

CONSTITUTIONAL DAMAGE CONTROL:
SAME-SEX MARRIAGE, *SMITH'S* HYBRID RIGHTS DOCTRINE,
AND PROTECTING THE PREACHER MAN
AFTER *OBERGEFELL*

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INTRODUCTION

Since before the public ratified the Constitution or adopted the Bill of Rights and even prior to *Marbury v. Madison* establishing the doctrine of judicial review, the clergy solemnization power existed as an embedded feature of this nation's marriage traditions.¹ That power allows ministers who perform religious marriages to legally marry couples under civil law.² Solemnization laws grant these officials near

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¹ See *Marbury v. Madison*, 5 U.S. 137, 138 (1803); Andrew C. Stevens, *By The Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage*, 63 EMORY L.J. 979, 987 (2014) (“The role religious officials play in solemnizing civil marriage has been in place in America since its colonial beginnings. As early as 1694, religious officials were allowed to solemnize civil marriages alongside local magistrates.”) (citing MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 76 (G. Edward White ed., 1985)).

² Stevens, *supra* note 1.

unbridled discretion, within statutory limitations, in deciding for whom they will perform a marriage ceremony.³ No serious constitutional challenge has ever been mounted against this practice.⁴ Over more than two centuries, couples developed settled expectations that their minister can marry them on behalf of the state without constitutional or statutory difficulty.⁵ *Obergefell v. Hodges*, however, throws this historical practice into serious doubt.

Although the headline from *Obergefell* is, of course, that the Fourteenth Amendment recognizes same-sex marriage in all 50 states, the impact of the decision's reasoning extends much further.⁶ It described marriage as a purely secular institution, which serves governmental interests as shown through pervasive material benefits the state provides to couples.⁷ Justice Kennedy provided no meaningful commentary that acknowledged the institutional role religious officials play in marriage policy.⁸

This is not to say that he completely ignored religion. He devoted two short, yet consequential, paragraphs that weakened the historical connection between faith and civil marriage in the United States.⁹ As Justice Kennedy diminished the important religious traditions that informed the nation's civil marriage laws, he explained religious freedom as indistinguishable from the right to free speech.¹⁰ By conflating these two distinct freedoms, post-*Obergefell* Fourteenth Amendment jurisprudence would allow religious opponents of same-sex marriage

³ See, e.g., Mass. Gen. Laws ch. 207, § 38 (2012); see also IOWA CODE § 595.10 (2014); Stevens, *supra* note 1, at 988.

⁴ *Id.*

⁵ Stevens, *supra* note 1, at 987-88.

⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

⁷ *Id.* at 2601.

⁸ See generally, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁹ *Id.* at 2602, 2607.

¹⁰ *Id.* at 2607 (“Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”).

the right to disagree with the ruling, but not the ability to act upon their religious beliefs in ways that contradict it.

Justice Kennedy emphasized that religious organizations could “continue to *advocate* with . . . conviction that . . . same-sex marriage should not be condoned.”¹¹ “The First Amendment,” he wrote, “ensures that religious organizations and persons [may] *teach* the principles . . . so central to their lives and faiths.”¹² Then he assured the reader that the ruling did not prevent citizens, with differing ideological views, from engaging “in an open and searching *debate*” on marriage policy.¹³ Justice Kennedy encouraged religious organizations to voice disagreement with same-sex marriage if that was consistent with their religious beliefs, but hesitated to encourage the practice of those beliefs. This is a cramped reading of religious liberty. The First Amendment protects an individual’s freedom to act upon and exercise their faith in the public square, not only the right to profess it at services and believe it privately.¹⁴

Justice Kennedy cast marriage in strictly civil terms, divorcing the institution from its religious heritage:

Many 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. But when 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.¹⁵

This statement does not explicitly mention the clergy solemnization power; however, its logic reaches it. If *personal opposition* to same-sex marriage cannot carry the *imprimatur of the state*, that is, governmental disapproval of the union, then it raises the question on whether those persons authorized to perform civil marriages can dis-

¹¹ *Id.* at 2607 (emphasis added).

¹² *Id.* (emphasis added).

¹³ *Id.* (emphasis added).

¹⁴ See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

¹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (emphasis added).

criminate against same-sex couples seeking to wed. In other words, would a minister's personal opposition to same-sex marriage sufficiently justify his or her refusal to marry a same-sex couple despite the state power of clergy solemnization?¹⁶ This Article concludes that *Obergefell* created a new Fourteenth Amendment doctrine whose reasoning may serve as the framework by which future Court decisions can forbid all statutorily recognized celebrants, including religious officials, from refusing to marry a couple based on their sexual orientation.¹⁷

Religious freedom protects religions from legislative or judicial encroachment, but it does not mean that religion is immune from government intervention. A federal court revoking rights or status from private actors because their religious doctrine clashed with constitutional or statutory law is not revolutionary. In *Bob Jones University v. United States*, the Court upheld an Internal Revenue Service (IRS) decision to revoke a Christian school's tax-exempt status for maintaining policies that expelled students who interracially married in violation of its religious teachings.¹⁸

The Court agreed with the IRS decision partly because a line of Fourteenth Amendment cases established that "racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."¹⁹ Though a tax law case, the *Bob Jones* decision demonstrates an occasion when the Court protected individual rights over the religious freedoms of a private entity receiving governmental support, whose actions were classified as discriminatory.²⁰

¹⁶ See *id.*

¹⁷ My conclusion has profound implications for clergy solemnization. As state actors, clergy are bound to respect all constitutional rights that couples desire to exercise. As *Obergefell* declared, the right to marry is "inherent in the liberty of the person." *Id.* at 2605. In this respect, *Obergefell's* reasoning opens Pandora's box by codifying civil marriage into the Constitution without recognizing the role faith plays in marriage policy. For instance, if a Catholic priest refuses to marry a heterosexual couple on the grounds that the groom is a non-Catholic, the couple could sue the priest for discriminating against the couple on the basis of religion under the Free Exercise Clause or under state anti-discrimination law. Other hypothetical situations can be devised to identify ways the state action doctrine can expose ministers to liability in the normal functions of their ecclesiastical duties. A clergy conscience exception to the state action doctrine shelters clergymen entirely from liability as they perform civil marriages based on their church teachings.

¹⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

¹⁹ *Id.* at 593.

²⁰ *Id.* at 600-04.

Although anti-miscegenation regulations by private organizations are constitutionally permissible,²¹ preserving Bob Jones University's tax-exempt status would have violated one's liberty to marry a person from another race.²² Therefore, the courts may be able to employ *Obergefell's* reasoning, much like anti-racial discriminatory policies used to protect interracial couples in the *Bob Jones* decision, to empower same-sex couples against ministers who refuse to wed them.²³

²¹ The Civil Rights Cases, 109 U.S. 3, 17-18 (1883) (“[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to state laws of the State for redress Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights which it denounces, and for which it clothes the Congress with power to provide a remedy.”).

²² *Bob Jones Univ.*, 461 U.S. at 592-93.

²³ It could be argued that *Loving v. Virginia*, 388 U.S. 1 (1967) challenges this Article's conclusion. *Loving* struck down anti-miscegenation laws, but the Supreme Court never employed the decision in subsequent cases to curtail the authority of religious officials – who opposed interracial relationships – to perform civil marriages. *Id.* at 11-12; see also Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1104 (2014) (“Because *Loving* repudiated the equal application theory when evaluating Step One of an equal protection claim, judges who are determined to evade heightened scrutiny based on gender have sought to distinguish *Loving*. Indeed, almost every court to reject the sex discrimination argument for heightened scrutiny of gender-specific marriage laws has asserted that loving is ‘inapt,’ ‘inapposite,’ or ‘not analogous,’ such that any ‘reliance [on *Loving*] is misplaced.’”). There are faint parallels between anti-miscegenation laws and bans on same-sex marriage. But the essential holding in *Loving* is not as far-reaching as *Obergefell*. Unlike *Obergefell*, *Loving* is technically not a marriage case. See *Loving*, 388 U.S. at 12 (devoting only a long paragraph or more to the right to marry in a 13-page opinion making that portion of the decision *dictum*). The *Loving* decision does not provide an exegetical analysis of the right to marry in the Constitution. See *id.* Nor does it comment on the scope of the state's power to define marriage. See *id.* However, *Obergefell* developed a broad theory of individual rights, which included the right to same-sex marriage, based in large part on a potpourri of Fourteenth Amendment cases. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601-05 (2015) (identifying a connection between the Due Process and Equal Protection Clauses “that can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.”). The Court decided *Loving* on narrower grounds. See *Loving*, 388 U.S. at 10 (invalidating anti-miscegenation laws under the Equal Protection Clause, because the Clause was designed to eliminate invidious racial discrimination by government). Because the anti-miscegenation laws discriminated against interracial couples, the *Loving* Court was able to invalidate those statutes under the Equal Protection Clause, *id.* at 11, and not on the theory that there exists a free floating right to marry “inherent in the liberty of the person.” *Obergefell*, 135

Some may dismiss this conclusion as alarmist, or even entirely theoretical, assuming that same-sex couples would not desire to wed in a denomination that disapproves of homosexual lifestyles. Others may argue that the First Amendment provides a minister with enough protection against a lawsuit arising from his or her refusal to officiate a same-sex wedding.²⁴ It cannot be assumed that same-sex couples will seek accommodations from only gay-affirming individuals or organizations to officiate their wedding ceremonies. Same-sex couples are now bringing claims under state anti-discrimination laws against private businesses that refuse to provide services to their weddings because of religious objections.²⁵ Lawsuits involving clergymen who refuse to celebrate same-sex marriages are, therefore, foreseeable. Many socially conservative²⁶ churches, synagogues, and mosques have gay and lesbian members within their ranks.²⁷

S. Ct. at 2604. *But see* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2086-87 (2005).

²⁴ See John Corvino, *The Slippery Slope of Religious Exemptions* (Nov. 22, 2009), <http://johncorvino.com/2009/11/the-slippery-slope-of-religious-exemptions/> (“[T]he gay-rights debate concerning religious accommodation is not about worship. No serious person argues that the government should force religions to perform gay weddings (or ordinations or baptisms or other religious functions) against their will. That would violate the First Amendment, and beyond that, it would be foolish and wrong.”).

²⁵ See *Ingersoll v. Arlene’s Flowers*, ACLU (Feb. 18, 2015), <https://www.aclu.org/cases/ingersoll-v-arlenes-flowers> (describing a court ruling where a Washington superior court judge found that a florist who refused to sell floral arrangements for a same-sex wedding violated the state’s anti-discrimination and consumer protection laws).

²⁶ For this Article’s purposes, I define the term “social conservative” and its derivatives only as a religious organization or official that opposes homosexuality.

²⁷ Eve Tushnet, *I’m Gay, but I’m Not Switching to a Church that Supports Gay Marriage*, THE ATLANTIC (May 30, 2013), <http://www.theatlantic.com/sexes/archive/2013/05/im-gay-but-im-not-switching-to-a-church-that-supports-gay-marriage/276383> (offering a testimonial from an openly gay Catholic who refuses to leave the church for its doctrinal stances on homosexuality); Corey Dade, *Blacks, Gays, and the Church*, NPR (May 22, 2012), <http://www.npr.org/2012/05/22/153282066/blacks-gays-and-the-church-a-complex-relationship> (describing homosexuality in the African-American Church as the “worst kept secret in black America”); *Haggard Admits ‘Sexual Immorality,’ Apologizes*, NBCNEWS (Nov. 5, 2006), http://www.nbcnews.com/id/15536263/ns/us_news-life/t/haggard-admits-sexual-immorality-apologizes/#.V2ULDCMrJow (reporting that the former National Evangelical Association President resigned from leading his 14,000 member megachurch for engaging in a homosexual affair); Azmat Khan, *Meet America’s First Gay Imam*, AL JAZERRA AMERICA (Dec. 20, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/12/20/meet-america-s-firstopenlygayimam.html> (discussing the first openly gay imam); Steve Osunsami & Sarah Kunin, *Georgia Mega Church Pastor Reveals He is Gay*, ABCNEWS (Nov. 2, 2010), <http://abcnews.go.com/GMA/megachurch-pastor-reveals-gay/story?id=12030163> (discussing the pastor’s reasons for finally publicly acknowledging his homosexuality); Edward Wyckoff Williams, *Coming Out: Growing up Gay and Muslim in America*, AL JAZERRA AMERICA (July 3, 2014), <http://america.aljazeera.com/watch/shows/>

The reality that gays and lesbians are members of faiths that oppose homosexuality is often an unspoken, but known, phenomenon.²⁸ Although they may serve their church in the closet, they do not always occupy seats in the back pews.²⁹ Gays and lesbians serve in prominent leadership roles – often at severe risk to their reputations – and fellow worshippers tolerate their private lifestyles, particularly if they provide talents that benefit the congregation.³⁰ However, religious commentators have noted that many homosexual Christians are not content to attend services as closeted parishioners but are determined to express their sexual identities in ways that challenge, and even transform, hard line attitudes in traditional congregations.³¹

Obergefell may have raised expectations, and perhaps intensified demands for total inclusion, among homosexual members of these congregations. “As we look ahead to a movement beyond marriage equality,” a same-sex Christian advocacy group posted, “It’s now time for churches to move beyond simply accepting what we understand, to *affirming* [Lesbian, Gay, Bisexual, Transgender, and Queer] people as they are.”³² Therefore, a possible claim asserted by an openly gay congregant against a clergyman who refuses to marry him or her

america-tonight/articles/2014/7/3/coming-out-gay-andmusliminamerica.html (recounting personal stories of gay Muslims).

²⁸ See Dade, *supra* note 27. According to the Pew Research Center, a majority of gay and lesbian adults have a religious affiliation, with a plurality of them identifying as “Christian (53% Protestant, 26% Catholic and 1% some other Christian faith).” PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 91 (2013). Pew reported, “one-in-ten identify with Judaism (2%) or some other non-Christian faith (8%).” *Id.* at 92. The doctrines of most of these faiths disapprove of homosexuality. See *infra* Part III.A.1.

²⁹ See Dade, *supra* note 27.

³⁰ See Khan, *supra* note 27.

³¹ Eve Tushnet, *Coming Out Christian, How Faithful Homosexuals Are Transforming Our Churches*, THE AM. CONSERVATIVE (Jan. 29, 2014), <http://www.theamericanconservative.com/dreher/gays-church/> (citing examples of “coming out narratives” by gay Christians that challenged their respective church culture); Rod Dreher, *Gays & Church*, THE AM. CONSERVATIVE (Jan. 31, 2014), <http://www.theamericanconservative.com/dreher/gays-church/> (explaining how some openly gay Christians choose celibacy as a way to reconcile their sexuality with their church’s teachings).

³² Samantha Allen, *LGBT Leaders: Gay Marriage Is Not Enough*, THE DAILY BEAST (June 26, 2015), <http://www.thedailybeast.com/articles/2015/06/26/same-sex-marriage-is-legal-now-what.html> (explaining the reaction of Believe Out Loud, a LGBTQ advocacy group, to *Obergefell*). Believe Out Loud is an organization determined to achieve gay and lesbian equality in the American Christian Church. The group describes its mission in bold terms:

Believe Out Loud is an online community that empowers Christians to work for [LGBTQ] equality . . . Members of Believe Out Loud . . . are creating a world where *all Christian churches welcome and affirm LGBTQ people* . . . Rooted in a framework of

should be considered seriously. To do otherwise would grossly underestimate these believers' desire for equality, as well as the Court's penchant to rewrite Fourteenth Amendment doctrine to reflect its perception of current values on liberty.³³

Each case in the Court's sexual orientation jurisprudence rationalized invalidation of social legislation by developing novel, and largely indefinable, concepts that provided a basis for it to take sides in cases involving hot button issues.³⁴ In *Romer v. Evans*,³⁵ *Lawrence v. Texas*,³⁶ and *United States v. Windsor*,³⁷ the Court claimed to review challenged federal and state statutes under the most deferential standard, but it struck down those laws based upon a widely perceived alteration of that standard, which, in reality, resulted in the applica-

justice, Believe Out Loud affirms our members in their identities and challenges LGBTQ Christians to "go and do likewise" (Luke 10:37). (emphasis added).

Believe Out Loud, <http://www.believeoutloud.com/background/about-us> (last visited Nov. 18, 2016).

