about marrying someone of the same sex (988–991). Notably, some of the campaign rhetoric appealed to “tolerance” for the gay community, but drew the line at “acceptance”—allowing that community to redefine marriage for everyone else (988–989). Evidence showed that Prop 8 supporters decided that a potent campaign message would be on “how this (p.126) new ‘fundamental right’ would be inculcated in young children throughout public schools” (988, paragraph 79[d]). As Richard Garnett makes clear in this volume, determining what “tolerance” requires in a pluralistic polity is critical in areas where rights may collide.176 “Tolerance” as used in the Prop 8 campaign means not criminalizing private sexual conduct and perhaps even allowing domestic partnerships; it does not require official recognition of same-sex relationships as marriages. The latter, in other words, is forced acceptance and also a forced redefinition at odds with peoples’ religious understandings of marriage.

The court’s extensive findings about the basic similarities between opposite-sex and same-sex couples lead it to reject the Prop 8 proponents’ argument that the amendment advances a state’s interest in treating same-sex couples and opposite-sex couples differently by “using different names for different things.” The court reasons about the role of moral and religious views:

> [P]roponents assume a premise that the evidence thoroughly rebutted: rather than being different, same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same ... The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples.... The evidence fatally undermines any purported state interest in treating couples differently; thus, these interests do not provide a rational basis supporting Proposition 8.177

The court then states an emphatic conclusion about the basic equality, and perhaps Michael Sandel would say, equal moral worth, of same-sex couples:
Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples … The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents, and citizens, opposite-sex couples and same-sex couples are equal … Proposition 8 violates the Equal Protection clause because it does not treat them equally (1002).

Note that this conclusion about sameness—equal worth—is rooted in an evidentiary showing, an assessment of “metrics.” This form of argument is that, as we assess how these couples compare with respect to the purposes or goods of marriage—intimate commitment, responsible parenting, and household stability—we find that they are identical.

Finally, in his legal conclusions, Walker relies on *Romer* and *Lawrence* on the role of moral disapproval, stating: “a private moral view that same-sex couples are inferior to opposite-sex couples is not a proper basis for legislation.” Again, he marshals evidence supporting the inference that “Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples” (1002). He explains:

Whether that belief [about comparative goodness] is based on moral disapproval of homosexuality, animus toward gay and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate (1002).

In this passage, it bears emphasizing, Walker uses moral disapproval and animus as alternative bases for the problematic belief: they need not both be present; either is a constitutionally insufficient basis for Prop 8.

In support of his conclusion about animus, Walker cites *Romer*, where the Supreme Court said of Colorado’s Amendment 2: “Laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected” (1003). He also cites (as did Holder) to *Palmore*’s famous statement that, “The constitution cannot control [private biases] but neither can it tolerate them” (1003).

On the moral disapproval point, Judge Walker analogizes to *Lawrence*, where, he notes, the Supreme Court asked “whether a majority of citizens could use the power of the state to enforce ‘profound and deep convictions accepted as ethical and moral principles’ through the criminal code.” Here, Walker reasons, “the question is whether California voters can enforce those same principles through regulation of marriage licenses. They cannot.” The court further appropriates *Lawrence*: “California’s obligation is to treat its citizens equally, not to ‘mandate its own moral code.’ “ Walker continues, citing Justice O’Connor’s concurrence in
Lawrence: “‘Moral disapproval, without any other asserted state interest,’ has never been a rational basis for legislation.” Further invoking Supreme Court precedents, the court reiterates: “Tradition alone cannot support legislation” (1002).

In conclusion, the Perry court’s rejection of private moral views is premised on an understanding of these moral views as, ultimately, based on animosity or moral disapproval without any other supporting reason. Far from offering such a reason, proponents of Prop 8 simply could not or did not counter the extensive evidence about the ways in which same-sex and opposite-sex couples are identical in the ways relevant to the state’s regulation of marriage.

(p.128) C. The Ninth Circuit’s Affirmance: Mere Disapproval Is Not Enough

Although the Supreme Court vacated the Ninth Circuit’s affirmance due to a lack of standing by the Prop 8 proponents to appeal Judge Walker’s ruling, it is useful to mention briefly the counterpart, in the Ninth Circuit opinion, to Judge Walker’s discussion of the constitutional insufficiency of “private moral views” as the basis for Prop 8. This aspect of its opinion bears directly on the issue of religious freedom versus equality and the role of moral disapproval.

In evaluating possible rationales for Prop 8, the Ninth Circuit considers the desire to “restore[] the traditional definition of marriage as referring to a union between man and a woman.”180 This appeal to maintaining the traditional definition of marriage was made, for example, in the amicus brief filed by the USCCB and other religious groups. That brief argued that voters had many legitimate secular reasons for supporting the law and that even the religious reasons were not born of animus or hostility toward homosexuals, but of theological convictions about the nature and purpose of marriage. However, the Ninth Circuit cites Romer to dispose of the appeal to tradition: “tradition alone is not a justification for taking away a right that had already been granted, even though that grant was in derogation of tradition” (1092, emphasis in original). Amendment 2 “could not be justified on the basis that it simply repealed positive law and restored the ‘traditional’ state of affairs” (1092). The court also invokes Lawrence and Loving v. Virginia: “The fact that the government majority in a State has traditionally viewed a practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack” (1093).181

Religious opponents of same-sex marriage loathe this kind of invocation of Loving, arguing that it wrongly analogizes their stance to racial bigotry. However, the court’s point is that history and tradition alone are not enough to justify stripping same-sex couples of the right to marry. In Windsor, Kennedy stated that “state laws defining and regulating marriage, of course, must respect the constitutional rights of persons,” citing Loving. Numerous federal courts, ruling post-Windsor in favor of constitutional challenges to state marriage laws,
have viewed Kennedy’s invocation of *Loving* as a “disclaimer of enormous proportion.” In such jurisprudence, *Loving* not only serves as a vital precedent for the fundamental right to marry, which includes the freedom to marry a person of one’s choice, but also signals heightened scrutiny for evaluating restrictions on that right.182

The Ninth Circuit concluded that Prop 8 enacted “nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class” (1094). It assessed the campaign for Prop 8 differently than did the USCCB brief, drawing on the district court’s finding that stereotypes about the inferiority of same-sex relationships featured prominently in the campaign for Prop 8. For instance, the district court found that Prop 8 was motivated out of a “concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage” and “conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships” (1094).

In an analogue to Judge Walker’s reference to a “private moral view,” the Ninth Circuit concluded the Prop 8 violated the Equal Protection Clause because it “operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships, by taking away from them the official designation of ‘marriage,’ with its societally recognized status. Prop 8 therefore violates the Equal Protection Clause” (1095). The district and appellate courts did not find persuasive the arguments that Prop 8’s proponents and amici made that there were legitimate ends served by Prop 8. It is critical to appreciate that California had taken a step toward equality with respect to the family life of gay men and lesbians—according them, under domestic partnership law, the same benefits and obligations accorded spouses under civil marriage, rendering appeals to responsible procreation and optimal childrearing unpersuasive. In light of these developments in family law and the messages of the Prop 8 campaign, neither court found persuasive arguments for singling out this class and stripping away one right—to use the name “marriage”—for a relationship otherwise treated like marriage for nearly all purposes of state law.

**Conclusion**

In this chapter, I have offered three frameworks that may be helpful in evaluating claims that access by same-sex couples to civil marriage in the United States threatens religious liberty: congruence and conflict with respect to the relationship between civil society and government; the relationship between civil and religious marriage; and the role of moral disapproval as a basis for law. Although a way forward may be challenging, it is important to find a way to achieve a mutual adjustment of equal basic liberties. In this regard, it is notable that the Mormon Church, so prominent in the campaign against Prop 8, recently
came out in support of anti-discrimination laws for lesbian, gay, bisexual, and transgender (LGBT) persons, so long as such laws protect the rights of religious groups. Even so, recent controversies over efforts to pass state religious freedom restoration acts to protect business owners suggest that even religiously motivated refusals to serve customers seem uncomfortably like forms of discrimination rejected as part of an unjust past. On the one hand, defenders of religious liberty strenuously reject historical comparisons to objections to interracial marriage and to public accommodations laws that would bar racial discrimination in providing goods and services. They urge that robust accommodation of religious conscience and exemption from anti-discrimination laws are an appropriate concession to “surrender” by opponents of same-sex marriage. On the other, when exemptions would reach beyond nonprofit religious institutions to for-profit businesses owned by religious persons, some critics insist that such exemptions remind us uncomfortably of past forms of discrimination in the public sphere and that present-day civil rights law cannot allow such selective refusals.