³³ The sexual orientation cases abandoned tradition-based substantive due process, which looked to objective evidence (i.e., statutes, state constitutions, or federal policies) to identify unspecified rights in the Constitution. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Rather, these cases adopted a subjective approach, which identifies liberties in the Constitution's text based upon an evolutionary interpretation of the document. Justice William J. Brennan, Jr., Speech at the Text and Teaching Symposium, Georgetown Univ. (Oct. 12, 1985), http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html (articulating the living constitution theory). The Court has employed an evolutionist theory to justify reversing precedent in order to recognize new rights for gay citizens. In *Lawrence*, for example, Justice Kennedy struck down anti-sodomy laws and justified the decision on an expansive view of individual liberty: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 578-79 (1996). Similarly in *Obergefell*, Justice Kennedy interpreted individual rights broadly, insisting that the case be informed by "new insights" and not traditional views on freedom. *Obergefell*, 135 S. Ct. at 2598, 2603.

³⁴ *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that laws inspired by "animus" against homosexuals violate the Equal Protection Clause); *Lawrence*, 539 U.S. at 559 (identifying an "emerging awareness" on liberty to justify invalidation of anti-sodomy laws); *United States v. Windsor*, 133 S. Ct. 2675, 2692-95 (2013) (employing federalism principles to strike down a provision of the Defense of Marriage Act on individual rights grounds).

³⁵ *Romer*, 517 U.S. 620, 632 (1996).

³⁶ See *Lawrence*, 539 U.S. at 574-75 (2003).

³⁷ Cf. *Windsor*, 133 S. Ct. at 2695 (2013).

tion of heightened scrutiny.³⁸ Now, *Obergefell* has gone a step further.³⁹

Justice Kennedy's conclusion that same-sex marriage bans violated the Fourteenth Amendment was not guided by any known standard articulated in constitutional law.⁴⁰ As a marked departure from established fundamental rights and Equal Protection doctrines, Justice Kennedy did not inquire into whether the states had a compelling, or even a legitimate, reason to justify maintaining traditional marriage.⁴¹

³⁸ These cases departed from the presumption that challenged laws are constitutional, with the Court applying the most lenient standard, rational basis review, over them. "The rational basis test in its traditional form," one scholar wrote, "is extremely deferential to any proffered governmental interest." Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2773 (2005). This standard does not require government to justify its action based upon any rationale stated in the record. On the contrary, the Court upholds the law if it can imagine "any reasonably conceivable state of facts that [can] provide a rational basis" for it. *Id.* Nearly 90 percent of laws reviewed under this standard survive review. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 *IND. L. REV.* 357 (1999). *Romer, Lawrence*, and *Windsor* struck down legislation based upon this deferential standard, making these cases anomalies in the rational basis canon. As a result, the standard employed in these cases has been characterized by scholars as "rational basis with bite," "heightened rationality review," and "rigorous rational basis scrutiny." Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 *MARQ. L. REV.* 377, (2012).

³⁹ Arguably, *Obergefell's* reasoning is consistent with the sexual orientation cases because they too transcended Fourteenth Amendment doctrine by not articulating any standard of review. *But see* Nelson Lund & John O. McGinnis, *The Boundaries of Liberty After Lawrence v. Texas: Lawrence v. Texas and Judicial Hubris*, 102 *MICH. L. REV.* 1555, 1578 (2004) (concluding that the standard employed in *Lawrence* is indeterminate).

⁴⁰ Scholars debate over how to characterize the standard Justice Kennedy employed in light of methodologies the Court used in prior decisions. Compare Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 *HARV. L. REV.* 147, 149-74 (2015) (finding that *Obergefell* relied heavily on a common-law approach, which employed a "balancing methodology" to identify rights for subordinated groups articulated in Justice Harlan's dissent in *Poe v. Ullman*), with Jack B. Harrison, *At Long Last Marriage*, 24 *AM. U. J. GENDER SOC. POL'Y & L.* 1, 6-54 (2015) (explaining that *Obergefell* applied some form of heightened scrutiny not attached to traditional Fourteenth Amendment jurisprudence). I conclude that he applied a balancing test to scrutinize marriage regulations, a methodology the Court has never formally adopted in either its Substantive Due Process or Equal Protection cases. *See infra* Part I.C.

⁴¹ As noted before, challenges under the Fourteenth Amendment are examined under well-developed standards of review, with the Court applying the most rigorous standard, that is, strict scrutiny review whenever government either infringes upon fundamental rights or discriminates against historically vulnerable minorities. *See Glucksberg*, 521 U.S. at 720; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Although state conduct that burdens individual rights are presumptively unconstitutional, it is not automatically invalid if the Court finds that the measure is narrowly tailored to achieve compelling state interests. *Id.* Therefore, no right is completely immune from government regulation. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992). In other words, official action can burden a liberty interest so long as the

Instead, he created a balancing test derived from the Court's marriage cases, where he identified constitutionally recognized attributes of the marital bond and concluded that the principles and traditions discussed in those precedents "apply with equal force to same-sex couples."⁴² Any infringement on the right to same-sex marriage was hence *per se* unconstitutional. Since the sexual orientation cases upended long-standing doctrine, and actually conjured up new ones, those decisions encourage gays, lesbians, and their allies to use constitutional law as a means to advance political agendas in federal courts.⁴³

In these decisions, Justice Kennedy issued a clarion call to same-sex couples to challenge the heteronormative socio-legal order.⁴⁴ They should not settle – he seemed to urge – for incremental progress towards their policy preferences via legislation.⁴⁵ Not satisfied with

government has a compelling reason to do so and the measure adopted is narrowly tailored to achieve its goals. *Glucksberg*, 521 U.S. at 720. However, *Obergefell's* departure from these standards repeats the mistake that the Court made in *Roe v. Wade*, where the Court held that government could not interfere with a woman's right to abort a fetus during the first trimester of pregnancy. *Roe v. Wade*, 410 U.S. 113 (1973). In *Casey*, (an opinion Justice Kennedy joined) the Court found that "[a]s our jurisprudence relating to all liberties *save perhaps abortion* has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right." *Casey*, 505 U.S. at 873 (emphasis added). In order to resolve this anomaly created in *Roe*, *Casey* revised abortion jurisprudence to permit government regulation of abortion throughout a woman's pregnancy. *Id.* at 878. But Justice Kennedy did not learn his lesson. Similar to *Roe*, *Obergefell* does not apply strict scrutiny review to analyze burdens on the right to marry and hence resurrects the theory of absolute rights *Casey* buried over two decades ago. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

⁴² *Obergefell*, 135 S. Ct. at 2599.

⁴³ See generally *supra* note 33 and accompanying text.

⁴⁴ Many find similarities between the civil rights movement in the 1960s that secured federal anti-discrimination protections for African Americans and the quest to establish equality for gays and lesbians today. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 440-46 (2005). For instance, some scholars argued that the sexual orientation cases carry the same moral authority as *Brown v. Board of Education*, where the Court held that separate but equal public school facilities on the basis of race violated the Equal Protection Clause. *Brown v. Board of Education*, 347 U.S. 483 (1954). Such comparisons inspire advocates to advance equality for gays in other areas. Professor Ervin Chemerinsky described *Obergefell* as an unassailable "huge step forward" for gay equality: "I have no doubt that history will regard *Obergefell*, like *Brown*, as a decision that was clearly right and that was an important advance to creating a more equal society." Ervin Chemerinsky, *A Triumph For Liberty and Equality*, 57 ORANGE CTY. LAWYER 16, 20 (2015). Others have used *Brown* as a way to elevate other sexual orientation decisions as sacrosanct. See also Pamela S. Karlan, *Same Sex-Couples: Defining Marriage in the Twenty-First Century: Introduction: Same-Sex Marriage as a Moving Story*, 16 STAN. L. & POL'Y REV. 1 (2005).

⁴⁵ As an example, the American Civil Liberties Union has committed to a list of so-called 'post-marriage' priorities that call for extending civil rights protections for gays and lesbians in

constitutional protection for private sexual intimacy between consenting adults, he insisted that the Constitution's protection for gay citizens fell short. Justice Kennedy argued in *Obergefell*, "But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."⁴⁶ Reading such a bold statement, gay rights advocates may conclude that although *Obergefell* "confirmed a dimension of freedom" that allows same-sex couples to marry, "it does not follow that freedom stops there" either.⁴⁷

In keeping with the progressive trajectory of the sexual orientation cases, gays and lesbians – especially those who are already out to their congregations – may push the envelope again, knocking on the church house door to demand that an objecting preacher sign their marriage license. Even a justice of the Court envisioned a constitutional challenge involving religious officials and same-sex couples in this post-*Obergefell* world.⁴⁸

Siding with *amici* filed with the Court by the General Conference of Seventh-day Adventists, Justice Thomas warned that the conflict between the right to same-sex marriage and the right of religious organizations to oppose those unions would be "inevitable" because "marriage is not simply a governmental institution; it is a religious institution as well."⁴⁹ This clash could arise, he imagined, "as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."⁵⁰ Such a conflict could materialize in an anti-discrimination suit by a same-sex couple

the areas of "employment, housing, businesses, schools, credit, and other aspects of life" by persuading courts that existing anti-discrimination laws cover LGBT people. The organization also stated that it would combat all religious exemptions that would absolve officials and organizations from following such laws with respect to same-sex couples even if it would conflict with their religious tenets. James Esseks, *After Obergefell, What the LGBT Movement Still Needs to Achieve*, ACLU (July 7, 2015), <https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve>.

⁴⁶ *Obergefell*, 135 S. Ct. at 2600.

⁴⁷ Samantha Allen, *LGBT Leaders: Gay Marriage Is Not Enough*, THE DAILY BEAST (June 26, 2015) <http://www.thedailybeast.com/articles/2015/06/26/same-sex-marriage-is-legal-now-what.html> (noting post-*Obergefell* plans from gay rights groups to highlight "a wide range of other cultural and legal problems facing their communities.").

⁴⁸ *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

⁴⁹ *Id.*

⁵⁰ *Id.*

against a religious official who refuses to celebrate their marriage based upon the theory that the solemnization power converts the clergyman into a state actor similar to a judge, mayor, clerk, or governor for marriage purposes.⁵¹

Consider the following *hypothetical case* which illustrates circumstances that would motivate a gay congregant to sue his or her religious leader:

Jayson Fairclothe and Brock McCoy are engaged. Jayson desires to be married at the New Day Pentecostal Church near West Hollywood, California. He has strong ties to the Church. In fact, his grandfather is the founding pastor. Jayson's father currently serves as the deacon board chairman. At age 12, his grandfather baptized him there. Jayson attends services every week and is one of the choir directors. He has never been a member at any other church. While Brock identifies as agnostic, he supports Jayson's desire to have their "special day" at his family church. Bishop Felicia Fairclothe, Jayson's aunt, pastors the church now. Like many members in the congregation, she knows about Jayson's sexual orientation but never discussed the matter openly. The Bishop tolerated his relationship with Brock and allowed Jayson to serve in the local church anyway. One day, Jayson went to the Bishop privately and requested that she marry him and Brock. The Bishop responded with fierce opposition, reiterating their denomination's stance against homosexuality. Jayson responded: "This is wrong! I've been here all my life. I know my rights." Jayson sued the Bishop in federal district court, arguing that clergymen are state actors when they perform civil marriages; the court agreed and ruled that the state could not authorize celebrants that deprived same-sex couples of their right to marry, effectively taking the power to perform civil marriages away from the Bishop. She appealed the decision. The Ninth Circuit Court of Appeals affirmed. The United States Supreme Court granted *certiorari* in (again, the hypothetical case of) *Fairclothe v. Fairclothe*.

Scenarios like the one above, involving gay parishioners and refusing clergywomen, may serve as the impetus for a new line of public interest cases brought to expand gay rights.⁵² Such cases would place

⁵¹ See *infra* Part I.C.

⁵² Lawsuits filed by same-sex couples against religious officials and organizations that refuse to perform their marriages in other countries may forecast the kinds of cases that can

Obergefell's new Fourteenth Amendment doctrine into direct conflict with religious freedoms. This Article provides a solution that can maintain the clergy solemnization power while not disturbing the command that same-sex couples be allowed to marry under the Constitution.

Part I of this Article demonstrates that *Obergefell* recognized only the civil aspects of the constitutional marital right and placed traditionally protected religious practices, like the clergy solemnization power, under Fourteenth Amendment restrictions. Religious freedom laws do not provide clergy with safe harbor from *Obergefell's* sweeping ruling. Part II explains how *Obergefell's* dignity doctrine provides government bureaucrats with compelling justifications to deny accommodation to religious officials and organizations who believe that government policies protecting gays and lesbians substantially burden their religious practices.

Conceivably, courts obeying *Obergefell* could strip solemnization powers from religious officials who object to marrying same-sex couples, rationalizing the decision as a means of preventing the government from supporting discrimination on the basis of sexual orientation. A system of reverse discrimination against opposite-sex couples from socially conservative faiths would manifest, because religious officials from denominations that oppose same-sex marriages would no longer be able to perform civil marriages. Solutions to prevent this result are limited. *Obergefell* is irreversible and could produce a negative dynamic effect in constitutional law by sacrificing religious freedom for the liberty of same-sex marriage. This Article suggests a remedy: that courts should adopt a new theory — as the

appear before American courts in the future. For example, a same-sex couple in Great Britain challenged the Church of England for not celebrating same-sex weddings, arguing that the discrimination placed his relationship on unequal status with heterosexual couples:

I am a Christian - a practising Christian. My children have all been brought up as Christians and are part of the local parish church . . . If I was a Sikh I could get married at the Gurdwara. Liberal Jews can marry in the Synagogue - just not the Christians . . . It upsets me because I want it so much - a big lavish ceremony, the whole works.

Steve Doughty, *Millionaire Gay Fathers to Sue the Church of England for Not Allowing Them to get Married in the Church*, DAILY MAIL (Aug. 2, 2013), <http://www.dailymail.co.uk/news/article-2383686/Millionaire-gay-fathers-sue-Church-England-allowing-married-church.html#ixzz4DUA RaTW8>. See also *Hundreds of Canadians Have Faced Legal Proceedings Over Same-Sex Marriage*, CHRISTIAN CONCERN (June 12, 2013), <http://www.christianconcern.com/our-concerns/social/hundreds-of-canadians-face-legal-proceedings-for-opposing-same-sex-marriage> (explaining complaints filed against religious officials and organizations in Canada and Denmark who refused to perform or respect same-sex marriages).

second best solution — to prevent the marriage disenfranchisement that could result from following *Obergefell's* reasoning to its logical conclusion. Part III suggests a revised individual rights doctrine that exports the hybrid rights theory explained in *Employment Division, Department of Human Resources of Oregon v. Smith* from Free Exercise to Fourteenth Amendment jurisprudence to establish a clergy conscience exception to maintain the status quo and achieve constitutional damage control from *Obergefell's* fallout.

I. *OBERGEFELL*, CLERGY SOLEMNIZATION POWER, AND THE PUBLIC FUNCTION DOCTRINE

A. *State Action Doctrine and the Public Function Exception*

Ministers are God's representatives in their respective religions and traditionally they have acted on behalf of their churches in concert with the state with respect to marriage solemnization. However, the Fourteenth Amendment as applied after *Obergefell* transfigures ministers into state agents when they perform civil marriages. Religious officials act on behalf of their church in concert with their religious teachings with respect to marriage, but state solemnization statutes empower religious officials to act on the state's behalf, making their religious marriages also recognized in civil law.⁵³ Therefore, preachers wear two hats in one ceremony; they have obligations to their religious organization as well as the state. Because these religious officials act on behalf of two institutions when celebrating marriages, any alteration to one hat invariably has an impact on the other. This section explains how *Obergefell's* reasoning incorporates only the civil dimensions of marriage in the Fourteenth Amendment and provides the reasoning to place the clergy solemnization power under the state action doctrine.

The Constitution limits governmental power, not private power. Several constitutional provisions plainly express this principle.⁵⁴ The First Amendment commands that "Congress shall make no law

⁵³ See *infra* Part I.C.

⁵⁴ See generally U.S. CONST. art. I, § 6, cl. 2 (prohibiting senators and representatives from holding other offices during their tenure in the legislature); see also U.S. CONST. art. I, § 9, cl. 3-8 (prohibiting laws which suspend habeas corpus, ex post facto laws, capitation taxes, taxes on exports from states, preferential treatment for ports, and limiting expenditures to funds secured through appropriations); see also U.S. CONST. art. I, § 10 (limiting state power).

respecting an establishment of religion”⁵⁵ Both the Fifth and Fourteenth Amendments forbid the government from “depriv[ing] any person of life, liberty, and property without due process of law”⁵⁶ Even though states control elections in their respective jurisdictions, the Fifteenth Amendment places limits on that power; a citizen’s right to vote cannot be denied “by the United States or by any State on account of race, color, or previous condition of servitude.”⁵⁷ Notably, the text of these amendments target government entities and do not concern private conduct at all.⁵⁸ This textualist reading of the Constitution has been adopted in Supreme Court precedent.⁵⁹ The landmark *Civil Rights Cases* of 1883 establish the general rule that the Fourteenth Amendment regulates only state activities that infringe upon individual liberty.⁶⁰

In that case, the Court held that the Civil Rights Act of 1875 violated the Fourteenth Amendment, because the Act prohibited racial discrimination at public accommodations owned by private actors.⁶¹ The Court found that the Fourteenth Amendment reached only state activity.⁶² Despite the government’s desire to extend constitutional restrictions to private actors, the “amendment was intended to provide against . . . State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment.”⁶³ Twentieth century First and Fourteenth Amendment decisions reaffirmed the understanding that the Constitution comes into play when government activity restrains individual rights.⁶⁴ Therefore, the principle that laws

⁵⁵ U.S. CONST. amend. I (granting citizens the right to religious and political freedom).

⁵⁶ U.S. CONST. amend. V (requiring due process of law in criminal proceedings); *see also* U.S. CONST. amend XIV (extending due process requirements to state action).

⁵⁷ U.S. CONST. amend. XV (extending the right to vote to African Americans).

⁵⁸ *See* U.S. CONST. amend. I; *see also* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

⁵⁹ *See* Jeffery Rosen, *Translating the Privileges and Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1242 (1998) (discussing the history of the Fourteenth Amendment and textualism and its effect on the Privileges and Immunities Clause).

⁶⁰ *See* *United States v. Stanley*, 109 U.S. 3, 11 (1883).

⁶¹ *See id.* at 13-14.

⁶² *See id.* at 13.

⁶³ *Id.*

⁶⁴ *See generally* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (where the Supreme Court held that malls are public places, but they are not protected by the First Amendment because the purpose of the malls is business, and not speech); *see also* *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (quoting its decision in *Lloyd Corp. v. Tanner*, the Supreme Court reversed determination by the NLRB, holding that warehouse employees did not have a First Amendment right to enter the DeKalb shopping center for the purpose of picketing because the First and Fourteenth Amendments are a restriction on state action); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349

“directed exclusively against the action of private persons” fall outside the Constitution’s reach is a firmly entrenched rule in constitutional law.⁶⁵ But the public function exception permits for rare occasions when private action is transformed into state conduct.⁶⁶

The public function exception converts private conduct into state action when the private actor performs tasks that only the government can do.⁶⁷ This exception to the state action doctrine is extraordinarily limited, however. In *Jackson v. Metropolitan Edison Co.*, the Court explained that public functions are not simply “symbiotic” relationships between state and private actors where those activities are “heavily regulated” by government.⁶⁸ Rather, private action transforms into official conduct when it performs tasks “traditionally exclusively reserved to the State.”⁶⁹ In other words, private actors must perform something that is “traditionally associated with sovereignty. . . .”⁷⁰ As suggested in *Obergefell*, marriage is a purely civil institution making solemnization an ideal example of a task that only government does.⁷¹

(1974) (where petitioner brought a § 1983 deprivation of property claim arguing she had a Fourteenth Amendment right to continuous electricity, after a private electricity company holding a certificate of public convenience shut off her electricity without notice).

⁶⁵ *United States v. Harris*, 106 U.S. 629, 640 (1882) (invalidating under the Fourteenth Amendment the provision of the Third Force Act of 1871 which allowed the government to penalize individuals for invading another person’s Fourteenth Amendment rights, because the government was only allowed to regulate state behavior).

⁶⁶ Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1414 (2009).

⁶⁷ While this Article concludes that clergy perform state actions under the public function doctrine when they solemnize civil marriages, it does not foreclose the possibility that this thesis can rest on an alternate theory. Citizens may claim private conduct as state action when government entangles or intertwines itself with the actor’s conduct. See *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 302 (2001) (holding that the Tennessee Secondary School Athletic Association, a nonprofit athletic regulatory organization, was a state actor because the Association was entwined from top to bottom with state officials who regulated public and private school sports competitions, and its actions were therefore subject to constitutional restraints). Arguably, the so-called entanglement exception under the state action doctrine applies to clergy solemnization, because state government dictates the circumstances and criteria for all celebrants, including religious officials, to marry eligible couples. Government entanglement with marriage is emphasized by *Obergefell*, which recognized it as an institution that advances the state’s interests in public order. See *Obergefell*, 135 S. Ct. at 2590. Whether the state is sufficiently intertwined with clergy solemnization to make it state action is a question ripe for further research.

⁶⁸ See *Jackson*, 419 U.S. at 351.

⁶⁹ *Id.*

⁷⁰ *Id.* at 353.

⁷¹ See *Obergefell*, 135 S. Ct. at 2601-02.

It could be argued that government has, in fact, established a monopoly over marriage.⁷²

A web of laws in each state governs who may marry and the conditions under which a marriage may be civilly sanctified.” As a result of these and related rules, only those authorized by the state can access ‘marriage’ and, therefore, marriage’s socially valuable connotations. Put another way, the state exercises monopoly authority over the entry into, incidents of, and dissolution of civil marriage.⁷³

Historically, marriage solemnization was not only a state affair, but a joint endeavor with religious officials.⁷⁴ Although government determines the process and substance of marriage, each state recognizes that the institution carries religious significance for many citizens.⁷⁵

Religious officials have performed civil marriages since the 1690s in the American colonies.⁷⁶ After the American Revolution, all states retained the clergy solemnization power; the practice did not raise any controversy during the “debates surrounding the adoption of the individual state constitutions or the federal First Amendment Religion Clauses.”⁷⁷ It appears that ministers performing civil marriages based upon their religious beliefs did not concern the Framers at all.⁷⁸ Nor did this practice provoke any serious court challenges during the nineteenth century.⁷⁹ Despite intense litigation over the precise meaning of anti-establishment principles in the twentieth century, “religious solemnization of civil marriage [has] remained unchallenged.”⁸⁰ As a feature of marriage policy for over two hundred years, the clergy solemnization power is a deeply rooted practice in the laws and traditions of the American people.⁸¹ So embedded is this practice in the nation’s marriage traditions that citizens view the act of solemnization

⁷² See Goldberg, *supra* note 66.

⁷³ Goldberg, *supra* note 66, at 1411.

⁷⁴ See Stevens, *supra* note 1, at 988.

⁷⁵ See Stevens, *supra* note 1, at 988.

⁷⁶ Stevens, *supra* note 1, at 987.

⁷⁷ *Id.*

⁷⁸ *Id.* at 988.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (explaining that non-textual rights that states historically protected are recognized under substantive due process).

by a minister as having profound legal as well as religious significance for couples during their wedding ceremony.⁸²

Clergymen have exercised the solemnization power throughout history, yet it coexisted with increased state regulation into the procedure and substance of marriage during the nineteenth and twentieth centuries.⁸³ A couple can receive recognition from their congregation by exchanging vows before their priest, but this act does not necessarily produce a valid marriage under state law.⁸⁴ Having a priest officiate at a wedding ceremony is only one requirement on the statutory checklist a couple must satisfy to receive state recognition.⁸⁵ In other words, the sacrament by itself is not enough.

B. *Procedural and Substantive Requirements: Complying with Marital Red Tape and Definitions*

1. Procedural Red Tape

Procedures for getting married vary from state to state. Each jurisdiction expects couples to navigate through a reasonable amount of red tape to legitimize their union in the eyes of the law.⁸⁶ Regarding marriage policy, it is crucial to satisfy certain procedural requirements because 42 states do not recognize a common law marriage status for couples who hold themselves out as being married but who have not satisfied all the state procedural requirements to obtain

⁸² An analogy between citizenship and marriage can further explain the marital right's dual character as a religious and civil institution. Through the Fourteenth Amendment, an individual's citizenship in his or her respective state automatically confers United States citizenship as well. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."). Similar to state citizenship, the clergy solemnization power is a conduit for couples to acquire formal recognition at their respective houses of worship. The interconnection between church and state, much like the relationship between state and federal citizenship, in conferring recognition upon religious couples establishes the clergy's central role in marriage policy. The institution's dual character empowers a minister to wield both spiritual and governmental authority when he or she solemnizes a couple's wedding.

⁸³ See *infra* Part I.B.

⁸⁴ See *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (explaining that with respect to the procedure to constitute marriage, the legislature has always had control over marriage); *Pinkhasov v. Petocz*, 331 S.W.3d 285, 290-91 (Ky. Ct. App. 2011).

⁸⁵ *MacDougall v. Levick*, 782 S.E.2d 182, 189 (Va. Ct. App. 2016).

⁸⁶ See *Adam Candeub & Mae Kuykendall, Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 747 (2011) (explaining that all states have some sort of procedure to validate a marriage).

recognition.⁸⁷ Not following procedure can have devastating consequences for these couples.⁸⁸

Suppose Jayson and Brock, from the previous hypothetical, live together in Jayson's home in West Hollywood, CA. They tell neighbors that they are spouses but never get formally married. If Jayson suddenly dies without a will, Brock's future would be uncertain. Under California law Jayson's parents would inherit the home through intestacy and Brock might be homeless as a result.⁸⁹ Failure to satisfy recognition rules, as you can see, can leave partners without any legal protection.

Marital procedure is important. The red tape involved in obtaining recognition may not be as bureaucratically tedious as, say, a business trying to comply with municipal zoning laws. Nevertheless, procedural requirements for marriage are demanding.⁹⁰ Most states require, for example, couples to be physically present at the ceremony.⁹¹ In other words, couples cannot be married via Skype or FaceTime on the bridegroom's iPhone. These rules promote informed or deliberative decision-making by the couple, which is why half the states mandate waiting periods before licensing, ranging from one to five days.⁹² Yet, all states share common requirements that couples must satisfy to access recognition. A prime example is solemnization statutes.

Solemnization provisions list the categories of persons who can officiate civil marriages. Ministers and judges are allowed to perform marriages in every state.⁹³ On rare occasions, states bestow the solemnization power onto other officials, most commonly mayors. Fifteen

⁸⁷ *Marriage Laws of the Fifty States, District of Columbia, and Puerto Rico*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/table_marriage#b (last visited Nov. 17, 2016); *Common Law Marriage*, NATIONAL CONFERENCE OF STATE LEGISLATURES (August 4, 2014), <http://www.ncsl.org/research/human-services/common-law-marriage.aspx>.

⁸⁸ See, e.g., *Thomas v. Sullivan*, 713 F.Supp. 114, 115 (S.D.N.Y. 1989) (A "widow" who lived with decedent for 47 years and had ten children with him was denied Social Security widow benefits because she had an invalid common law marriage with the decedent).

⁸⁹ CAL. PROB. CODE § 6402(b) (West 2016) (providing that the intestate estate of a decedent without a surviving spouse or children passes to their parents).

⁹⁰ See Candeub, *supra* note 86, at 747, 753 (describing state marriage procedures as "oddly burdensome.").

⁹¹ *Id.* at 751. See also *Lopez v. Lopez*, 245 A.2d 771, 773 (N.J. Super. Ct. Ch. Div. 1968) (explaining that New Jersey marriage laws do not allow proxy marriages).

⁹² Candeub, *supra* note 86, at 751.

⁹³ *U.S. Marriage Laws*, AMERICAN MARRIAGE MINISTRIES, <https://theamm.org/marriage-laws/> (last visited Nov. 17, 2016).

states allow mayors to officiate.⁹⁴ Twelve states permit city clerks to perform marriages.⁹⁵ Seven states empower their governor with the solemnization power.⁹⁶ These persons are part of an elite group, indeed. Presumably, legislatures considered investing the authority to solemnize marriages in a variety of individuals: those who hold public office or who practice in time-honored professions and that have sufficient connection to the legal system or standing in the community. And yet, the legislatures still declined to give those officials that authority.⁹⁷

For instance, not all officers of the state courts can officiate. Only Maine allows its attorneys to perform civil marriages for its residents.⁹⁸ There are other individuals that hold positions of public trust who cannot perform marriages, including the secretary of state, attorney general, state legislators, city council members, and local police chiefs.⁹⁹ Although states provide a very exclusive list of officials that can perform civil marriages in their borders, solemnization laws are in keeping with this Nation's First Amendment traditions by making provision for both the spiritual and civil roles that marriage plays in society.¹⁰⁰

These statutes afford clergy the unique right to exercise discretion to decide whether to marry couples based upon their religious beliefs.¹⁰¹ At least theoretically, if states can determine who can solemnize marriages, it could be argued that the state can regulate how celebrants exercise that power on its behalf.¹⁰² But states did not take this approach with respect to the reverend clergy.¹⁰³ States never required religious officials to serve all qualified couples equally, but,

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See generally *U.S. Marriage Laws*, American Marriage Ministries, <https://theamm.org/marriage-laws/> (last visited Nov. 17, 2016).

⁹⁸ ME. REV. STAT. ANN. tit. 19-A § 655(1)(A)(2) (2016) (allowing lawyers admitted into the state bar to solemnize marriages for its residents).

⁹⁹ Robert E. Rains, *Marriage in the Time of Internet Ministers: I Now Pronounce You Married, But Who am I to Do So?*, 64 U. MIAMI L. REV. 809, 842-77 (2010); *U.S. Marriage Laws*, AMERICAN MARRIAGE MINISTRIES, <https://theamm.org/marriage-laws/> (last visited Nov. 17, 2016).

¹⁰⁰ Stevens, *supra* note 1, at 987.

¹⁰¹ Stevens, *supra* note 1, at 989.

¹⁰² Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J.L. & SOC. POL'Y 274, 282 (2010).

¹⁰³ Stevens, *supra* note 1, at 989.

as Part I.C. will show, *Obergefell's* reasoning makes clergy into state agents, thus stripping them of their discretion.¹⁰⁴ *Obergefell* recognized marriage as only a governmental institution; therefore, its reasoning can be used to interpret these statutes as though marriage were a purely civil institution.¹⁰⁵

The procedural requirements discussed above provide the basis to characterize marriage solemnization as a public function because legislatures decide who can perform civil marriages; moreover, those marriages must conform to the marital definitions enacted by legislators to receive recognition.¹⁰⁶ These facts are crucial to the new dignity doctrine established by *Obergefell* as it provides the predicate for increased judicial control over marriage definitions.¹⁰⁷ This marks a cosmic shift in marriage law. Over the past two decades, citizens have intensely debated whether marriage should extend to same-sex couples.¹⁰⁸ That question was the subject of multiple referendums and

¹⁰⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

¹⁰⁵ See *id.* at 2601. Describing marriage only as a civil institution can profoundly impact the social meaning citizens attach to the institution as well. Wedding ceremonies may take on a new cultural meaning as a consequence. After the couple exchange vows, and share in other rituals, the religious official declares: "By the power vested in me by the State of _____, I now pronounce you husband/wife and husband/wife. You may now kiss the bride/groom." *Welcome to Open Ministry*, <http://www.open-ministry.org/wedding-ceremony.php> (last visited Nov. 16, 2016). Prior to *Obergefell*, this pronouncement was boilerplate language in marriage ceremonies, which simply highlighted the state's respect for the union that the religious official had celebrated. At these nuptials, all qualified couples received simultaneous recognition at their respective places of worship, where they were married under both religious and civil law. This is no longer the case, as *Obergefell* alters the collaborative relationship between church and state in providing recognition to religious couples. The pronouncement may become an official message, within a sacred event, to the clergyman and audience that the authority to solemnize the union did not come from God but from government alone.

¹⁰⁶ See Stevens, *supra* note 1, at 989, 996. While religious officials and their members hold sincere views on marriage, those beliefs do not serve as a basis for a legalized marriage. Suppose the Prophet in the Fundamentalist Mormon Church marries Brittany to Joseph. Brittany is his fourth wife. The marriage ceremony is a spiritual occasion. According to their faith, plural or "celestial" marriage makes Brittany forever "sealed" to Joseph. See Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GEND. L. & POL'Y 1, 10-11 (2014) (discussing the doctrine of celestial marriage). Brittany believes that God, through her Prophet, "sealed" her union with Joseph and joined her with her fellow sister wives. In reality, however, no marriage exists. It would be invalid from its inception. Marriage can only exist between two people. In fact, the state could prosecute Joseph for bigamy. See *id.* at 1-2. Although Brittany and Joseph believe the union is religiously sanctioned, state law does not recognize the Prophet's authority to solemnize a plural relationship.

¹⁰⁷ See Lupu, *supra* note 102, at 282.

¹⁰⁸ Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015) (explaining the history of the legal and political battle over same-sex marriage), <https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings->

litigation in state and federal courts.¹⁰⁹ Prior to *Obergefell*, constitutional law reserved marriage policy to state control.¹¹⁰

2. Defining the Substance of Marriage

Because marriage is mentioned nowhere in the Constitution, the power to define the institution is given to the states.¹¹¹ In *Windsor*, it appeared that the Court adopted this understanding when Justice Kennedy wrote, “By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States.”¹¹² His language on this point became more emphatic, writing that the “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.”¹¹³ Although state power in this area is broad, it is not without limitations.¹¹⁴ Justice Kennedy cabined the states’ broad discretion with respect to marriage by observing that “[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”¹¹⁵ There are a few examples where states’ regulations infringed inappropriately on individual rights.

In *Loving v. Virginia*, the Court struck down anti-miscegenation laws on the grounds that defining marriage on the basis of race violated the Equal Protection Clause.¹¹⁶ *Zablocki v. Redhail* found another impermissible classification under that Clause.¹¹⁷ In *Zablocki*, the Court struck down a statute that denied a marriage license to a resident who owed child support.¹¹⁸ The Court found that the right to marry extended to prisoners in *Turner v. Safley*, too.¹¹⁹ In that decision, the Court held that prison officials improperly denied prisoners the right to marry when they imposed regulations that for-

at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.6c09368fac20.

¹⁰⁹ See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

¹¹⁰ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013); see *infra* Part I.B.2.

¹¹¹ See *Haddock v. Haddock*, 201 U.S. 562, 575 (1906).

¹¹² *Windsor*, 133 S. Ct. at 2691.

¹¹³ *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 383, 404 (1975)).

¹¹⁴ *Id.* at 2691.

¹¹⁵ *Id.*

¹¹⁶ *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

¹¹⁷ *Zablocki v. Redhail*, 434 U.S. 374, 381-82 (1978).

¹¹⁸ *Id.*

¹¹⁹ *Turner v. Safley*, 482 U.S. 78, 96 (1987).

bade marriage access to inmates.¹²⁰ The final example is, of course, *Obergefell*.

Sexual orientation is no longer a permissible classification to regulate marriage under the Fourteenth Amendment.¹²¹ Still, states retain expansive powers to define the marital relationship.¹²² Substantive definitions on marriage are products of legislative compromise and provoke little controversy among Americans today.¹²³

Although substantive restrictions on age, polygamy, and incest are universally adopted by the states, the Constitution's text and history do not dictate how these areas are regulated, so differences among the states are expected by democratic design.¹²⁴ Legislatures have flexibility to enact either narrow or broad rules when regulating marriage policy.¹²⁵

Laws can establish a general rule to govern a given area but, at the same time, carve out exceptions for certain activities or for entire groups.¹²⁶ For instance, even though all states, save for Nebraska and Mississippi, agree that the presumptive age of consent to marry is 18 years old, they disagree on when an underage individual can marry with parental consent.¹²⁷ Furthermore, some states impose sex-based distinctions when permitting underage people to marry with parental consent.¹²⁸ But in other areas, the states have enacted ironclad rules

¹²⁰ *Id.*

¹²¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). But the exceptions carved out by *Loving*, *Zablocki*, and *Turner* did not have the same impact on the states' power to define marriage as *Obergefell*. As Chief Justice Roberts explained:

[T]he 'right to marry' cases [which *Obergefell* relied upon] stand for the . . . limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.

Id. at 2619 (Roberts, C.J., dissenting).

¹²² See Stevens, *supra* note 1, at 988-89.

¹²³ See *id.*

¹²⁴ See *Haddock v. Haddock*, 201 U.S. 562, 575 (1906).

¹²⁵ See Lupu, *supra* note 102, at 282.

¹²⁶ See generally R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L. Q. 525, 555-56 (2013) (explaining waivers to general statutory rules).

¹²⁷ See Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1832 (2012).

¹²⁸ See *id.*

that provide no accommodations. Polygamy laws are a prime example.¹²⁹

Although scholars still debate whether polygamy condones child abuse, subjugates women under patriarchy, or would place a strain on the welfare system,¹³⁰ the public remains steadfast in its opposition to plural marriage with every state both prohibiting and criminalizing polygamy.¹³¹ In fact, opposition to polygamy is embedded in state constitutional law history.¹³² Refuting the claim that government cannot disfavor sexual orientation, Justice Scalia pointed out in *Romer* that “[t]he constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah to this day contain provisions stating that polygamy is ‘forever prohibited.’”¹³³ Even though states agree on restricting marriage based upon universally accepted taboos, such as polygamy, legislatures do not always agree on how to precisely define socially forbidden practices.¹³⁴ Take anti-incest laws as another example.

All states in the Union and the District of Columbia have codified the “incest taboo” into law, prohibiting biologically related persons from obtaining formal recognition of marriages.¹³⁵ However, states disagree on whether biology or genetics alone should define anti-incest laws, with about 25 states that expanded the meaning of incest to ban first cousins from marrying.¹³⁶

The different approaches that states have adopted with respect to substantive marriage definitions illustrate the flexibility the Constitution afforded to states in defining the institution’s meaning. Solemnization statutes, though procedural rules, also display the broad powers legislatures wield in regulating how couples enter into the marital bond. Conceivably, states could have required all licensed celebrants

¹²⁹ See *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (holding that a person’s religious practice cannot be a defense against federal anti-polygamy and bigamy laws under the First Amendment).

¹³⁰ Compare Ashley E. Morin, *Use It or Lose It: The Enforcement of Polygamy Laws in America*, 66 RUTGERS L. REV. 497, 511-16 (2014), with Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL’Y 1, 4-5 (2014).

¹³¹ See Morin, *supra* note 130, at 500; Faucon, *supra* note 130, at 1.

¹³² See *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

¹³³ *Id.*

¹³⁴ See *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family,”* 119 HARV. L. REV. 2464, 2469-71 (2006).

¹³⁵ *Id.*

¹³⁶ See COUSIN COUPLES, U.S. STATE LAWS, <https://www.cousincouples.com/?page=states>; *Inbred Obscurity*, *supra* note 134, at 2470-71.

that perform civil marriages to treat all qualified couples the same.¹³⁷ But states chose not to do so.

Although these statutes control who can perform civil marriages, they allow clergy to refuse to celebrate those relationships that conflict with their religious views.¹³⁸ Pre-*Obergefell*, states could provide accommodations to religious officials in their performance of civil marriages because defining the procedure and substance of marriage fell under the states' "virtually exclusive" purview.¹³⁹ In this way, these statutes codified a nuanced compromise where clergy could perform civil marriages according to their conscience so long as those relationships conformed to the statutory definition of marriage. Compromises like these can be forged by legislators so both secular and religious needs are met. However, courts are not legislatures.

To carry prudential force, constitutional principles announced by the Supreme Court must be taken to their logical conclusion so they can be applied consistently from case to case.¹⁴⁰ This Article explains how *Obergefell's* reading of the Fourteenth Amendment recognized only the civil dimensions of the marital relationship and, in doing so, placed the clergy solemnization power within constitutional limitations. As a result, legislatures presently have less flexibility to regulate marriage.

C. *Obergefell's New Fourteenth Amendment: Reshaping Substantive Due Process Doctrine and the Clergy Solemnization Power*

1. The *Obergefell* Miracle: Turning Preachers into State Actors

The procedural and substantive requirements discussed above do not make solemnization a public function alone. Ministers have performed civil marriages unrestrained by the Fourteenth Amendment

¹³⁷ Stevens, *supra* note 1, at 990 ("If a law that required all individuals licensed to solemnize civil marriage to do so in a nondiscriminatory manner were found to be a neutral law of general applicability, then a licensed religious official would have no free exercise exemption.").

¹³⁸ CAL. FAMILY CODE § 400(a) (2016) ("A person authorized by this subdivision shall not be required to solemnize a marriage that is contrary to the tenets of his or her faith.").

¹³⁹ United States v. Windsor, 133 S. Ct. 2675, 2691 (2013).

¹⁴⁰ See Charles Adside III, *Replay That Tune: Defending Bakke on Stare Decisis Grounds*, 64 CLEV. ST. L. REV. 519, 521 (2016).

throughout American history.¹⁴¹ The doctrine of substantive due process instructs the Court to be reluctant to identify implied rights that involve matters that are routinely settled through the political process.¹⁴² The reasons for judicial restraint in this area are convincing.

Whenever the Court identifies unspecified rights, it places the subject under heightened judicial scrutiny and hence impairs democratic debate and lawmaking on the matter.¹⁴³ The amendment process, the procedure established in the Constitution to add new rights into the document, is bypassed as a result.¹⁴⁴ Another reason is more practical and hits closer to home for the Court. It suffered a loss of institutional prestige when it enforced a robust version of substantive due process during the *Lochner* Era, enabling the Court to strike down over 200 pieces of social and economic legislation for what it perceived as violations of the implied freedom of contracting.¹⁴⁵ The Court was seen as substituting its judgment of wise policy “for the judgment of legislative bodies, who are elected to pass laws.”¹⁴⁶ In the post-New Deal period, the Court rejected *Lochner* and its progeny in favor of an approach that solicited judicial deference to legislative judgments.¹⁴⁷

As explained in *Washington v. Glucksberg*, the Court would no longer be guided by theoretical and often vague conceptions of individual rights, but rather, it would focus on objective evidence to identify fundamental liberties that are “deeply rooted in this Nation’s history and tradition”¹⁴⁸ Then *Obergefell* changed the rules of the game when it implicitly reversed over eight decades of precedent that reaffirmed tradition-based substantive due process as a method for recognizing unspecified rights in the Constitution.¹⁴⁹ Conspicuously, it also failed to analyze the marriage amendments under any known tier

¹⁴¹ Stevens, *supra* note 1, at 987.

¹⁴² *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.”).

¹⁴³ *Id.* at 721.

¹⁴⁴ U.S. CONST. art. V (outlining the requirements to amend the Constitution).

¹⁴⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting).

¹⁴⁶ See *id.*

¹⁴⁷ See *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women and children on due process grounds as violation of liberty of contract), *overruled in part* by *West Coast v. Parrish*, 300 U.S. 379 (1937).

¹⁴⁸ *Glucksberg*, 521 U.S. at 721.

¹⁴⁹ See *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“[T]he majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of

of review in Fourteenth Amendment doctrine, leaving the reader unaware as to the level of scrutiny the Court applied to evaluate the constitutionality of those laws.¹⁵⁰ By detaching itself from foundational cases that confine judicial decision-making, *Obergefell* places the clergy solemnization power in doubt in the following ways.

First, *Obergefell* implicitly overturned tradition-based substantive due process by concluding that “central reference to specific historical practices . . . is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”¹⁵¹ Effectively, Justice Kennedy found that the wisdom gained from “new insights” on marriage freedom justified the eradication of a traditional practice dating back many millennia that prevented same-sex couples from accessing marriage recognition.¹⁵² In doing so, he enshrined into the Constitution a moral view that gained popularity in some quarters within the last ten years. For socially conservative clergymen and women whose morals have not converged with the Court, sexual orientation discrimination regarding marriage cannot be justified as a traditionally-protected exercise of the solemnization power granted to them by statute.¹⁵³ Referring to this long historical practice would revive an era where “laws excluding same-sex couples from the marriage right impose[d] stigma and injury of the kind prohibited by our basic charter.”¹⁵⁴

Second, although the decision identified the liberty interest affected in this case, it failed to clearly articulate the standard of review that would govern marital restrictions. It appeared that the Court was guided by “essential attributes” that it pulled from precedents that commented on the marital bond and then employed those traits as a four-part balancing test to evaluate bans on same-sex mar-

substantive due process.”); *see also* Yoshino, *supra* note 40, at 162 (“After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent.”).

¹⁵⁰ *See supra* notes 38, 39.

¹⁵¹ *Obergefell*, 135 S. Ct. at 2602.

¹⁵² *See id.* at 2612 (Roberts, C.J., dissenting). Chief Justice Roberts slammed the Court’s “new insight” into marriage freedom as evidence of judicial arrogance because it repudiated traditions that dated back to antiquity:

[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

Id.

¹⁵³ *See id.* at 2602.

¹⁵⁴ *Id.*

riage.¹⁵⁵ Having found that same-sex couples possessed these “essential attributes,” any restriction upon their access to the marriage right is a *per se* violation of the Fourteenth Amendment.¹⁵⁶ Thus, a clergyman’s refusal to officiate a same-sex wedding would never serve as a “sufficient justification” for refusing the couple’s request.¹⁵⁷

Lastly, the decision found that the Due Process and Equal Protection Clauses “converge” when the states deprived same-sex couples of their “dignity” under the Fourteenth Amendment when similarly situated opposite-sex couples could receive recognition.¹⁵⁸ In so doing, *Obergefell’s* reasoning thus expanded the liberty interest affected from marriage to a broader interest concerned about group-based deprivations that “stigmatize” and “demean” gays.¹⁵⁹ As such, the protective covering afforded under the Fourteenth Amendment reaches beyond marriage recognition and could extend into other related areas where the Constitution is now concerned about the dignity rights of same-sex couples. Very easily, clergy could be found to deny same-sex couples “equal dignity” under the law for refusing to marry them for religious, moral, or philosophical reasons.¹⁶⁰

To fully understand how *Obergefell* places the clergy solemnization power under constitutional restrictions, a discussion on the balancing test it employed to evaluate same-sex marriage bans is necessary. A balancing test takes an array of relevant factors into account when deciding a case and, at least in the abstract, one factor is no more important than the others.¹⁶¹ But as factors are applied to specific circumstances, one factor may become dispositive or more

¹⁵⁵ See *id.* at 2598-2601. Based upon Fourteenth Amendment precedents, Justice Kennedy identified the following four constitutionally recognized “essential attributes” that define the right to marry: (1) individual autonomy, (2) supports a two-person union, (3) safeguards children and families, and (4) “keystone of our social order,” as evidenced in pervasive material support by the state.

¹⁵⁶ *Id.* at 2602.

¹⁵⁷ *Id.* at 2607.

¹⁵⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015).

¹⁵⁹ *Id.* at 2602.

¹⁶⁰ *Id.* at 2603.

¹⁶¹ In *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976), for example, the Court announced a three-part balancing test in its procedural due process jurisprudence to determine if government must afford an individual additional procedures before it deprives them of their rights. Abortion jurisprudence now employs a balancing test too. In *Whole Women’s Health v. Hellerstedt*, Justice Breyer reinterpreted the undue burden standard announced in *Casey*, as requiring courts to weigh the burdens a regulation imposes on access to abortion services against the benefits the law confers. *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

meaningful when weighed against others. As mentioned before, Justice Kennedy identified four “essential attributes” of marriage and investigated if same-sex couples possessed those traits.¹⁶² Revealingly, one attribute carried more weight in Justice Kennedy’s analysis although others appeared to be less important.¹⁶³ He found that marriage’s connection to the nation’s “social order” illustrated its fundamental character and codified the civil aspects of the institution into the Constitution.¹⁶⁴

Emphasizing the civil character of marriage, Justice Kennedy found that “marriage is a keystone of our social order” pointing to the massive economic and social benefits state and federal governments provide to married couples:

[T]hroughout our history [states] made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.¹⁶⁵

This conclusion provided the basis for Justice Kennedy to recognize dignity rights protected under the Fourteenth Amendment. He found that provision of material support by the state to married couples profoundly “contributed to the fundamental character of the marriage.”¹⁶⁶ By withholding these benefits from same-sex couples, he concluded, the state stigmatized gays by relegating their relationships

¹⁶² *Obergefell*, 135 S. Ct. at 2598.

¹⁶³ For example, he acknowledged that marriage safeguarded children and argued that “[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” *Obergefell*, 135 S. Ct. at 2600. But Justice Kennedy limited the importance of children to the marriage question finding that the institution is no “less meaningful for those who do not or cannot have children” and “that the marriage right has never been conditioned on the ability to procreate or raise children.” *Id.* at 2601. While childbearing was an ingredient in the marriage right, it did not carry dispositive weight in the analysis.

¹⁶⁴ *Id.* at 2601.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

to a second-class status.¹⁶⁷ This unequal treatment deprived same-sex couples of “equal dignity” that linked the Due Process and Equal Protection Clauses together.¹⁶⁸ Justice Kennedy’s reasoning here does more than provide the basis to require states to license same-sex marriage—it precludes alternative views on the meaning of marriage from attaining protection in constitutional law.¹⁶⁹ Diversity in marriage policy is no longer permitted, particularly if the law does not serve secular or governmental ends.¹⁷⁰

Justice Kennedy offered no commentary on the religious and spiritual meaning the institution carries in American society. Civil marriage is the union the Constitution appears to protect now over and against marriage’s religious dimension. This is reflected in Justice Kennedy’s emphasis on the “material benefits” the government provides to support couples.¹⁷¹ For this reason, the clergy solemnization power – a religious practice that has played a vital role in contributing to the meaning of marriage for millions of couples – plays no role in Fourteenth Amendment jurisprudence.¹⁷² This presents severe challenges for the clergy.¹⁷³

Because the Court dismissed religious, moral, and philosophical reasons that justified same-sex marriage bans, it logically follows that those institutions with state power that continue to discriminate against same-sex couples should be ruled unconstitutional too. While ministers may continue to advance personal objections to same-sex marriage, their beliefs cannot carry the “imprimatur” of the government state.¹⁷⁴ Religious officials that refuse to marry a same-sex couple would be imposing their disapproval with the state’s imprimatur on a constitutionally protected civil marriage. In a nutshell, *Obergefell’s* reasoning transforms the religious official’s refusal to perform a civil marriage into state action for the following reasons:

- (1) Marriage is integral to the nation’s social order as reflected in the “material benefits” the state provides to couples, and to

¹⁶⁷ *See id.*

¹⁶⁸ *Id.* at 2608.

¹⁶⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

¹⁷⁰ *Id.* at 2608.

¹⁷¹ *Id.* at 2601.

¹⁷² *See Stevens supra* note 1, at 1008.

¹⁷³ *See id.* at 989.

¹⁷⁴ *Obergefell*, 135 S. Ct. at 2602.

deny gays marriage access unconstitutionally stigmatizes them.¹⁷⁵

- (2) The state regulates the entry and definition of civil marriage, establishing the civil institution as a task exclusively performed by government since it is “a keystone of our social order.”¹⁷⁶
- (3) Because the entry into civil marriage is exclusively regulated by the state, those permitted to perform civil marriages, like religious officials, on the state’s behalf are state actors under the public function doctrine.¹⁷⁷
- (4) Therefore, religious officials that refuse to marry same-sex couples act with the state’s “imprimatur” to deprive these individuals of their dignity rights under the Fourteenth Amendment.¹⁷⁸

In this state of affairs, the way a judge would rule on a dispute between a same-sex couple and a refusing minister would be easy. The previous hypothetical case featuring Bishop Fairclothe and Jayson illustrates the point.

In *Fairclothe v. Fairclothe*, a judge could rule that the Bishop’s refusal to marry Jayson and Brock was unconstitutional. Even though *Obergefell* is unclear on what standard courts should employ to evaluate marriage restrictions, the Court’s sexual orientation cases made clear that the Bishop’s moral disapproval of homosexuality would further no legitimate state interest.¹⁷⁹ Judicial inquiry into whether Bishop Fairclothe had a sufficient justification to not perform a same-sex marriage is thus unnecessary. *Obergefell* established a per se rule. She denied Jayson and Brock of their dignity rights because her refusal carries the state’s “imprimatur” under California’s solemnization statute.¹⁸⁰ However, it could be argued that the state action doctrine does not reach the clergy. In an effort to narrow the public function exception, the Court in *Moose Lodge No. 107 v. Irvis* found

¹⁷⁵ See *id.* at 2601.

¹⁷⁶ *Id.*

¹⁷⁷ *Supra* note 67 and accompanying text.

¹⁷⁸ *Obergefell*, 135 S. Ct. at 2602.

¹⁷⁹ See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (establishing that traditional views that homosexuality is immoral does not serve as a legitimate basis to justify legislation).

¹⁸⁰ Stevens, *supra* note 1, at 990 (“If a law that required all individuals licensed to solemnize civil marriage to do so in a nondiscriminatory manner were found to be a neutral law of general applicability, then a licensed religious official would have no free exercise exemption.”).

that mere licensing to perform a heavily regulated task does not convert private conduct into state action.¹⁸¹ Though marriage solemnization is regulated through separate ecclesiastical and governmental licensing regimes for celebrants and couples, the following analysis reveals that the activities in *Moose Lodge* are in no way comparable to marriage in *Obergefell*, which controls the constitutional question of whether religious officials are state actors for solemnization purposes.

2. *Moose Lodge*, Fundamental Rights, and the Preacher's Hangover

In *Moose Lodge*, the Court held that a license issued by the government for a private actor to engage in a heavily regulated activity does not convert that activity into state action.¹⁸² There, Irvis argued that the lodge, a private social club, violated the Equal Protection Clause when its employees refused to serve him because he was black and that the lodge's liquor license made it a state actor for Fourteenth Amendment purposes.¹⁸³ The Court rejected this reasoning because all private entities that receive a service or license from government would be subject to constitutional restrictions.¹⁸⁴

One can say that *Moose Lodge* controls the question on religious officials. Because a state liquor license does not convert a private social club into a state actor when it racially discriminates, it follows that a licensed religious official can discriminate in the exercise of the solemnization power according to their faith.¹⁸⁵ However, *Moose Lodge* is completely inapplicable here when analyzed through the individual rights doctrine.

Indeed, *Moose Lodge* needed a license to serve spirits to its members and clergymen need a license from their respective religious

¹⁸¹ See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

¹⁸² See *id.* at 173.

¹⁸³ *Id.* at 171.

¹⁸⁴ See *id.* at 173 (“Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, [a holding that a social club is a state actor] would utterly emasculate the distinction between private, as distinguished from state, conduct set forth in *The Civil Rights Cases* . . . and adhered to in subsequent decisions.”).

¹⁸⁵ Stevens, *supra* note 1, at 1000-01 (“As *Moose Lodge No. 107 v. Irvis*, makes clear, the mere licensure of an individual or an organization does not make that private individual or organization a state actor. Thus, it is no violation of the [Constitution] for such a licensed religious official to discriminate in the administration of his or her license according to the dictates of his or her faith.”).

organizations to marry couples, but the comparison ends there. Nowhere in Fourteenth Amendment jurisprudence does the Court describe the consumption of alcohol as an individual right.¹⁸⁶ Marriage and alcohol are further distinguished in that marriage is a unique institution and government policies treat it as “a building block of our national community.”¹⁸⁷

Obergefell characterized marriage as integral to “social order,” with the government granting couples special treatment and rights for entering into a state recognized union.¹⁸⁸ Drinking spirits at one’s leisure occupies no such place in America’s legal tradition; rather it is a recreational activity that can take place at the local bar, during a party, or while observing a sporting event with friends. Thus, it makes sense that the state action doctrine does not reach private actors that provide licensed services that are not constitutionally protected. When viewed through this prism, *Moose Lodge* and the power to marry couples take on entirely different meanings in Fourteenth Amendment jurisprudence: one involves access to a fundamental right while the other simply does not. The preacher cannot escape the state action doctrine, and federal and state Religious Freedom Restoration Acts are also likely insufficient as a mechanism to protect ministers.¹⁸⁹

¹⁸⁶ See, e.g., *Alcohol Beverage Control: The Basics for New State Alcohol Regulators*, CTR. FOR ALCOHOL POLICY, http://www.centerforalcoholpolicy.org/wpcontent/uploads/2015/06/Alcohol_Beverage_Control_Basics.pdf (explaining the Constitution gives states carte blanche to regulate their respective alcohol markets. Alcohol regulations touch upon a wide range of areas, with laws that determine the hours liquor can be sold, when underage drinking is lawful, and the appropriate punishment for driving while under the influence); Hunter Schwarz, *Where in the United States You Can’t Purchase Alcohol*, WASH. POST (Sept. 2, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/02/where-in-the-united-states-you-cant-purchase-alcohol/> (listing ten states that still permit local governments to enforce prohibition; these so-called “dry counties” criminalize the sale or purchase of alcoholic beverages within its borders). Any activity that is subject to this sort of heavy regulation cannot be considered fundamental in the constitutional sense.

¹⁸⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

¹⁸⁸ *Id.*

¹⁸⁹ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

II. WHY CLERGY CANNOT RECEIVE ACCOMMODATION UNDER STATE RELIGIOUS FREEDOM LAWS IN THE POST-*OBERGEFELL* WORLD

A. *Religious Freedom Laws Cannot Protect the Clergy Solemnization Power from Obergefell*

Employment Division v. Smith abandoned constitutional standards enforced by the Supreme Court upon government policies that burdened religious practices, igniting a widespread political firestorm that culminated in a bipartisan effort in Congress to overturn the decision through the 1993 Religious Freedom Restoration Act (RFRA).¹⁹⁰ *Smith* involved two Native Americans who ingested peyote, a controlled substance, as part of their sacramental obligations as members of the Native American Church.¹⁹¹ Their employer fired them for ingesting the substance.¹⁹² The state denied their claims for unemployment compensation because “they had been discharged for work-related ‘misconduct.’”¹⁹³

Smith upheld the denial because “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”¹⁹⁴ In so holding, the Court found that the government did not have to show a compelling state interest to justify not granting a religious dissenter an accommodation when a neutral law incidentally burdened the dissenter’s religious practice.¹⁹⁵

The so-called compelling interest test arose from *Sherbert v. Verner*.¹⁹⁶ The Court held that the state failed to demonstrate a compelling interest in denying an employee – a member of the Seventh Day

¹⁹⁰ Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html>.

¹⁹¹ *Emp’t Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 874 (1990).

¹⁹² *Id.* at 874.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in judgement)).

¹⁹⁵ *Id.* at 878-79, 890.

¹⁹⁶ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (explaining that the Court’s analysis would consider whether the eligibility provisions of the unemployment compensation statute had some compelling state interest to justify substantial infringements of religious freedoms).

Adventist Church – unemployment compensation because her employer fired her for refusing to work on Saturdays, which is the day her faith adopted as the Sabbath.¹⁹⁷ RFRA restored the compelling interest test, which *Smith* rejected, as the standard to employ when evaluating generally applicable laws that did not intentionally burden free exercise.¹⁹⁸ But in *City of Boerne v. Flores*, the Court held that the statute was unconstitutional as it applied to state and local governments.¹⁹⁹ That is to say, the Court limited RFRA’s reach to federal, not state or local, policies.²⁰⁰ *City of Boerne* motivated state legislatures across the country to enact their own mini-RFRAs.²⁰¹

Currently, 21 states have either enacted a statutory version of RFRA or amended their constitutions to require state and local governments to show a compelling justification for policies that substantially burden religious practices.²⁰² Following the decision in *Obergefell*, there has been renewed concern for religious freedom, and in 2015 “[s]eventeen states . . . introduced legislation . . . regarding the creation of, or alteration to, a state religious freedom law.”²⁰³

State RFRAs are generally very similar to one another and modeled after federal law. State laws may “substantially burden a person’s exercise of religion only if” application of the law to a religious objector serves “a compelling governmental interest” and the government employs “the least restrictive means of furthering that compelling governmental interest.”²⁰⁴ Legislatures simply codified the compelling interest test into their laws, which essentially copied language employed by the Supreme Court in its strict scrutiny cases under both the First and Fourteenth Amendments.²⁰⁵

¹⁹⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

¹⁹⁸ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

¹⁹⁹ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁰⁰ See *id.*

²⁰¹ 2016 *State Religious Freedom Restoration Act Legislation*, NAT’L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/2016-state-religious-freedom-restoration-act-legislation.aspx>.

²⁰² *Id.*

²⁰³ 2015 *State Religious Freedom Restoration Act Legislation*, NAT’L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rra-legislation.aspx>.

²⁰⁴ Compare ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.02 (2010) with 42 U.S.C. § 2000bb-1 (1993).

²⁰⁵ Christopher Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV 466, 474-76 (2010).

There is no question that these states provided robust protection to religious dissenters whose practices had become burdened by government policy. This would be particularly true for clergy who were forced to perform duties contrary to their church doctrine. Before *Obergefell*, states could not assert a compelling reason to justify denying an accommodation to a minister who refused to perform a same-sex marriage on religious grounds in part because same-sex marriage was not viewed as a historically protected practice under the Constitution. An understanding of marriage policy prior to federal and state court intervention may help explain the compelling interest test.

Formal recognition of same-sex marriage is a recent phenomenon in United States history.²⁰⁶ Every state in the Union defined marriage as between one man and one woman until Massachusetts recognized same-sex marriage in 2003.²⁰⁷ Federal law mirrored state marriage policy on this issue. In 1996, President Bill Clinton signed the Defense of Marriage Act (DOMA), which adopted the traditional definition of marriage for federal purposes.²⁰⁸ “When it became the law of the land, [DOMA] enjoyed overwhelming bipartisan support on Capitol Hill” with the House of Representatives passing the law 342-67 and the Senate voting 85-14 in its favor.²⁰⁹ While demands for marriage equality gained some traction twenty years later, only 12 states enacted same-sex marriage through democratic means.²¹⁰ In contrast, “voters in 32 states had consistently voted to limit same-sex marriage. Thirty states had enacted constitutional provisions to define marriage as a relationship between a man and a woman and [thus] prohibit[ed]

²⁰⁶ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (recognizing same-sex marriage in Massachusetts, becoming the first state to do so). *Goodridge* shows that formal recognition of same-sex marriage in the nation’s marriage history is novel. Additionally, political support for the practice is new as well. As an example, President Barack Obama admitted that his views on the issue have “evolved” throughout his political career, culminating in announcing his support for same-sex marriage nearly four years into his presidency in 2012. Becky Bowers, *President Barack Obama’s Shifting Stance on Gay Marriage*, POLITIFACT (May 11, 2012), <http://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/>.

²⁰⁷ *Goodridge*, 798 N.E.2d at 948.

²⁰⁸ Nick Ramsey, *How - and Why - DOMA Became Law in 1996*, MSNBC (Mar. 30, 2013), <http://www.msnbc.com/the-last-word/how-and-why-doma-became-law-1996>.

²⁰⁹ *Id.*

²¹⁰ Robin Fretwel Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1168 n.22 (2014).

same-sex marriages” in their respective jurisdictions.²¹¹ During the intense debate over marriage equality in the states, there was a notable consensus that the clergy solemnization power should remain a feature in state marriage policy.²¹²

States that recognized same-sex marriage prior to *Obergefell* foresaw the possible conflict between same-sex marriage and a minister’s religious freedom.²¹³ As a result, 11 states and the District of Columbia enacted statutes that specifically exempted the clergy from performing same-sex marriages.²¹⁴ These statutes guaranteed that ministers were not coerced into solemnizing or participating in any marriage ceremonies that violated their religious tenets.²¹⁵ State conscience exemptions do not, however, protect clergy from *Obergefell*’s impact upon marriage policy.²¹⁶

As noted earlier, these states did not impose a rigid rule upon all celebrants.²¹⁷ In jurisdictions that recognized same-sex marriage, faith communities feared that same-sex marriage recognition would make clergy lose their solemnization powers, particularly if “government could treat the celebration of civil marriage as a public accommodation, and prohibit discrimination by providers of that service.”²¹⁸ These states adopted a simple compromise to address this concern.²¹⁹ Gays could marry but clergy retained their authority to perform marriages based upon their religious views.²²⁰ *Obergefell* invalidates these

²¹¹ *Same-Sex Marriage Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>.

²¹² Wilson, *supra* note 210, at 1253 (citing CONN. GEN. STAT. § 46b-22b (West 2009); DEL. CODE ANN. tit. 13, § 106 (2013) <http://delcode.delaware.gov/title13/c001/sc01/index.shtml>; D.C. CODE § 46-406(c) (LexisNexis 2012); S.B. No. 1 H.D.1 § 572-D, 27th Leg., 2nd Spec. sess. (Haw. 2013); S.B. 10(a-5), 98th Gen. Assemb. Reg. Sess. (Ill. 2013); MD. CODE ANN., Fam. Law §§2-201, 2-202 (LexisNexis 2012)); MINN. STAT. ANN. § 517.09 (West Supp. 2013); N.H. REV. STAT. ANN. § 457:37(II) (Supp. 2013); N.Y. DOM. REL. LAW § 11(1) (McKinney Supp. 2014); Vt. Stat. Ann tit. 18 § 5144(b) (2012); R.I. GEN. LAWS ANN. § 15-3-6.1(b) (LexisNexis 2013); WASH. REV. CODE § 26.04.010(4) (LexisNexis 2013); ME. REV. STAT. ANN. tit. 19-A § 655 (Supp. 2013); CAL. FAM. CODE § 400 (West Supp. 2013)).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Lupu & Tuttle, *supra* note 102, at 282.

²¹⁹ *Id.* at 283.

²²⁰ *Id.* at 282.

compromises by establishing a national marriage rule, which does not permit state-by-state differences.²²¹

As explained before, clergy are state actors for solemnization purposes because *Obergefell* made marriage into a public function.²²² Conscience exemptions are, thus, unconstitutional because they permit states to place their approval on state actors that deprive gay citizens of their fundamental right to marry.²²³ One may argue that state RFRA could conceivably require the government to give an accommodation to ministers – as state actors – not to perform a same-sex marriage and simultaneously maintain their solemnization power. The dignity doctrine announced in *Obergefell*, however, precludes ministers from finding safe haven in state RFRA.²²⁴ But this Article will show that the decision does more than disable religious officials who discriminate against couples on the basis of sexual orientation from exercising the solemnization power. *Obergefell* contains logic that reaches areas beyond marriage policy and renders state RFRA ineffective to provide an accommodation to religious dissenters that disapprove of homosexuality in an array of different fields.²²⁵

B. *Religious Freedom Laws Cannot Protect Religious Freedom from Obergefell*

Obergefell is not limited to marriage policy.²²⁶ While the decision can be technically categorized as a marriage case, the Court found that same-sex marriage bans violated a broader liberty interest protected under the Fourteenth Amendment.²²⁷ The decision found that, on occasion, when unique forms of discrimination deny any citizen equal dignity under the law, both the Due Process and Equal Protection Clauses merge, creating an inter-clause “synergy.”²²⁸ That conclusion, of course, raises a question: when does the state violate a citizen’s dignity rights? It is unclear. All that is known is that same-sex marriage bans “demeaned” and “stigmatized” those couples because same-sex couples possessed all the “essential attributes” that

²²¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 2599-2601.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2623 (2015).

²²⁸ *Id.* at 2623.

heterosexual couples possess.²²⁹ Because *Obergefell* did not cabin the scope of this new doctrine, it can be employed by civil libertarian groups in lawsuits to combat discrimination against gays and lesbians in other areas.²³⁰ To illustrate how *Obergefell* can expand constitutional protections beyond the marriage context, all one need do is replace references in the opinion to discrimination against gays with other issues such as health care, housing, and employment, as illustrated below.

Consider the following passages of the *Obergefell* opinion where marriage is replaced with another subject. “Choices about [*health care*] shape an individual’s destiny.”²³¹ (The consequences that result from health care decisions can make the difference between life and death. If that does not determine an “individual’s destiny,” it is difficult to know what does.) “The centrality of [*housing*] to the human condition makes it,” one could claim, “unsurprising that [*shelter*] has existed for millennia and across civilizations.”²³² Examine a longer passage from *Obergefell* with only minor revisions to show the potentially wide-ranging effect the decision may have on labor relations:

Here the [*employment laws*] enforced by the government are in essence unequal: [*homosexuals*] are denied all the benefits afforded to [*heterosexuals*] and are barred from exercising a fundamental right. Especially against a long history of disapproval of [*homosexuality*], this denial to [*gay citizens*] of the right to [*employment*] works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.²³³

As shown by the minor revisions above, the broad sweep of protection the new dignity doctrine extends to gay citizens provides the constitu-

²²⁹ *Id.* at 2598, 2603.

²³⁰ *Id.*

²³¹ *Id.* at 2599 (Choices about *marriage* shape an individual’s destiny) (emphasis added).

²³² *Id.* at 2594 (The centrality of *marriage* to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations) (emphasis added).

²³³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015):

Here the *marriage* laws enforced by the respondents are in essence unequal: *same-sex couples* are denied all the benefits afforded to *opposite-sex couples* and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to *same-sex couples* of the *right to marry* works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

tional basis to deny religious officials accommodation if state policy “substantially burdens” their beliefs.

Today, governments can plausibly assert a compelling state interest to deny accommodation because there is a constitutional imperative to protect the dignity rights of gays under the Fourteenth Amendment. This argument is bolstered by state policies that extend protections to gays beyond marriage equality.²³⁴ States have enacted a battery of laws to protect citizens against discrimination on the basis of sexual orientation in multiple areas.²³⁵ Pro-gay legislation enacted by federal and state governments in the last decade or more represents a revolutionary change in anti-discrimination law.²³⁶

The federal government, including 35 states and the District of Columbia, passed hate crimes legislation, which increased the penalties on crimes motivated by anti-gay bigotry.²³⁷ Government is not only concerned about the physical well-being of gay citizens but it desires to protect their free participation in the economy too. Over 30 states forbid either public or private employers from engaging in employment discrimination on the basis of sexual orientation.²³⁸ More broadly, 22 states provide protection to gays with respect to public accommodation.²³⁹ A growing number of states provide protection to homosexuals when entering into lease contracts, with nearly half of the states prohibiting landlords from discriminating against prospective gay tenants.²⁴⁰ There also appears to be an emerging movement to extend same-sex equality into new frontiers. The District of Columbia plus 19 states prohibit discrimination against gay and lesbian students at primary and secondary schools and the District

²³⁴ See, e.g., N.Y. EXEC. LAW § 296 (McKinney 2016).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *State Hate Crimes*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/state_maps (last visited Dec. 7, 2016).

²³⁸ *State Laws on Economic Related Discrimination*, NAT'L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx> (last visited Dec. 7, 2016).

²³⁹ *State Public Accommodation Laws*, NAT'L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> (last visited Dec. 7, 2016).

²⁴⁰ *Statewide Housing Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/state_maps (last visited Dec. 7, 2016).

of Columbia plus 13 states forbid health insurance discrimination based on sexual orientation.²⁴¹

In this post-*Obergefell* world, religious dissenters may not receive protection under state RFRAs if their decisions violate a same-sex couple's rights under its anti-discrimination laws. For example, this could arise if a family life center owned by a mosque is generally rented to the public but a request from one of its gay members to have his wedding reception there is denied because of his sexual orientation.²⁴² Another possible example is if a Catholic college with tax-exempt status denies a female student housing for married couples, because she wants to live in the dorm with her lesbian wife.²⁴³ The point is that state RFRAs may be insufficient to protect religious dissenters who provide public services if they discriminate against same-sex couples in doing so.²⁴⁴ In this respect, *Obergefell* may have a perverse effect on state RFRAs.

Those state RFRAs restored the compelling interest to protect dissenters from policies that burden religious exercise.²⁴⁵ Over the last two decades, state RFRAs restored the compelling interest to protect dissenters from policies that burden religious exercise. However, the *Obergefell* dignity doctrine now ironically provides the constitutional basis to reject accommodations to religious objectors that the RFRAs worked to establish. As the Article will explain, this result would disrupt over two hundred years of settled practice and expectations.²⁴⁶ The collateral consequences of *Obergefell* are profound; marriages performed by clergy, who do not share the Court's social mores on sexual orientation, may not be recognized by the state. A new theory is needed to counteract the degenerative effects of the dignity doctrine and hence achieve constitutional damage control that will maintain the status quo in permitting clergymen to perform civil marriages based upon their religious beliefs.

The hybrid rights doctrine, articulated in *Smith*, provides a way for ministers who object to same-sex marriage to have their marriages

²⁴¹ *Statewide School Non-Discrimination Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/state_maps; *Healthcare Laws and Policies*, MAP, http://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Dec. 7, 2016).

²⁴² Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J. L. & PUB. POL'Y 939, 964-65 (2007).

²⁴³ *Id.* at 972-73.

²⁴⁴ *Id.* at 973.

²⁴⁵ See generally 42 U.S.C. § 2000bb.

²⁴⁶ See *infra* Part III.A.1.

recognized by the state while respecting the fundamental right of same-sex couples to marry.²⁴⁷ But the collateral consequences previously mentioned must be explained in detail to establish the need for this Article's proposal. The stakes for religious liberty are high.

III. ACHIEVING CONSTITUTIONAL DAMAGE CONTROL: WHY SMITH'S HYBRID RIGHTS DOCTRINE IS THE BEST WAY TO PROTECT THE CLERGY'S SOLEMNIZATION POWER

A. *Collateral Consequences from Obergefell: Marriage Disenfranchisement and Smith's Hybrid Rights Doctrine as Damage Control*

It is necessary to identify and provide a remedy to the collateral consequences from *Obergefell's* reasoning. Part III.A.1 argues that taking the solemnization power away from religious officials who do not perform same-sex marriages would disenfranchise most believers in the United States because they would not be able to access formal recognition at their respective places of worship, whereas parishioners from faiths that recognize same-sex marriage can receive both civil and religious recognition in their churches. Part III.A.2 proposes a novel solution to this problem, arguing that the hybrid rights doctrine announced in *Smith* be transported from Free Exercise jurisprudence into the state action doctrine so that clergy that discriminate on the basis of sexual orientation can still perform civil marriages.

1. *Obergefell* Fallout: Marriage Disenfranchisement

Taking the solemnization power away from religious officials who do not perform same-sex marriages would have adverse real world consequences. If a minister, rabbi, or imam cannot perform formally recognized marriages then, by extension, their followers cannot access recognition at their places of worship. There is little remedy for these couples, particularly for those who view marriage as a spiritual moment or sacrament, which requires exchanges of vows before God and fellow believers. Marriage access for these couples would be encumbered with additional cost, and procedure, because couples would have to, for example, go before a justice of the peace to receive

²⁴⁷ Emp't Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990).

recognition from the state and exchange vows before the altar separately.²⁴⁸ On the other hand, citizens that attend churches that subscribe to the Court's views on homosexuality can simply receive access to marriage through their minister. It appears that a couple's faith may determine if the state dignifies their union with recognition.²⁴⁹

This two-tiered system would create a social climate that would offend the dignity principles *Obergefell* claimed to advance; it would demean marriages performed by religious organizations that do not approve of same-sex marriage by stigmatizing their doctrinal beliefs as so outside the mainstream that government cannot place them on equal footing with other faiths.²⁵⁰ Millions of citizens would, as a result, face the prospect of being spiritually but not civilly married.

A skeptic could claim, however, that the situation imagined here does not identify a deprivation of the right to marry at all. Instead, these couples are only denied the convenience of a one-stop-shop marriage where they can receive religious and civil recognition simultaneously. This argument is unconvincing, though, when scrutinized under *Obergefell's* reasoning.²⁵¹ Like love and hate, there is a thin line between inconvenience and injury under the dignity doctrine. As explained before, the Court did not define injuries to dignity rights with any specificity other than that bans on same-sex marriage impose stigma because "they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."²⁵² Socially conservative couples can assert a claim that parallels this reasoning. Citing to this same language in the opinion, opposite-sex couples – who cannot receive civil and religious recognition at their churches – can claim that the government imposes stigma upon them, because

²⁴⁸ *What it Costs: How Much Does a Justice of the Peace Wedding Cost – Prices*, <http://www.whatitcosts.com/justice-of-the-peace-wedding-cost/> (explaining that couples can expect to spend between \$50.00 to \$350.00 for having a justice of the peace perform their wedding ceremony).

²⁴⁹ Critics may argue that this Article is misidentifying the burden placed on couples from socially conservative congregations. Arguably, if courts employ *Obergefell* to strip solemnization powers from their ministers, then the courts are not infringing upon these congregants' right to marry. They simply have to go through lengthier ends, as the argument goes, to have their unions recognized for associating with a religion that discriminates. But such a description of the burden placed on these parishioners does not make the injury inflicted upon these individuals less constitutionally suspect. Placing burdens on couples because of this reason appears to violate their right to association protected under the First Amendment. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958).

²⁵⁰ *Cf. id.*

²⁵¹ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²⁵² *Id.* at 2602.

they are not afforded marriage rights “on the same terms and conditions” as same-sex couples who receive simultaneous recognition at their places of worship.²⁵³ The impact felt from the decision will not be miniscule, to be sure; rather, faith believers from across the religious spectrum will experience *Obergefell’s* fallout.²⁵⁴

Most believers in this country are members of religious denominations that disapprove of homosexuality and hence prohibit their clergy from performing same-sex marriages. The religious landscape in America is predominately Christian with 70 percent of citizens identifying with the faith.²⁵⁵ A high plurality of American Christians are either Evangelical Protestant or Roman Catholic, representing 25 percent and 20 percent of the population, respectively.²⁵⁶ Over 6 percent of the population are members of Historically Black Churches.²⁵⁷ The Church of Jesus Christ of Latter Day Saints makes up nearly 2 percent of the population.²⁵⁸ All these major Christian denominations, along with others, are doctrinally opposed to same-sex marriage.²⁵⁹ Major non-Christian faiths, like the Orthodox Jewish Movement, share this view as well.²⁶⁰ In fact, Islam, the fastest growing religion in the United States, does not permit imams to perform same-sex marriages.²⁶¹ As these demographics show, *Obergefell’s* effect on the solemnization power could be far reaching, placing obstacles in the way to marriage recognition for the majority of Americans.

In its quest to recognize same-sex marriage, *Obergefell’s* sweeping dignity doctrine ironically sanctions reverse discrimination against traditional Americans by establishing a system of marriage disenfranchisement upon religious officials and their followers who do not believe in same-sex marriage. The proposal of this Article, therefore,

²⁵³ *Id.* at 2602, 2605.

²⁵⁴ *See generally id.*

²⁵⁵ *America’s Changing Religious Landscape*, PEW RES. CTR. RELIGION & PUB. LIFE (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/>; *America’s Changing Religious Landscape*, *supra* note 255.

²⁶⁰ Masci & Lipka, *supra* note 259.

²⁶¹ Masci & Lipka, *supra* note 259; *America’s Changing Religious Landscape*, *supra* note 255.

is that a clergy conscience exemption be carved out of the Fourteenth Amendment by exporting the hybrid rights theory in Free Exercise jurisprudence into the state action doctrine. The proposal put forth by this Article intends to achieve some constitutional damage control in preventing the widespread discrimination that could ensue if *Obergefell* is left unchecked. *Smith* provides the answer.

2. Damage Control: *Smith's* Hybrid Rights Doctrine

Smith held that religiously neutral laws that incidentally burden religious practice do not violate the Free Exercise Clause.²⁶² In that decision, Justice Scalia found a glaring exception, however, to this rule. The Court struck down neutral policies when the claim “involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections”²⁶³ Justice Scalia cited to about eight cases to identify this hybrid claim exception in Free Exercise jurisprudence.²⁶⁴ However, two landmark First Amendment cases in particular are worthy of discussion because they illustrate the hybrid rights theory plainly: *Wisconsin v. Yoder* and *West Virginia Board of Education v. Barnette*.²⁶⁵

In *Yoder*, the Court invalidated a compulsory school attendance law as it applied to Amish parents who refused to send their children to public schools on religious grounds.²⁶⁶ The Court held that the law infringed upon the free exercise of religion because the attendance requirement would cause Amish students to violate their central belief in social separation from the modern world.²⁶⁷ At the same time, *Yoder* concluded that the law violated the Fourteenth Amendment as well, because it infringed upon a parent’s fundamental right to direct the education and upbringing of their children according to their religious tenets and traditions.²⁶⁸

Similarly, *Barnette* involved companion claims, where the Court struck down a compulsory flag salute statute for violating both the

²⁶² See *Emp’t Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990).

²⁶³ *Id.* at 881.

²⁶⁴ *Id.* at 881-82.

²⁶⁵ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁶⁶ *Yoder*, 406 U.S. at 207.

²⁶⁷ See *id.* at 210-11.

²⁶⁸ See *id.* at 214.

Free Exercise and Free Speech Clauses of the First Amendment.²⁶⁹ In this case, Jehovah's Witness students refused to salute the flag at school because their faith equated such conduct to worshipping a "graven image" in violation of the Ten Commandments.²⁷⁰ As a result, schools expelled students who refused to salute, and law enforcement prosecuted parents for abetting delinquency.²⁷¹ Justice Jackson recognized that while the statute infringed upon religious freedom, the statute presented contradictory, and profoundly dangerous, consequences for the freedom of speech.²⁷²

"To sustain the compulsory salute statute," Justice Jackson wrote, "we are required to say that a Bill of Rights which guards the individual's right to speak his own mind[] left it open to public authorities to compel him to utter what is not in his mind."²⁷³ He concluded that compulsion by the state to coerce citizens to utter or profess beliefs that they did not share empowered the government to silence dissenters through state-sanctioned speech.²⁷⁴ In addition to protecting religious freedoms, *Barnette* forbids compulsory speech from government and, thus, protects citizens from interference into "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."²⁷⁵

Although Justice Scalia clearly identified hybrid claims as the exception to *Smith's* holding, a minority of lower courts and scholars remain skeptical.²⁷⁶ Three circuit courts interpreted Justice Scalia's discussion on hybrid claims as *dicta* and, thus, not binding on Free Exercise cases.²⁷⁷ Two other circuits concluded that the theory invites frivolous claims, encouraging litigants to start "throwing multiple constitutional challenges at a court" unless "the additional claim [is] so persuasive that it is able to win independently from the free exercise claim."²⁷⁸ But these conclusions are not fair readings of *Smith*. Justice

²⁶⁹ See *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943).

²⁷⁰ *Id.* at 629.

²⁷¹ See *id.* at 629-31.

²⁷² See *id.* at 634.

²⁷³ *Id.*

²⁷⁴ See *id.* at 640-41.

²⁷⁵ *Barnette*, 319 U.S. at 642.

²⁷⁶ *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 881 (1990); Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L. REV. 1175, 1187 (2015).

²⁷⁷ Rummage, *supra* note 276, at 1190.

²⁷⁸ *Id.* at 1194.

Scalia wrote a lengthy paragraph that distinguished eight First Amendment cases “on the grounds that they featured hybrid claims” to identify the exception to *Smith’s* holding.²⁷⁹ The theory cannot, therefore, be dismissed as inexact logic that “was not intended to be taken seriously.”²⁸⁰ Notwithstanding these concerns about hybrid claims, they do not discredit this Article’s proposal. Clergy can assert strong additional Free Speech and association claims that can succeed independent from the Free Exercise claim. The Bishop Faithclothe hypothetical proposed earlier can help explain these claims.²⁸¹

The Bishop’s Free Speech claim would rest on the compelled speech doctrine established in *Barnette*.²⁸² Similar to the students that had to salute to the flag or suffer expulsion from school, the Bishop, too, is presented with a Hobson’s choice.²⁸³ She can either marry Jayson to Brock in defiance of her religious teachings on marriage and retain state recognition of her marriages or remain faithful to her religious objection to same-sex marriage and lose the power to solemnize civil marriages. The Bishop’s decision could bring about – according to her religious beliefs – consequences of biblical proportions. She can follow Caesar and suffer God’s wrath or refuse to marry same-sex couples and incur Caesar’s punishment. *Obergefell* coerces Bishop Fairclothe to obey Caesar.

The potential loss of the clergy’s solemnization power, like the threat of expulsion from school for failure to salute the flag, may compel her to utter words or participate in ceremonies that offend her religious beliefs.²⁸⁴ As a result, the Bishop would suffer clear injury to her associational rights protected under the First Amendment.

In *Boy Scouts of America v. Dale*, the Court held that state anti-discrimination laws could not force the Boy Scouts to accept homosexual members contrary to the values articulated in the Scout Oath

²⁷⁹ *Id.* at 1175.

²⁸⁰ Michael W. McConnell, *Free Exercise Revisionism and Smith Decision*, 57 UNIV. OF CHIC. L. REV. 1109, 1122 (1990).

²⁸¹ See *supra*, INTRODUCTION.

²⁸² See *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 645 (Murphy, J., concurring) (1943).

²⁸³ See Nathaniel Stewart, *Turning the Commerce Clause Challenge “On Its Face”: Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 162 (2004) (“A ‘Hobson’s choice’ is a take-it-or-leave-it proposition – ‘an apparent freedom of choice where there is no real alternative.’”) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1076 (1986)).

²⁸⁴ *Id.* at 629.

and Law because “the forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”²⁸⁵ The facts and issues in *Dale* are nearly identical to the ones presented in Bishop’s claim.

If the Boy Scout honor code is enough to protect the group’s decision to revoke membership of an openly gay scoutmaster, then it follows that religious doctrine is more than sufficient to justify the Bishop’s decision to not allow her Pentecostal church to be a forum for a same-sex wedding. Similar to forcing the Boy Scouts to accept an openly gay member, having the Bishop perform a same-sex wedding “would, at the very least, force the organization to send a message, both to [parishioners] and the world, that the [church] accepts homosexual conduct as a legitimate form of behavior,” which is contrary to its doctrinal beliefs.²⁸⁶

At least two criticisms can be launched at this proposal. For starters, the proposal, standing alone, is unconstitutional because *Smith* does not apply to state actors seeking accommodation from respecting individual rights.²⁸⁷ Second, it could be strongly argued that the proposal conflicts with the state action and Establishment Clause doctrines. Neither of these claims are sufficient to undermine the proposed solution.

B. Smith’s *Hybrid Rights Doctrine and Second Best Theory*

In this section, this Article explains how a clergy conscience exemption is the best alternative to stem the previously discussed collateral consequences that could flow from *Obergefell*. Part III.B.1 explains the constitutional theory of second best and Part III.B.2 shows why the theory applies to *Obergefell* for three reasons: (1) the decision runs contrary to the structural principle of federalism within the Constitution, (2) its holding lacks support in the Constitution’s original meaning, and (3) since the decision is irreversible under the doctrine of precedent, an exemption is needed to mitigate any fallout from the case.

²⁸⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

²⁸⁶ *Id.* at 653.

²⁸⁷ *See Emp’t Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 881 (1990).

1. The Constitutional Theory of Second Best

The reasoning behind this Article's proposal is consistent with the longstanding tradition in this country of the government granting religious objectors exemptions from legal obligations.²⁸⁸ Nor is the idea radical in legal scholarship. Professor McCutchen argued that the Court should search for "second best solutions" when irreversible precedent threatens structural principles in the Constitution, requiring "compensating institutions" to "move governmental structures closer to the constitutional equilibrium."²⁸⁹ In his article, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, he explained that the so-called second best theory intends to permit unconstitutional institutions to "preserve the constitutional structure."²⁹⁰ The theory is triggered when precedent is inconsistent with the Constitution's original meaning but is irreversible under *stare decisis* principles.²⁹¹

McCutchen applied the theory to the administrative state and concluded that it had morphed into a "fourth branch" in the nation's tri-branch system with agencies exercising a combination of powers that are vested in the executive, legislative, and judicial branches, which the structural Constitution separates.²⁹² However, he conceded that, for pragmatic and jurisprudential reasons, the Court could not dismantle the federal bureaucracy because it "would require the Court to overrule an immense and deeply rooted body of precedent."²⁹³ Under these circumstances, McCutchen argued that courts would be justified to permit otherwise unconstitutional practices, like the legislative veto, to bring the political branches closer to the constitutional equilibrium.²⁹⁴ He argued that the legislative veto would empower Congress to rescind certain presidential decisions as a means

²⁸⁸ See Brief for 43 Members of Congress as Amici Curiae Supporting Petitioners, *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016) (No. 15-862), 2016 WL 520085.

²⁸⁹ Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2-3 (1994) (explaining that "second best solutions" should be permitted because the administrative state encroached upon Congress's legislative power as a means to bring the separation of powers between the two branches closer the constitution's original design).

²⁹⁰ *Id.* at 21.

²⁹¹ *Id.* at 21-22.

²⁹² *Id.* at 1-2.

²⁹³ *Id.* at 2.

²⁹⁴ See *id.* at 30.

to counteract open-ended delegations of its authority to the executive branch.²⁹⁵ Although this Article adopts the second best theory, this Article's proposal is more limited than the one offered by Professor McCutchen.

A clergy conscience exception, unlike the legislative veto, "is not inconsistent with a formalist reading of the constitutional text."²⁹⁶ Nor is it a radical departure from the nation's norms; rather, it is consistent with them.²⁹⁷ Furthermore, it is precise in the ends it aims to achieve; this Article's proposal does not move governmental entities to an unknown position on the constitutional scale in an effort to move governmental structures close to balance. An accommodation to clergy would simply maintain the status quo by permitting the clergy to retain the solemnization power while not disturbing *Obergefell's* essential holding that gays and lesbians be allowed to wed.²⁹⁸ For the reasons below, the hybrid rights theory articulated in *Smith* is the second best solution because *Obergefell's* logic, if not cabined, will encourage continued erosion of structural principles such as federalism.²⁹⁹ A compensating institution, like the clergy conscience exemption, is justified to stem the consequences of an irreversible and unconstitutional ruling.

2. Why the Second Best Theory Applies to *Obergefell*: Federalism, Unconstitutionality, and Irreversibility

a. *Federalism*

Obergefell's dignity rights disturb the distribution of power between the federal and state governments.³⁰⁰ Federalism is a structural principle within the constitutional system designed to both pre-

²⁹⁵ McCutchen, *supra* note 289, at 37-38.

²⁹⁶ *Id.* at 30.

²⁹⁷ The legislative veto, which empowered one House of Congress to invalidate an executive decision, violated bicameralism and presentment requirements in the Constitution. See *INS v. Chadha*, 462 U.S. 919, 956-59 (1983) (ruling legislative vetoes unconstitutional). While Congress enacted the device in over 200 statutory provisions over a 50-year period, the legislative veto, unlike the clergy solemnization power, is not an embedded practice. See *id.* at 967-68 (White, J., dissenting); Stevens, *supra* note 1, at 987.

²⁹⁸ See *Obergefell*, 135 at 2604-05.

²⁹⁹ See *id.* at 2611-12 (Roberts, C.J., dissenting).

³⁰⁰ See *id.* at 2631-32 (Thomas, J., dissenting).

vent federal overreach and preserve individual rights,³⁰¹ but it does more than protect the states from federal encroachments. Federalism cultivates experimental democracy³⁰² in which different perspectives arising from a heterogeneous population can be expressed through legislative action at the state level.³⁰³ The constitutional default is strongly in favor of diversity in public policy.³⁰⁴ It rejects top-down, one-size-fits-all programs designed by federal officials to remedy social and economic problems for local communities.³⁰⁵

At the state level, the people are afforded flexibility to challenge old paradigms and test new approaches.³⁰⁶ In this respect, the states act as Petri dishes, or ‘laboratories of democracy’ wherein legislatures enact diverse solutions in response to problems that may face the nation as a whole. As these policies are implemented, the public assesses the results: the legislation can serve as a model to emulate, a starting point for further innovation, or an example of public policy failure.³⁰⁷ Experimental democracy is not an empty theoretical dis-

³⁰¹ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protections of ‘our fundamental liberties.’” (quoting *Garcia v. San Antonio Metro. Transit Auth.* 469 U.S. 528, 572 (1985) (Powell, J., dissenting))).

³⁰² Experimental democracy is a term that has been used by courts and scholars to describe the functional benefits of federalism, where states act unrestrained by political dogma and are free to implement a variety of proposals to solve problems in ways that can guide other states in a given area. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (explaining that federalism grants states flexibility to act as laboratories to “try novel social and economic experiments without risk to the rest of the country”); Amichai Cohen, *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*, 36 *GEO. J. INT’L L.* 1079, 1121 (2005) (explaining that “experimental democracy” allows “private parties, individuals, and local and state governments to experiment with policies. The policies that would emerge out of this process of local innovation and deliberation would sometimes be novel and introduce ideas that were not considered at the central level.”); Gary Peller, *Neutral Principles in the 1950’s*, 21 *U. MICH. J. L. REFORM* 561, 584 (1988) (describing a theory of democracy in which institutions serve as an “experimental laboratory” where participants act pragmatically, testing different solutions and discarding those that do not work).

³⁰³ *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes.”).

³⁰⁴ *See id.* at 458.

³⁰⁵ *Id.*

³⁰⁶ *Liebmann*, 285 U.S. at 311 (1932) (Brandeis, J., dissenting).

³⁰⁷ *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring) (describing how states can serve as laboratories in providing solutions for an emerging problem for incompetent patients who cannot either consent or refuse medical treatment); *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

course about federalism. It occurred in the debate on marriage equality for gays and lesbians.³⁰⁸

Prior to intervention by the federal courts, citizens expressed their diverse views and experimented with marriage, enacting complex, legislative compromises that advanced agendas for one side while protecting the interests of the other. While California voters, for example, retained traditional marriage in Proposition 8, the state did recognize same-sex couples as domestic partners, granting them all the substantive rights associated with marriage without that official status.³⁰⁹ At least ten other jurisdictions followed suit allowing same-sex couples to enter into domestic partnerships or civil unions but withholding from them the official status of marriage.³¹⁰ However, the majority retained the traditional definition of marriage. Citizens in 31 jurisdictions defined marriage as one man and one woman in their state constitutions, but the traditional definition was not retained in all states.³¹¹ Eleven states and the District of Columbia afforded marriage recognition to same-sex couples through the democratic process.³¹² Gay citizens, their allies, and traditionalists made their case to their fellow citizens on this issue. The public listened, deliberated, and adopted various approaches in response. Federalism made democracy work effectively on this contentious issue. *Obergefell* shut down the debate permanently, however.

The dignity doctrine short-circuited experimentation, compromise, and perhaps understanding on this sensitive topic by precluding legitimate debate with respect to policy differences on marriage. This should not come as any surprise; this has been the trajectory of the Court's substantive due process doctrine, which has taken a number of issues away from the states and placed them under its purview.³¹³ In

³⁰⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611-12 (2015).

³⁰⁹ Tamara Audi et al., *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008), <http://www.wsj.com/articles/SB122586056759900673>; *Civil Unions and Domestic Partnerships Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>.

³¹⁰ *Civil Unions & Domestic Partnership Laws*, *supra* note 309.

³¹¹ *Same-Sex Marriage Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>.

³¹² Wilson, *supra* note 210, at 1168 n.22.

³¹³ Since the 1960s, the Court has employed theories of individual rights that have attenuated connections to the Constitution's text and history. David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 29 (1999) (citing to Judge Robert Bork's reference that the Court's formulation of the penumbral right to privacy was like a "miracle of transubstantiation"). These theories empowered the Court to strike down a series of social legis-

so doing, the President, Congress, and state legislatures – the people’s representatives – have little or no say on marriage and domestic relations that have profound impact on citizens’ lives. Making the Court the arbiter in major social disagreements runs contrary to the original constitutional design.³¹⁴

b. *Unconstitutionality*

There is no question that *Obergefell* is inconsistent with the Constitution’s original meaning. Justice Kennedy did not attempt to reconcile the decision with the Constitution’s text or history by dismissing tradition as a viable methodology for deciding individual rights cases, particularly on matters pertaining to intimacy or marriage.³¹⁵ Even scholars that support *Obergefell’s* result criticized it for lacking any “originalist justification.”³¹⁶ Instead, Justice Kennedy chose to base the decision largely on an evolutionary view of the Fourteenth Amendment.³¹⁷

lation that regulated activity, which historically fell under the state’s police powers. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (striking down state regulations on abortion providers as an undue burden on the right to abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding the right of private consensual sex between adults as protected under the Constitution); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (conceptualizing privacy as a sphere of autonomy in which the person defines themselves); *Roe v. Wade*, 410 U.S. 113 (1973) (finding that the right to abortion fell within constitutionally protected zones of privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the privacy doctrine to an anti-conception law targeting unmarried couples under the Equal Protection Clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (identifying a penumbral right of privacy that emanated from a series of constitutional amendments).

³¹⁴ *Casey*, 505 U.S. at 979 (Scalia, J., dissenting) (explaining that debates over controversial issues, like abortion rights, “are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting”); *Lawrence*, 539 U.S. at 603 (arguing that sexual minority groups that desire their conduct to be legalized should promote their respective agendas through the democratic process) (Scalia, J., dissenting).

³¹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

³¹⁶ Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 649 (2016).

³¹⁷ *Obergefell*, 135 S. Ct. at 2589. Non-originalist readings of the Constitution do not necessarily justify the Court’s holding in *Obergefell*. The sexual orientation cases – decided upon evolutionary interpretative theories – do not *require* the states to recognize same-sex marriage. In fact, the issues presented in those cases are unrelated to the marriage question. *Romer* held that Amendment 2 did not serve any legitimate interest partly because of the “far reaching” effect of the Amendment, which denied protected status to gays, lesbians, and bisexuals in an array of areas, “involving housing, employment, education, public accommodation, and health and welfare.” *Romer v. Evans*, 517 U.S. 620, 624 (1996). The marriage amendments and laws at issue in *Obergefell*, on the other hand, had a limited reach as it only affected a single freedom, that is, the right to marry. In *Lawrence*, the Court struck down anti-sodomy laws that criminal-

Justice Kennedy found that the Fourteenth Amendment's jurisprudential history authorized him to define the marriage right in accordance with "new insights" that uncover "discord between the Constitution's central protections and a received legal stricture" because "the generations that wrote [the Constitution] did not presume to know the extent of freedom . . . and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."³¹⁸ Although the contention that the Court should, or even can, accurately update the Constitution to reflect current norms is a topic for another article, it suffices to say that the Framers would likely disapprove of the idea, as life tenure for the federal judiciary was intended to shield Article III judges from popular opinions when deciding cases before them.³¹⁹ It is a theory that deeply divides the Court today.³²⁰

ized private sexual conduct between consenting adults. As Justice Kennedy explained, that case did not involve laws that dealt with "formal recognition" of same-sex couples because laws that recognize traditional marriage do not criminalize same-sex intimacy. *Lawrence*, 538 U.S. at 578. Put another way, same-sex couples do not need recognition from the state to engage in private sexual intimacy. *Id.* at 578. Lastly, *Windsor* does not prevent states from defining marriage as only including opposite-sex couples and, in actuality, affirmed the exclusive power of the states to define the marital relationship within their borders. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). In this case, the Court invalidated DOMA for not respecting principles of federalism by withholding federal benefits to same-sex marriages recognized in some states. *Id.* at 2691-92. But the fact that the Court rebuked Congress for not respecting the states' authority to define marriage as a two-person union under federalism does not square with its decision to jettison the states' authority to define that same institution as one man and one woman. One would think the Court is bound to respect the same principles of federalism as Congress.

³¹⁸ *Obergefell*, 135 S. Ct. at 2598.

³¹⁹ See U.S. CONST. art. III, § 1 ("The judges . . . shall hold their offices during good behaviour . . ."); FEDERALIST NO. 78 (ALEXANDER HAMILTON) (arguing that life tenure for federal judges protects minority rights against abuses from the majority).

³²⁰ In a vigorous dissent, Justice Scalia criticized the theory that individual rights should be interpreted based on "new insights" of freedom, challenging the theory on its own terms. Even if liberty should be expanded to reflect these views, it does not follow that the Justices should be entrusted with this responsibility. As Justice Scalia pointed out, the Court's elite pedigree and non-diverse demographics renders it incapable of discerning what society thinks about marriage freedom:

[T]he Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School . . . Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination . . . [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

Obergefell, 135 S. Ct. at 2628 (Scalia, J., dissenting).

However, the argument that dubious constitutional reasoning supported *Obergefell* is now an academic question, because it is immune from reversal in its effects. Even though the decision is about two years-old, it established instantaneous reliance interests among individuals and dramatically altered institutions, policies, and programs to include same-sex couples as an integral part of marriage policy.³²¹

c. Irreversibility

The doctrine of precedent protects prior decisions from reversal, unless there are special justifications to do so.³²² The Court is especially reluctant to reconsider precedent, even clearly erroneous ones, which cause institutions and citizens to alter behavior or implement policies in reliance upon them.³²³ The reliance interests that flow from *Obergefell's* ruling are substantial. Same-sex marriage is practiced in all 50 states.³²⁴ There are hundreds of thousands of same-sex married couples in the United States.³²⁵ That number will likely increase in the coming years.³²⁶ Same-sex couples and their children rely on the expectation that their relationships and families will be placed on

³²¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855-56 (1992) (explaining how reliance interests can serve as a basis to reaffirm precedent).

³²² *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (“[W]e have long recognized that departures from precedent are inappropriate in the absence of a ‘special justification.’”).

³²³ Adside, *supra* note 140, at 542 (“In prior cases, reliance interests weighed heavily in the Court’s decision to reaffirm precedents that received scathing criticism for perceived departures from the Constitution’s original meaning or from historical practice.”).

³²⁴ See *Obergefell*, 135 S. Ct. at 2601.

³²⁵ Since same-sex marriage is a relatively new phenomenon in the United States, the Census Bureau and polling organizations struggle in counting the precise number of same-sex couples, with estimates ranging from about 400,000 to approximately 800,000 same-sex married couples. Hunter Schwartz, *There are 390,000 Gay Marriages in the U.S. The Supreme Court Could Make it Quickly a Half Million*, WASH. POST (Apr. 28, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/04/28/heres-how-many-gay-marriages-the-supreme-court-could-make-way-for/>; Gary J. Gates & Frank Newport, *An Estimated 780,000 Americans in Same-Sex Marriages*, GALLUP (Apr. 24, 2015), <http://www.gallup.com/poll/182837/estimated-780-000-americans-sex-marriages.aspx>; D’Vera Cohn, *Census Says It Will Count Same-Sex Marriages, But With Caveats*, PEW RES. CTR. (May 13, 2014), <http://www.pewresearch.org/fact-tank/2014/05/13/census-struggles-to-reach-an-accurate-number-on-gay-marriages>.

³²⁶ Seth Motel & Meredith Dost, *Half of Unmarried LGBT Americans Say They Would Like to Wed*, PEW RES. CTR. (June 26, 2015), <http://www.pewresearch.org/fact-tank/2015/06/26/half-of-unmarried-lgbt-americans-say-they-would-like-to-wed/>.

equal status with heterosexual couples.³²⁷ In addition to these prudential considerations, the onerous ratification requirements established in the Ratification Clause largely shelter precedent from political attacks launched from Congress or state legislatures and sometimes from ideological shifts on the Court because of personnel changes.³²⁸

If *Obergefell* sparked widespread public outcry against a constitutional right to same-sex marriage, opponents would need to “secure the votes of [two-thirds] of each house of Congress and majorities in [three-fifths] of the state legislatures” to pass a constitutional amendment to reverse *Obergefell*, keeping same-sex marriage as a state matter.³²⁹ In reality, the Court “effectively silenced” voters in the majority of states that passed referenda to retain the traditional definition of marriage because a quarter of states enacted same-sex marriage democratically and hence those states would likely block any amendment overturning *Obergefell*.³³⁰

The second-best solution test is satisfied because (1) the decision disturbs structural principles by upsetting the balance between the federal and state government on marriage policy, (2) *Obergefell* violates the original text and history of the Constitution, and (3) prudential reasons prevent the decision from being revisited by the Court.

³²⁷ *Obergefell*, 135 S. Ct. at 2600-01.

³²⁸ Presidential nominations to the Court give the political branches an opportunity to appoint Justices who can either reverse or alter controversial or erroneous cases. But the confirmation process is not the silver bullet to correcting flawed jurisprudence. First, Supreme Court vacancies rarely occur, and often unexpectedly, in the modern era. Adrienne LaFrance, *Down With Lifetime Appointments: Humans Are Living Longer. That Means Judges Are Serving Longer Too.*, SLATE (Nov. 12, 2013), http://www.slate.com/articles/technology/future_tense/2013/11/lifetime_appointments_don_t_make_sense_anymore.html (“The five most recently retired Supreme Court justices averaged more than 25 years apiece on the bench. That’s nearly triple the nine-year average tenure of the court’s first five justices.”). Second, ideological shifts on the Court do not always guarantee predicted changes to the Court’s jurisprudence in an area of law because life tenure grants Justices, unlike politicians, complete freedom to chart legal viewpoints independent from political party orthodoxy. Charlotte Alter, *Here’s What Kennedy Thinks About Abortion*, TIME (Mar. 2, 2006), <http://time.com/4243675/heres-what-justice-kennedy-thinks-about-abortion/> (reporting that Justice Kennedy switched his vote in the *Casey* decision and decided to uphold the right to abortion established in *Roe v. Wade*); Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS (Jul. 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> (revealing that Chief Justice Roberts initially sided with the Court’s four conservative Justices to strike down provisions of the health care reform law, but he changed his position and sided with the liberal Justices to mainly uphold it).

³²⁹ Nelson Lund & John O. McGinnis, *The Boundaries of Liberty After Lawrence v. Texas: Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1558-59 (2004).

³³⁰ *Id.* at 1588.

However, there are other problems that must be addressed. It could be argued that recognizing a clergy conscience exemption under the state action doctrine would permit other state officials to seek accommodation from respecting citizens' fundamental rights, and what is more, that it would offend the Establishment Clause by favoring religion.³³¹ This Article will show that both contentions are wrong.

C. *Clergy Conscience Exception: State Action and Establishment Clause Problems*

This section responds to two objections to a clergy conscience exemption. Part III.C.1 disputes the argument that an exemption would lead to a flood of similar claims asserted by other public officials, because the traditional and unique role the clergy plays in marriage policy limits the exemption only to religious officials. Part III.C.2 responds to the concern that the exemption for clergy would offend non-establishment principles under the First Amendment.

1. State Action

Granting an accommodation to clergy under a hybrid-rights theory would not lead to a stampede by state officials to ask for similar accommodations. This is so because the exemption is extraordinarily limited.³³² There is no historical tradition that recognizes state actors, like city clerks, acting within their official capacity the power to deny the right to marry to a couple for religious reasons.³³³ As stated earlier, the practice of allowing clergy to perform state recognized marriages in accordance with their beliefs pre-dates the Constitution itself and has remained unchallenged since, so an exemption for any other state actor would not be supported by this Article's theory. Although the exemption is limited and would minimize impact upon the state action doctrine, there remains the criticism that the accommodation is special treatment for ministers and is tantamount to establishment of

³³¹ See U.S. CONST. amend. I.

³³² Stevens, *supra* note 1, at 987.

³³³ See Jason Hanna et al., *Kim Davis Released, but Judge Bars Her from Withholding Marriage Licenses*, CNN (Sept. 8, 2015), <http://www.cnn.com/2015/09/08/politics/kim-davis-same-sex-marriage-kentucky/> (reporting that a federal judge ordered the release of a Kentucky clerk held for refusing to issue marriage licenses to same-sex couples but required that she not interfere with her deputies granting licenses to eligible couples).

religion. This would be true if the Establishment Clause forbade government from favoring religion in any context. It simply does not.

2. Establishment Clause

Contrary to popular opinion, there is no rigid, impenetrable wall of separation between church and state.³³⁴ In fact, Establishment Clause doctrine permits government and church collaboration, particularly when it arises from a custom that is “deeply embedded in the history and tradition of this country.”³³⁵ In *Marsh v. Chambers*, the Court held that state paid chaplains who perform daily prayers for legislative sessions did not violate the principles of disestablishment because the origins of the practice dated back to the First Congress and had been consistently adopted by successive congresses and state legislatures throughout the nation’s history.³³⁶

The Court revisited legislative prayer in *Towne of Greece v. Galloway*.³³⁷ There, the Court held that having a clergyman open city board meetings with a sectarian prayer followed *Marsh* because the boundaries of the Establishment Clause do not have to be precisely defined when “a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”³³⁸ Similar to legislative prayer, the clergy solemnization power is part of a historical pattern, which provides insight into the Framers’ intent on the

³³⁴ While President Thomas Jefferson’s “wall of separation between Church and State” metaphor guides discussion on issues involving the Religion Clauses, the separation between Church and State is not a dogmatic command. See Letter from President Thomas Jefferson to the Danbury Baptists (Jan 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html>. In *Zorach v. Clauson*, the Court famously explained that strict application of President Jefferson’s words would run contrary to our traditions:

There is much talk of the separation of Church and State . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly . . . Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment . . . We are a religious people whose institutions presuppose a Supreme Being.

Zorach v. Clauson, 343 U.S. 306, 312-13 (1952).

³³⁵ *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

³³⁶ *Id.* at 787-90.

³³⁷ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

³³⁸ *Id.* at 1819.

meaning of the Establishment Clause.³³⁹ “From colonial times through the founding of the Republic and ever since,” laws that allow ministers to perform state recognized marriages in accordance with their religious views have become a persistent feature in marriage policy which both the Founding Fathers and contemporary Americans would not consider as an establishment of religion.³⁴⁰ Therefore, a clergy conscience exception does not violate the Establishment Clause because it maintains a tradition followed to the present day.

CONCLUSION

Religious liberty with respect to same-sex marriage is the new front in the culture wars. Justice Kennedy believed that his decision forever settled the dispute over marriage equality for same-sex couples, relying upon “papers, books, and other popular and scholarly writings” that “led to an enhanced understanding of the question”³⁴¹ However, his epiphany on individual liberty – which eluded the Founding Fathers and the majority of modern-day voters – jeopardizes the clergy solemnization power. Although the decision praises marriage as a pillar that supports the nation’s social order, *Obergefell’s* reasoning ironically will likely disrupt it. In the future, *Obergefell* has the potential to incite discord within religious communities.

Gays and lesbians are members of faiths that oppose same-sex marriage. Expecting them to have another religious official from a different denomination perform their nuptials would be beneath their dignity. Same-sex couples do not have to settle for less. Responding to the claim that the political process should resolve the marriage question, Justice Kennedy insisted that “individuals need not await legislative action before asserting a fundamental right.”³⁴² If same-sex couples did not have to win legislative victories in all 50 states to redefine marriage, then why should they wait for a religious organization, cloaked with solemnization powers, to honor their fundamental right to marry? While this Article does not advocate for same-sex couples to sue their ministers, the answer to that question is that there is no reason at all. *Obergefell* does not advise same-sex couples to advance

³³⁹ *Marsh*, 463 U.S. at 789-92.

³⁴⁰ *Id.* at 786.

³⁴¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

³⁴² *Id.*

their agenda through patient deliberation with opposing groups. Rights delayed are rights denied under the dignity doctrine. *Obergefell* leads the sheep to sue their shepherd.

Such cases would tear the nation's social fabric to shreds, dividing citizens along religious lines, with federal judges having to decide between religious and non-religious freedoms. In recent years, the nation has borne witness to highly divisive litigation over government policies that infringed upon the religious freedoms of conservative organizations—cases range from a lawsuit by a federal agency against a religious school for firing one of its ministers under an anti-discrimination statute, to a mandate under a healthcare reform law that forced closely-held businesses to purchase contraceptives for employees against their religious beliefs.³⁴³ But cases that involve the government stripping privileges or status from religious persons and organizations for their personal opposition to same-sex marriage would create the perception among many Americans that the government is hostile towards their faith, particularly if courts begin to rule against the clergy solemnization power, thereby imposing a doctrinal litmus test on the exercise of that authority.

A two-tiered system of religious entitlement, with some ministers allowed to celebrate civil marriages and others who cannot, would convey the message to citizens from socially conservative religions that the government disapproves of their “personal religious choices” and that “they are outsiders or less than full members of the political community.”³⁴⁴ This could breed intense resentment in these believers against their government and fester antagonism against those perceived as favored by *Obergefell*.

The proposal put forth in this Article controls the damage *Obergefell* inflicts upon both First and Fourteenth Amendment doctrines. It maintains the status quo by allowing the freedoms of religious exercise and same-sex marriage – now at odds – to continue to coexist. Moreover, it allows for a truce in this particular battle in the

³⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that the federal RFRA provides closely held businesses an exemption from legal duties that conflict with their religious beliefs if there is less restrictive means available to achieve governmental interests); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012) (holding that federal anti-discrimination laws do not govern a religious organization's discharge of its religious officials).

³⁴⁴ *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) *abrogated by* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

broader culture wars, which can maintain cultural and social peace among Americans from diverse religious backgrounds by ensuring that the Constitution respects all valid marriages performed by religious officials. A clergy conscience exception to the state action doctrine would prevent “the very kind of religiously based divisiveness that the [First Amendment] seeks to avoid.”³⁴⁵ However, the dignity doctrine is not limited to erasing marriage inequality for same-sex couples. This Article’s proposal lays the foundation for future scholarship that can identify other constitutionally based exceptions that can repair *Obergefell’s* reach into other areas, such as employment, housing, health care, and education.

³⁴⁵ *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting)).