As this chapter goes to press, the most visible conflict over religious liberty, post-*Obergefell*, concerns what the scope of religious freedom and accommodation should be in the case of public officials whose duties include issuing marriage licenses or performing marriage ceremonies. For example, Ryan Anderson argues that “peaceful coexistence is possible” if states may protect public officials like Kim Davis, the Kentucky clerk mentioned earlier in this chapter, by enacting conscience-protection laws allowing them to “recuse themselves” from issuing licenses or performing marriages. Already, the inevitable references to the civil rights era are proliferating, with supporters of Ms. Davis invoking the examples of civil disobedience by Dr. King and Rosa Parks and critics calling her a “bigot” and comparing her to Governor George Wallace and other recalcitrant public officials resisting court-ordered school desegregation. For supporters of marriage equality (and here I include myself), it is disturbing to see religious opponents invoke civil disobedience that was aimed at ending discrimination and unequal treatment based on race in public institutions and public accommodations to justify present-day refusals by public officials to treat gay and lesbian citizens equally in access to—as *Obergefell* describes marriage—an “important public institution.” Another disturbing use of historical analogy is that, invoking President Lincoln’s statements about the infamous *Dred Scott* case, some prominent conservative religious critics of *Obergefell* have called upon “all federal and state officeholders” to refuse to accept *Obergefell* as binding precedent except for the plaintiffs immediately before the Supreme Court and “to recognize the authority of states to define marriage, and the right of federal and state officeholders to act in accordance with those definitions.” On the view of such conservatives, because of the “grave” consequences of *Obergefell*, including the vilification of believers in traditional marriage (as predicted by Justice Alito), public office
holders should justifiably assist, legally and politically, “anyone who refuses to follow Obergefell. Another view of the matter is that—to quote Justice Scalia’s earlier warning on the risk of an overly robust view of the free exercise of religion that would trump civil law—“to permit this would make the professed doctrines of religious belief superior to the law of the land and, in effect, to permit every citizen to become a law unto himself.”

The full implications of Obergefell for how to resolve constitutional commitments to the fundamental right to marry and to the free exercise of religion await further exploration. However, in closing, if one is mindful of the distinction between civil and religious marriage, then the words of one federal district judge upholding a challenge to Florida’s marriage law may be apt:

Liberty, tolerance, and respect are not zero-sum concepts. Those who entered opposite-sex marriages are harmed not at all when others, including these plaintiffs, are given the liberty to choose their own life partners and are shown the respect that comes with formal marriage. Tolerating views with which one disagrees is a hallmark of civilized society.

Notes:
This chapter is an expanded and updated version of a paper originally prepared for the conference, “Religious Freedom and Equality: Emerging Conflicts in North America and Europe,” held at Magdalen College, Oxford University, April 11–13, 2012. I am grateful to Georgetown University’s Religious Freedom Project and to Kellogg College, Oxford University for including me in the conversation. Thanks also to Timothy Samuel Shah, Jack Friedman, and Melissa Proctor for editorial comments. I thank BU law librarian Stefanie Weigmann and BU law student Jessica Lees for help with research. I also thank the BU Department of Theology for affording me a chance to present this draft while I was a Faculty Fellow in the Religion Fellows Program. Because this chapter was substantially completed before the US Supreme Court’s decision in Obergefell v. Hodges on June 26, 2105, I briefly indicate the relevance of my analysis to that decision and to religious liberty issues in the post-Obergefell landscape, but leave a full evaluation to later work.


Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality

757 [E.D. Mich. 2014]), Ohio (Obergefell v. Wymso, 962 F. Supp. 2d 968 [S.D. Ohio 2013]), and Tennessee (Tanco v. Haslam, 7 F. Supp. 3d 759 [M.D. Tenn. 2014]) that barred same-sex couples from marrying and/or barred recognition of their out-of-state marriages. These several cases were consolidated before the Supreme Court under the name Obergefell v. Hodges.


(4.) Lori, “Address on Religious Liberty.”


(9.) Ibid.

(10.) Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting). For example on October 8, 2015, the American Principles Project (founded by Professor Robert P. George) quoted Justice Alito’s prediction about vilification in
its “Statement Calling for Constitutional Resistance to Obergefell v. Hodges.”
https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges% E2%80%AF/.


(15.) Brief for Manhattan Declaration as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group, United States v. Windsor, 133 S. Ct. 2675 (2013).


(19.) Goodridge, 798 N.E.2d at 954.

Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality


(27.) Ibid., 76 n. 49 (describing a statement from The Catholic Bishops of Louisiana recognizing that the required divorce instruction under Covenant Marriage would “confuse or obscure the integrity of the Church’s teaching and disciple” because it is “contradictory to Church teaching and mandated by this state law”).

(28.) Brief for Robert P. George, et al., 5.

(29.) Ibid., 6.

(30.) Laycock, “Religious Liberty,” 848.

(31.) Ibid.

(32.) Ibid.


(38.) Quoting Department of Agriculture v. Moreno, 413 US 528, 534 (1973).


(41.) Charles W. Colson, “Kingdoms in Conflict.”

(42.) Ibid.


(44.) Ibid.

(45.) Ibid.


(49.) Lawrence, 539 US at 601.

(50.) Ibid., 604–605.


(52.) Sprigg, “Does Lawrence v. Texas Imply a Right to Same-Sex Marriage?”


(55.) This analysis draws on my discussion in Fleming and McClain, Ordered Liberty, 199-205.


(57.) Remarks by Senator Saland, 6107.


(60.) Remarks by Senator Grisanti, 6129–6130.


(66.) Laycock, “Religious Liberty,” 848.

Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality


(69.) Ibid. (quoting Julian E. Zelizer, history professor at Princeton).

(70.) Ibid.


(72.) A08354 Memo, “Purpose.”

(73.) A08354 Memo, “Statement in Support.”


(76.) See Public Rights/Private Conscience Project of the Columbia School of Law to Interested Parties, “Proposed Conscience or Religion-Based Exemptions for Public Officials Authorized to Solemnize Marriages,” memorandum, November 5, 2014 (on file with author). The memo explores the constitutionality of proposed conscience or religion-based exemptions for public officials authorized to solemnize marriages.

(77.) For elaboration, see Fleming and McClain, Ordered Liberty, Chapter 6.


(79.) Laycock, “Religious Liberty,” 867.

(80.) These letters are available at the Mirror of Justice blog, http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html; see also Robin Fretwell Wilson, “The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage and


(85.) See New York State Department of Health Office of Vital Records to New York State Town and City Clerks, “Amendment to Domestic Relations Law—‘The Marriage Equality Act,’” informational memorandum, July 13, 2011 (“No application for a marriage license shall be denied on the ground that the parties are of the same or a different sex”); Kaplan, “Rights Collide”; Robert Harding, “Ledyard Clerk Controversy Headed for Courts?” *Citizen* (Auburn, NY), November 13, 2011, http://auburnpub.com/news/local/article_6922ee6c-0da6-11e1-b3ed-001cc4c03286.html (accessed January 24, 2015) (reporting that the couple, Katie Carmichael and Dierdre DiBaggio, were considering legal action and that the Courage Fund would support the newly re-elected clerk, Rose Marie Belforti, in such a challenge); Lori, “Address on Religious Liberty,” 5 (listing as threat to religious liberty “a county clerk in New York State who faces legal action because she refuses to take part in same-sex marriages”).

(86.) See Wilson, “The Calculus of Accommodation,” 1426, 1440–1442; Wilson, “Insubstantial Burdens: The Case for Government Employee Exemptions to

(87.) See Robin Fretwell Wilson’s chapter in this volume.


(90.) Blinder and Fausset, “Clerk Who Said ‘No’ Won’t Be Alone” (quoting Molly Criner, clerk in Irion County, Texas).


(92.) Ibid.

(93.) *McCarthy v. Liberty Ridge Farm*, Recommended Findings of Fact, Opinion and Decision and Order, Case No. 10157952 (N.Y. Division of Human Rights).


(96.) *McCarthy v. Liberty Ridge Farm*, 11.


(98.) Davey and Smith, “Indiana Governor, Feeling Backlash.”
Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality


(102.) Ibid., 958–959.

(103.) At the time the US Supreme Court reviewed Edith Windsor’s challenge to DOMA, the majority opinion noted that eleven states and the District of Columbia allowed same-sex couples to marry. United States v. Windsor, 133 S. Ct. 2675 (2013).


(105.) See, e.g., Massachusetts v. US Dept. of Health and Human Services, 682 F.3d 1, 6–7, 15–16 (1st Cir. 2012) (detailing lawsuits challenging Section 3 brought by Massachusetts couples and by the Commonwealth of Massachusetts; affirming lower court ruling finding Section 3 unconstitutional).

(106.) John Flynn, “The End of Religious Liberty.”


(108.) This is a bit of a misnomer since the two Democrats in this five-member group declined to participate in defending DOMA.

(109.) The four factors are: “(1) whether the group in question has suffered a history of discrimination; (2) whether individuals ‘exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group’; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual’s ‘ability to perform or contribute to society.’” Ibid., 2.


Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality


(116.) They registered as domestic partners in New York City in 1993, “as soon as that option became available.” Ibid.

(117.) Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012). The judge was Chief Judge Dennis Jacobs.

(118.) Ibid., 181.

(119.) Ibid., 180-181.


(121.) McClain, “From Romer v. Evans to United States v. Windsor,” 430-460. This section of the chapter incorporates some of that analysis.


(123.) Ibid., 5.

(124.) Ibid., 15.


(126.) NAE brief is quoting Board of Education of Westside County Schools (Dist. 66) v. Mergens, 496 US 226, 248 (1990), which is in turn quoting McDaniel v. Paty, 435 US 618, 641 (1978) (Brennan, J., concurring in judgment).

(128.) Brief for Manhattan Declaration at 3, *Windsor*, 133 S. Ct.


(131.) Brief for Manhattan Declaration at 6–7, *Windsor*, 133 S. Ct.

(132.) See Brief for Westboro Baptist Church as Amicus Curiae Supporting Neither Party (Suggesting Reversal) at 13–20, *Windsor*, 133 S. Ct.


(134.) Ibid.


(137.) Ibid.


(139.) Ibid., 4–5.

(140.) Brief for Manhattan Declaration at 3–4, *Windsor*, 133 S. Ct.
Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality


(142.) Ibid., 17.

(143.) Ibid., 15-16.


(146.) Ibid.


(149.) Ibid.

(150.) Ibid.

(151.) See Brief for the American Jewish Committee as Amicus Curiae Supporting Individual Respondents (On the Merits) at 3-4, *Windsor*, 133 S. Ct.

(152.) *Windsor*, 133 S. Ct. at 2693.


(154.) See Fleming and McClain, *Ordered Liberty*, 190-205 (elaborating a view of marriage as securing rights and responsibilities and allowing various substantive moral goods).


(158.) Justice Kennedy identifies four relevant “principles and traditions” that demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. Ibid., 2599.


(160.) Ibid., 2674.

(161.) Prop 22 (codified as Cal. Fam. Code § 308.5 [2000], and held unconstitutional by In re Marriage Cases 183 P.3d 384, 453 [Cal. 2008]).

(162.) In re Marriage Cases at 413, 414-416.

(163.) Ibid., 446, 452.

(164.) For an analysis of this case, see Fleming and McClain, Ordered Liberty, 190-199.

(165.) See Cal. Const. Art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California”).


(169.) Putnam and Campbell, American Grace, 365.

(170.) Ibid.


(173.) Perry, 704 F. Supp. at 1002.

(174.) Indeed, in his Obergefell dissent (2613), Chief Justice Roberts explains the origin and purpose of marriage as “ensuring that children are conceived by a
mother and father committed to raising them in the stable conditions of a lifelong relationships.”

(175.) Perry, 704 F. Supp. at 932, 935, 956, 963.


(177.) Perry, 704 F. Supp. at 1001.


(180.) Perry v. Brown, 671 F. 3d 1052, 1092 (9th Cir. 2012) (quoting Strauss v. Horton, 207 P. 3d at 76 [2009]).


(185.) Ibid. See also Terry Kleeman, letter to the editor, New York Times, March 7, 2014, http://www.nytimes.com/2014/03/08/opinion/the-holdouts-on-same-sex-marriage.html (critiquing Douhat; asking if Jim Crow laws were “an acceptable accommodation to the religious beliefs of white supremacy” and asserting that “fortunately, by the time we got around to legalizing interracial marriage, we had had enough” and “no one was permitted to discriminate against interracial couples” lest they face a civil rights prosecution).


(188.) “Statement Calling for Constitutional Resistance.”


Access brought to you by: