Civil and Uncivil Disagreement over Marriage and Religion

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I. Introduction

My working paper focuses on conflicts about access to marriage, which affords a rich, if challenging, opportunity to pursue this Religion Fellows Program’s 2010-2011 theme of “Religion, Conflict, and Peacemaking.” It does not take much effort to demonstrate that religion plays a role in the ongoing conflict over whether states should eliminate the gender requirement of civil marriage – that it be between one man and one woman – so that gay men and lesbians who seek to marry may do so. For example, when state supreme courts have ruled that their state constitutions require extending marriage to same-sex couples (e.g., Massachusetts, California, Iowa), they have been at pains to distinguish civil and religious marriage and explain that, while religious convictions about marriage, its definition, and its purposes may underlie much opposition to same-sex marriage, the government’s interest in civil marriage must be expressed in secular, not religious, terms. And where state legislatures, either in response to a state court ruling or on their own initiative, have enacted laws redefining marriage to be between “two persons” rather than between one man and one woman (e.g., New Hampshire, Vermont, and the District of Columbia), they have taken care to declare a commitment both to marriage equality and to protection of the free exercise of religion, often reflected in titling the new laws. They do so through legislative provisions stating that religious clergy may not be compelled to perform marriage ceremonies that conflict with their religious beliefs. In addition, these state laws typically include other forms of exemption for religious institutions from providing goods and services associated with celebrating marriages. Some laws offer even more exemptions.
This same two-pronged focus on civil equality and religious liberty appears in state laws creating a civil union or domestic partnership status open to same-sex (and in some states, also to opposite-sex) couples. For example, in February 2011, Hawaii’s governor signed a civil union bill that states:

Solemnization may be entirely secular or may be performed according to the forms and usages of any religious denomination in this State. Nothing in this section shall be construed to require any person authorized to perform solemnizations of marriages or civil unions to perform a solemnization of a civil union, and no such authorized person who fails or refuses for any reason to join persons in a civil union shall be subject to any fine or other penalty for the failure or refusal.7

Even with such statutory protections, however, some religious institutions claim that their religious liberty is at risk because of the ripple effects of redefining marriage. That claim illustrates a second form of conflict: and evident clash between state and local laws that bar discrimination in “public accommodations” and the provision of goods and services and rights to religious liberty (and to assert freedom of conscience as a basis to refuse service). Thus, controversies over defining civil marriage reflect two levels of conflict. The first is a direct conflict between civil and religious definitions of marriage. Religious opponents of extending civil marriage to same-sex couples believe that civil and religious understandings of marriage should be congruent with each other. Thus, to allow, in civil law, a form of marriage that religious law does not departs from such congruence and creates conflict. This premise that religious and civil law have been or should be congruent is problematic for various reasons, but it is critical to the stance I discuss in this paper. Religious exemptions from marriage equality laws are
one strategy for minimizing conflict or, if you will, finding a way of peacemaking. However, when religious leaders reject these exemptions as too narrow or as otherwise insufficient, they are stating that the path of exemptions cannot alleviate the underlying conflict between religious and civil definitions of marriage. The controversy over exemptions, then, is a second conflict.

In this working paper, I will explore the first of these two conflicts – the battle over defining civil marriage. Are there forms of peacemaking that can be brought to bear on this conflict? What role can religion play in such resolutions? I will introduce the problem by examining a recent statement by conservative religious leaders, “the Manhattan Declaration,” which expresses the conflict over marriage as posing an acute threat to religious liberty and sees proper resolution in congruence between civil and religious understandings of marriage. I will then examine how religious organizations argued on both sides of the controversy in California over whether a system of allowing same-sex couples to enter into domestic partnerships but not civil marriage survived challenge under California’s constitution. My resource for those arguments is two “friend of the court” (amicus curiae) briefs filed by religious organizations on both sides of the state court litigation, In re Marriage Cases (2008). The victory of same-sex couples in that litigation triggered an amendment to California’s constitution – defining marriage as the union of one man and one woman – through the enactment of ballot initiative Proposition 8, which was declared unconstitutional under the U.S. constitution after a trial in federal court. Of particular concern will be what kinds of arguments these
religious groups made in *In re Marriage Cases*: did they appeal explicitly to religious ideas about marriage or did they base their arguments in terms of the public policies or social ends advanced by marriage? This choice about argumentation bears on an issue of ongoing significance: the place of religion in the public square and how citizens and institutions may bring their religious convictions to bear on matters of public good and public policy. To aid in my analysis of forms of argument, I will draw on the recent work of political philosopher Michael Sandel. I will then conclude by examining whether and how the Supreme Court of California addressed these friend of the court briefs, in particular, and, more generally, the relationship between civil and religious marriage in *In re Marriage Cases*. This working paper is one part of a larger project in which I consider the relationship between civil and religious marriage and, more broadly, how the constitutional liberalism that I support resolves evident conflicts between liberty and equality.9

II. The Premise that Religious Liberty is Under Siege due to Marriage Equality

On November 20, 2009, a group of prominent Christian clergy, religious leaders, and scholars released “The Manhattan Declaration: A Call of Christian Conscience,” drafted by Professor Robert George (Princeton University), Professor Timothy George (Beeson Divinity School, Samford University), and Chuck Colson (now deceased, but then of the Chuck Colson Center for Christian Worldview), and signed by “more than 125 Orthodox, Catholic and evangelical Christian leaders.”10 The Declaration addresses three areas under threat: “Life,” “Marriage,” and “Religious Liberty.”11 On the website,
three images alternate: a hand cradling tiny human feet; the Holy Bible cushioned on an American flag; and a bride and groom joining hands before an officiant at their wedding.

In the section on “Marriage,” the Declaration invokes Genesis 2:23-24 and Ephesians 5:32-33. It articulates a theology of marriage according to which the “one-flesh union” of man and woman as husband and wife is “the crowning achievement of God’s creation,” and, therefore, “[m]arriage . . . is the first institution of human society,” the foundation of all other institutions. It condemns the failure of Christians to uphold the institution of marriage, their embrace of the “culture of divorce,” and their silence about social practices undermining marriage.

The Declaration particularly faults “the impulse to redefine marriage” to recognize same-sex marriage, since it reflects a “loss of understanding of the meaning of marriage as embodied in our civil and religious law and in the philosophical tradition that contributed to shaping the law.” It espouses a “hate the sin, not the sinner” approach toward homosexuality: those disposed toward homosexual conduct are entitled to compassion and to respect as “human beings possessing profound, inherent and equal dignity,” but it is a mistake to believe that, as a matter of “equality or civil rights,” homosexual relationships should be recognized as marriage. This is because of the “objective reality” of marriage as a “covenantal union of husband and wife,” and the role of “sexual complementarity” in marriage: the union of one man and one woman is “sealed, completed, and actualized by loving sexual intercourse in which the spouses
become one flesh, not in some merely metaphorical sense, but by fulfilling together the behavioral conditions of procreation.”

Thus, the Declaration explains, it is not “animus” or “prejudice” that leads them to “pledge to labor ceaselessly to preserve the legal definition of marriage,” but “love” and “prudent concern for the common good.”

This statement no doubt aims at findings and conclusions in some state high court opinions diagnosing some of the traditional rationales for exclusion as, in fact, being manifestations of such prejudice and animus and stating that excluding same-sex couples from civil marriage cannot rest on prejudice or animus.

Under the section “Religious liberty,” the Declaration identifies several threats, including efforts to “weaken or eliminate conscience clauses,” such that “pro-life institutions” and “pro-life” health care professions must refer for abortions or even perform or participate in them.

Pertinent to this working paper is a different identified threat, often related to the marriage controversy: “the use of anti-discrimination statutes to force religious institutions, businesses, and service providers of various sorts to comply with activities they judge to be deeply immoral or go out of business.” The Declaration offers two examples, both linked to extending civil marriage to same-sex couples or giving them the benefits and obligations of civil marriage through civil union or domestic partnership laws (I provide these without comment, for purposes of illustration):

(1) “After the judicial imposition of ‘same-sex marriage’ in Massachusetts, for example, Catholic Charities chose with great reluctance to end its century-long work of helping to place orphaned children in good homes
rather than comply with a legal mandate that it place children in same-sex households in violation of Catholic moral teaching.”

(2) “In New Jersey, after the establishment of a quasi-marital ‘civil unions’ scheme, a Methodist institution was stripped of its tax exempt status when it declined, as a matter of religious conscience, to permit a facility it owned and operated to be used for ceremonies blessing homosexual unions.”

The Declaration links these developments to the “[d]isintegration of civil society,” invoking the importance of religious institutions as the “intermediate structures of society, the essential buffer against the overweening authority of the state, resulting in the soft despotism Tocqueville so prophetically warned of.”

The Declaration, recall, is subtitled “A Call to Christian Conscience.” Thus, on this issue of religious liberty, it speaks of the two-fold biblical obligation of Christians to “respect and obey those in authority,” on the one hand, but, on the other, to engage in civil disobedience when laws are “unjust” and “purport to compel citizens to do what is unjust.” Unjust laws undermine rather than serve the common good, while “[t]he biblical purpose of law is to preserve order and serve justice and the common good.” On Christian refusal to compromise on proclaiming the gospel and to engage in civil disobedience when faced with unjust laws, the Declaration traces a trajectory reaching back from the “earliest days of the church” to Dr. Martin Luther King Jr.’s Letter from a Birmingham Jail, written from an “explicitly Christian perspective, and citing Christian writers such as Augustine and Aquinas.” Just laws, King taught, elevate and ennoble human beings, because they have roots in the moral law, while unjust laws degrade
human beings and lack authority to bind conscience.²³ Drawing on King’s “exemplary
and inspiring” example, the Declaration warns that its signatories will not
bend to any rule purporting to force us to bless immoral sexual
partnerships, treat them as marriages or the equivalent, or refrain from
proclaiming the truth, as we know it, about morality and immorality and
marriage and the family. We will fully and ungrudgingly render to Caesar
what is Caesar’s. But under no circumstances will we render to Caesar
what is God’s.²⁴

Since the issuance of the Manhattan Declaration, there have been other
prominent public declarations that religious liberty is under siege and that redefining civil
marriage is a primary source of that threat. Indeed, the U.S. Conference on Catholic
Bishops formed a special committee on religious liberty and many examples in
speeches by prominent Catholic leaders about those threats involve same-sex
marriage. The supposed threats come both from redefining civil marriage and from
affording insufficient religious exemptions from such civil laws.²⁵

A premise of the recent book, Same-Sex Marriage and Religious Liberty: Emerging Conflicts (edited by, among others, prominent religion scholar Douglas Laycock) is that marriage implicates so many different areas of law and policy that,
inevitably, if same-sex couples are allowed access to civil marriage, or even civil unions
or domestic partnerships, there are numerous sites of likely conflict between the
exercise of this right and the right to religious liberty, some of which are unpredictable
today.²⁶ Examples include clashes in schools, both over school curricula (when children
are taught about diverse families, including those formed by same-sex couples) and
over student speech critical of homosexuality, housing, employment and employee benefits, free speech, health care facilities (e.g., access to assisted reproductive technology), just to name several.  

III. Religious Voices in Conflicts over Defining Civil Marriage: The California Marriage Litigation

The recent constitutional litigation in California over the exclusion of same-sex couples from access to civil marriage provides a valuable opportunity for studying issues of religion, conflict, and peacemaking. Alas, to date, there has been more conflict than peacemaking! A multitude of lawsuits filed in state court – by same-sex couples seeking to marry, by public officials supporting such couples, and by opponents of same-sex marriage suing over a San Francisco mayor issuing marriage licenses to same-sex couples – culminated in a ruling, in *In re Marriage Cases*, by the California Supreme Court that California’s constitution required that same-sex couples be allowed to marry and that domestic partnerships (although offering most of the material benefits and obligations of marriage) did not afford their families equal dignity and respect. The Court ruled based on the state constitution’s Due Process clause and its Equal Protection clause.

A second act in this drama over California’s marriage law was that, subsequent to *In re Marriage Cases*, opponents of same-sex marriage nullified the high court’s ruling that only marriage would do by the enactment, through the ballot initiative process, of Proposition 8 (Prop 8). Prop 8 amended the state constitution by adding a
definition of marriage as the union of one man and one woman. A third act was the lawsuit brought by same-sex couples in federal court, *Perry v. Schwarzenegger*, asserting that Prop 8 violates the federal constitution. Strikingly, the California Attorney General declined to defend Prop 8 in court, leading to a ruling by California’s high court that the proponents of Prop 8 had “standing” to do so. After a lengthy trial, Judge Vaughn Walker ruled that Prop 8 violated the federal constitution; the Ninth Circuit subsequently affirmed, although on narrow grounds focused on the violation of Equal Protection due to Prop 8 stripping away rights from gay men and lesbians without any legitimate governmental purpose for doing so. As I write this paper, it is not yet known whether the U.S. Supreme Court will review the case. Although the role of religious actors and organizations and religious beliefs in the Prop 8 campaign became a critical issue in that trial and in Judge Walker’s findings and conclusions, as did the role of moral disapproval and animus, that is a story I must defer to another day and another working paper.

**A. Forms of Argument about Marriage: Rights or Goods, or Both?**

I will now examine arguments made by religious organizations in “friends of the court” (*amici curiae*) briefs filed in *In re Marriage Cases*. To set the stage, I should explain that in other work, I have explored the question of the role of moral argument in defending or challenging civil marriage laws in circumstances of moral disagreement. Michael Sandel, for example, distinguishes between virtue-based arguments about substantive moral goods arguments and arguments, based on liberal neutrality, that “bracket” talk about moral goods and appeal, instead to equality, nondiscrimination,
and, above all, choice: the right to be free from governmental interference in choosing one’s partner. This dichotomy too reductive, but Sandel’s invitation to dwell on moral argument is a helpful frame for considering how religious organizations actually do make arguments in court.

Here is Sandel’s critique of liberal neutrality as it bears on the same-sex marriage controversy:

[T]he case for same-sex marriage can’t be made on nonjudgmental grounds. It depends on a certain conception of the telos of marriage — its purpose or point. And, as Aristotle reminds us, to argue about the purpose of a social institution is to argue about the virtues it honors and rewards. The debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers. So the underlying moral question is unavoidable.

Sandel argues against the naked public square. He faults liberals for a long period of silence about the place of moral and religious argument in public discourse. He praises President Obama for breaking this silence, and quotes at length from an Obama speech criticizing the idea of leaving our religious beliefs out of the public square. The president spoke about how “thousands of Americans” are coming to realize that “something is missing . . . . They want a sense of purpose, a narrative arc to their lives. . . . If we truly hope to speak to people where they’re at – to communicate our hopes and values in a way that’s relevant to their own – then as progressives, we cannot abandon the field of religious discourse.” Sandel comments:

Obama’s claim that progressives should embrace a more capacious, faith-friendly form of public reason reflects a sound political instinct. It is also
good political philosophy. The attempt to detach arguments about justice and rights from arguments about the good life is mistaken for two reasons: First, it is not always possible to decide questions of justice and rights without resolving substantive moral questions; and second, even where it’s possible, it may not be desirable.\textsuperscript{39} What we must do, argues Sandel, is evaluate competing moral arguments, not avoid them.

My thesis (defended elsewhere at greater length) is that Sandel sets up an overly stark dichotomy between liberal neutrality and substantive moral argument: either an argument is about rights or about goods and virtues; about justice as freedom or justice as virtue. In fact, both strands of argument are important to making the case for extending civil marriage to same-sex couples. Liberal argument can – and does – engage both with claims about rights and claims about purposes and goods. Legislators as well as judges employ both kinds of vocabulary in support of extending civil marriage. At the same time, in a morally pluralistic constitutional democracy, there is an important place for some limiting principles on public argument, whether one speaks about these in terms of the demands of “public reason” or in terms of “neutrality.” (I lay this out in my forthcoming book (with James Fleming), \textit{Ordered Liberty: Rights, Responsibilities, and Virtues}.\textsuperscript{40}

In this paper, I turn from what judges and legislators argue to examine how religious organizations argue on both sides of the marriage issue. This will allow a test for Sandel’s assertions about the inevitability of moral argument and for my own
assertion that there is room for an appeal both to moral goods and to rights. This close examination also allows us to see whether and how much notions of neutrality or of whether one may appeal to religious arguments in the public square seem to shape the arguments religious groups make in court. For instance, contrary to Sandel’s expectations, some religious organizations couch their arguments in secular terms and claim to eschew moral or religious argument. Do they, to use Sandel’s words, express a “more capacious, faith-friendly form of public reason,” or do they perceive that they may not appeal to religion?

Another focus of my examination will be what these religious groups see as the relationship between civil and religious marriage. This allows us to consider how they address the problem of congruence and conflict concerning the definition of marriage.

B. Arguments in defense of California’s marriage law

As an example of a “friend of the court” brief filed by religious groups in support of the State of California’s defense of California’s existing marriage law and in opposition to opening up civil marriage to same-sex couples, I will analyze the Brief Amici Curiae of the Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America in Support of Respondent State of California (“Brief of the Church of Jesus Christ of Latter-Day Saints”). Most of the brief does not make explicit reference to religion as a basis for argument. However, there are some significant
appeals to religion as a source of marriage’s social meaning, its role as an institution, and the like.

1. Public Reason and Public Values

When *amici* state their “powerful interest in the institution of marriage,” they assert in a footnote the “right” of faith communities to “be heard in the debate over public policy” and “express their views in the public square,” contrary to those who “have sought to dismiss the perspectives of faith communities as improper because they are informed by religious beliefs.” But they also appeal to “public reasons and political values,” contending that:

amici’s arguments are not about religious beliefs. On the contrary, our submission is based on historical and sociological facts about what marriage has always been across time and cultures (and why), and on the venerable legal doctrines that counsel against courts removing fundamental policy decisions from the democratic process. Our arguments are based, in short, on public reasons and political values implicit in our political culture.

Notable here is the static (and historically inaccurate) view of what marriage is and has always been. Also notable is the brief’s relegation of the question about whether the definition of marriage should expand to the realm of policy, hence the popular will (“the democratic process”), rather than rights (as interpreted or enforced by courts). This is consistent with its emphasis on marriage as a social institution serving public interests, not a matter of personal rights.
We might ask: Is this reference to “public reasons and political values” evidence of recognition of the rules of the game, that is, that one shouldn’t appeal explicitly in constitutional litigation to religion, but must abide by certain rules of political discussion? The brief’s stance is a bit self-contradictory: “religious viewpoints” have a “right” to be heard in the public square, but amici do not appeal to religion, but to facts, to legal doctrine, to public reasons, and to political values.

2. The Relationship Between Civil and Religion Marriage: Congruence and Harmony

What is the relationship between civil and religious marriage and between civil and religious authority? Despite the brief’s disclaimer about not making a submission based on religious beliefs, the final few pages assert an important “cooperative” relationship between religious institutions and the state with respect to supporting marriage and its special cultural value. The argument is that this cooperation is possible because the definition of civil marriage is harmonious with the understandings of most religious traditions. In other words, they are congruent. The warning is that if such congruence ceases, there will be a troubling disconnect or disharmony between the two (as I elaborate below).

This notion of a cooperative relationship between civil and religious authority is a good illustration of liberal political theorist Tamara Metz’s observation that what gives marriage its special value and meaning is not the state, but other sources, particularly religion. These sources, she contends, supply marriage’s meaning. This, for her, is a
reason to “disestablish” marriage, leaving it to religious and other communities, and to have the state create a new civil status organized around intimate care giving unions.⁴⁷ For the brief writers, it is a reason to maintain congruence between civil and religious understandings of marriage. The brief makes claims about the unique role of “faith communities” in supporting an ideal of marriage, a role threatened by redefining marriage.⁴⁸ These claims assert a harmony among religions as well as between religious and civil understandings of marriage. I quote the brief at length:

Replacing the male-female definition of marriage with a genderless definition would diminish marriage’s high social status. Marriage is nourished and supported by a deeply ingrained social consensus that creates a web of meanings, practices and expectations. The push for same-sex marriage threatens that consensus.

The existing social consensus reflects, in part, a powerful agreement among virtually all faith communities on the meaning and importance of marriage. More than all other institutions, faith communities foster and nourish the marriage ethic as the ideal institution for family life. Marriage is often associated with powerful religious symbolism and traditions that anchor a couple’s commitment to the institution. Faith communities are an essential pillar in the social infrastructure that sustains the uniquely elevated status of marriage. They give marriage spiritual meaning that fortifies the social consensus that marriage is the best venue for bearing and raising children. Notably, while marriages can be celebrated by various secular functionaries, the overwhelming majority of people choose to be married by a religious official. . . . Even for many people who are not religious, the religious imprimatur on marriage is highly valued culturally. In effect, the State and religious institutions informally cooperate in maintaining and fostering a social institution vital to vouchsafing both secular and religious interests.

However, broad religious support for the civil institution of marriage exists only because the current legal definition of marriage corresponds to the definition of most faith communities. The creation of a genderless definition would fracture the centuries-old consensus about the meaning of marriage, spawning deep tensions between civil and religious understandings of the institution. What is now a point of social unity would
inexorably become a point of social conflict, to the great detriment of marriage.\textsuperscript{49}

This assertion of a “centuries-old consensus” is problematic because it posits a far higher degree of congruence between religious understandings of marriage and contemporary family law than actually exists.\textsuperscript{50} Just to take one simple example, the availability of divorce, in civil law, based not only on fault grounds but on one or both spouses asserting irreconciliable differences or irretrievable breakdown, flatly contradicts notions of marital permanence and indissolubility still held in many religious traditions. Moreover, religious rules of divorce that have different rules for men and women concerning access to and grounds for divorce also conflict with contemporary family law. Constitutional protection of a married couple’s right to use contraception and, thus, avoid procreation, as well as of a woman’s right to decide to terminate a pregnancy also sharply conflict with the notion of marriage set out in the Manhattan Declaration. Contemporary family law’s “gender revolution” away from fixed gender roles of spouses and parents and toward marriage as a partnership of equals conflicts with notions of gender complementarity and some form of male headship still found in many religious traditions.\textsuperscript{51}

Even assuming, however, that such a civil-religious consensus did exist, an interesting question to pose is: would the parallel institution of Domestic Partnership, with virtually all the legal rights and responsibilities of marriage, including those parenthood rights and obligations flowing form marital status, not upset the consensus because this status does not use the name “marriage”? \textit{Would this be, for amici, an}
acceptable form of peacemaking? To the extent amici claim that marriage is the best venue for bearing and raising children, how can this parallel legal institution – which, since 2005, gives domestic partners all the parental rights and responsibilities of marital partners – not threaten this perception of marriage, unless the social meaning of this dual system is that this status is tolerated so long as it does not try to claim the marital name? But what about the children? Isn’t that much societal support and recognition of same-sex parents in conflict with the view that society properly channels reproduction and social reproduction into marriage?

3. The Purposes of Marriage

I now explicate two arguments the brief makes about marriage’s purposes (what Sandel might call arguments about goods or virtues) – channeling and gender roles – and then consider the brief’s consideration of the issue of rights.

(a) Marriage Channels Reproduction and Social Reproduction

The brief asserts that marriage is a social institution, one that exists to “serve broad public and social purposes,” not merely private ends. It claims that “[m]arriage has always been a male-female institution centered on children,” and that “across time and cultures,” its “core purpose” has been “centered on creating enduring male-female unions for the bearing and rearing of children.”

Similarly, the brief contends: “[R]egulating the sexual union of men and women for the bearing and optimal rearing of children has always been the primary public purpose and meaning of marriage.” This “primary public purpose” argument, which focuses on procreation and parenthood, is in
evident tension with the history of marriage in the U.S. as a potent political metaphor for consensual government. In the political thought of the founders, for example, the husband was the political head of the household, an important unit of self-government, and the wife was thought to consent freely to his rule (consent of the governed). Gender ordering, in the sense of expanding a man’s capacity for citizenship through his status as a husband and contracting a woman’s civil status through the civil and legal disabilities she incurred when she became a wife, was a vital part of marriage. Families, through the efforts of the wife, were “seedbeds” of civic virtue as women’s qualities gentled men. Similarly, in his famous observations of 19th century America, Alexis de Tocqueville credited women in America as the most important source of America’s mores and wrote approvingly of the nation’s conception of “democratic equality” that was compatible with women surrendering their independence and freedom when they married.

Thus, the “primary public purpose” argument centered on managing procreation ignores this historical role of marriage in properly ordering the sexes. Certainly the latter was an important “public purpose” of marriage.

The brief does acknowledge that goods flow from marriage as an adult-adult relationship, but places these in the realm of the “myriad private purposes and meanings” individuals assign to marriage. But this seems inconsistent with the primacy of adult companionship or friendship as a good of marriage, along side, for
example, such goods as procreation in certain religious traditions.\textsuperscript{57} Moreover, it certainly seems at odds with contemporary family and constitutional law, where, in \textit{Griswold v. Connecticut}, a case affirming the right of a marriage couple to avoid procreation by using contraception, the Supreme Court spoke of marriage as a “noble” association between adults, intimate to the degree of being sacred.\textsuperscript{58} One could readily find other language in earlier Supreme Court opinions about the companionate dimension of marriage (e.g., “the best solace of human existence”)\textsuperscript{59} – language casting doubt on the effort to treat the goods of the adult-adult relationship as peripheral to procreative purpose. Finally, as a matter of contemporary understandings of the purposes or goods of marriage, public opinion studies reveal that adults’ views of why people marry or should marry hew much closer to the idea that companionship and commitment, rather than children, are the most important reasons to marry or “goods” of marriage.\textsuperscript{60}

(b) Gender Roles and Marriage

The brief asserts: “This cross-cultural, historical understanding of marriage [as a “male-female institution centered in children”] is silent about the various roles men and women may assume within marriage. As an institution, marriage cares nothing about who does the dishes or cuts the grass or controls the money. What it has always profoundly cared about, however, is the uniting of men and women to procreate and care for the next generation.”\textsuperscript{61} It then asserts that marriage has been about other things, but procreation and optimal child rearing has always been the core.
This statement about indifference concerning gender roles seems disingenuous and misleading at best. At worst, it is erroneous and in conflict with the history of marriage, both in civil and religious law. I have already provided some evidence on this in the foregoing discussion of channeling and marriage’s purposes. Historically, law, religious traditions, and cultures have had plenty to say about “the various roles men and women may assume within marriage.” Precisely because of its importance as an institution, marriage featured as a civil contract to assume a status: women assumed the duties and rights of wife and, men, those of a husband. Gender hierarchy was a salient feature in the English common law model of marriage (with the rules of coverture and married women’s civil and legal disabilities), inherited by the American colonies. I noted above the significance of marriage as a political metaphor for consent of the governed and how a man’s capacity for citizenship was enhanced by his role of head of the household, while a women’s status of wife put her under legal and civil disabilities (“coverture,” or the idea that the wife was under the cover or protection of the husband). Far from being indifferent to the household division of labor, the law of marriage imposed a duty on husbands to support wives financially and a duty of wives to provide husbands their services. Limits on wives’ ability to make contracts also restricted their ability to enter into employment and, in any case, husbands were entitled to their wives earnings. Thus, thus picture of the law’s supposed indifference to gender roles is flatly wrong. Indeed, because of the status of being a husband and wife, certain types of contracts between spouses to try to alter the gendered division of labor simply offended
public policy, such as a contract that is the husband performed services for the wife, she
would support him.

The overt hierarchy of the common law system of coverture gradually gave way to
gender complementary, with different spheres for husband and wife, male and
female. However, only in the second half of the 20th century were certain vestiges of
the English common law system finally dismantled (such as a husband’s right to
manage marital property, rules favoring men as administrators of estates, or rules
imposing an obligation on husbands, but not wives, to provide “necessaries” or to pay
alimony).

And what about the claim that religious understandings of marriage are similarly
indifferent to gender roles within marriage? This group of Religion Fellows does not
need a tutorial on the salience of gender roles in religious understandings of marriage,
but evidence would include: (a) religious symbolism about the relationship between the
husband and wife being a symbol of the relation between Christ and the Church; (b) the
so-called household (or family) codes in the New Testament about wifely submission
and male headship; and (c) myriad religious teachings about marriage and proper
husbandly and wifely roles and the roles of father and mother (e.g., papal teaching
about women’s special gifts in the family). Some religious traditions continue to adhere
to a gendered division of labor, such as husbandly authority and wifely obedience,
creating tension with feminism and with perceived contemporary cultural values and
public norms of sex equality.\textsuperscript{64} This suggests a lack of congruence between civil law about marriage and religious teaching, a point the brief ignores.

Perhaps the aim of the brief’s statement about gender roles is to deflect or counter the argument that as the institution of marriage has evolved, with respect to moving away from fixed gender roles within marriage, little logic remains for the two-gender requirement of who may enter marriage. These gender roles, the brief might argue, were never at the “core” of what marriage was. In \textit{Perry v. Schwarzenegger}, for example, the federal district court concludes that the one man-one woman gender rule is an “artifact” of an earlier era and that, today, gender is irrelevant to a person’s capacity to perform the roles of a spouse and to a person’s capacity to function as a parent.\textsuperscript{65}

The amicus brief argues that the contemporary understanding of marriage is “silent about . . . roles,”\textsuperscript{66} and yet a strong theme of the brief is that gender complementarity is important for parenting and social reproduction. Same-sex unions lack this complementarity, as do, e.g., single-parent families. The brief appeals to: (a) social science, (b) intuition, (c) amici’s pastoral experience, and (d) common sense. The brief refers to marriage as “bridging the gender divide,” providing to children both female and role models, and providing a form of “cooperation” between the sexes.\textsuperscript{67} The practical problem with some of these appeals is that they simply do not fit contemporary family law: for example, the contemporary law of parenthood in California, in allowing
gay men and lesbians to have parental rights and responsibilities, reflects a value judgment that the “best interest of children” can be pursued in households in which children do not have a male and female role model. Moreover, the contemporary law of child custody does not permit the gender of a parent to be a consideration in awarding custody, by contrast to earlier custody rules presuming that a child of tender years belonged with his or her mother and that older children should be matched with a parent of their gender. True, many state custody laws contain public policy statements that it is in the child’s best interest to have ongoing relationships with both parents, but this reflects more a move away from the sway of a “sole custody” model – rooted in psychological theories about children having one primary parent and that shared custody could be harmful to children – than a conviction about role modeling.

4. Rights Arguments

A curious argument the brief makes is that because marriage is such a vital social institution, with public purposes, it is wrongly discussed in terms of rights. Instead, it should be a matter of public policy, with “the people” having their say.68 Diametrically opposite is the Supreme Court of California’s eventual opinion, in In re Marriage Cases (2008), in which the majority opinion stresses several times that this is not a matter of determining the best public policy, but of determining constitutional rights, namely, the scope of the right to marry, which stems from right to privacy and right to liberty.69

The brief never discusses these constitutional rights. Instead, it argues for a kind of populism, which leaves it to “the people” and to the legislature because of marriage’s
public purposes. In California, the ballot initiative process allows “the people” to amend the constitution on a simple ballot initiative that bypasses the legislature entirely. This comparatively easy process of amending a state’s constitution by popular vote ill fits a common understanding of “the very purpose” of the Bill of Rights in our U.S. Constitution: “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” So the U.S. Supreme Court stated in the famous case of West Virginia Board of Education v. Barnette (1948), in which it struck down a compulsory flag salute in public schools in the face of a challenge by Jehovah’s Witnesses. The Court continued: “One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

Certainly, the brief itself notes California is at the “radical” extreme in terms of the power of the people, a structure makes a strong statement about the will of the people and gives the courts little role. However, family law is not simply a matter of populist will, as expressed at the polls. The notion of “the constitutionalization of family law” refers to the way in which constitutional cases since the 1960s have put constraints on the ability of states to regulate the family. (The notion also encompasses the role of state constitutions as well.) Those constitutional limits range from the right of privacy, under the Due Process clause, protecting unmarried or married persons to use contraception and to decide whether to bear or beget a child to the Equal Protection
Clause requiring that states have an “exceedingly persuasive justification” for using sex-based classifications in family law. With respect to the latter, for example, the Court, beginning in the 1970s, struck down state laws differentiating between the rights and duties of husbands and wives and between fathers and mothers – laws that previously reflected the “separate spheres” ideology reinforced by law and culture. The Court also struck down laws forbidding interracial marriage, even though those laws had popular support and might well have succeeded in a ballot initiative. Thus, the notion that “the people” set the basic terms of family law ignores the interplay of rights and democratic self-government in shaping family law. As I noted earlier, some of these federal constitutional developments directly undercut the procreative purpose and gender role arguments amici make in defense of preserving civil marriage as exclusively the union of one male and one female.

B. Arguments in favor of the challenge to California’s marriage laws

In re Marriage Cases lists one brief filed by religious organizations in support of the challenge by same-sex couples to California’s marriage laws: The Brief Amici Curiae the Unitarian Universalist Association of Congregations, General Synod of the United Church of Christ, the Union for Reform Judaism, Soka Gakkai International-USA, the Universal Fellowship of Metropolitan Community Churches, the California Council of Churches, and California Faith for Equality, et al., in Support of Parties Arguing for Marriage Equality.73 The brief was signed by hundreds of denominations, congregations, and religious leaders; listing these many parties to the brief takes more than three pages in the published opinion – far more than for any other brief.74 The
sheer number of “friends of the court” joining this particular brief may reflect a calculated strategy to file just one brief by religious leaders and organizations in support of marriage equality. (By contrast, many religious groups or religiously-based interest groups filed briefs in support of California’s marriage laws.) This group of religious organizations and leaders also filed a friend of the court brief in the appellate court (just as did the Church of Jesus Christ of Latter-Day Saints and allies).

My analysis of this omnibus brief in support of marriage equality will address these central arguments it makes: (1) contrary to the assertion of the Church of Jesus Christ of Latter-Day Saints and other religious amici, there is no consensus among California’s faith traditions on a universal understanding of marriage that would preclude extending civil marriage to same-sex couples; (2) because of constitutional commitments to separation of church and state and to religious freedom, the distinction between civil marriage and religious marriage is of critical importance; civil marriage should not be defined to establish a particular religious understanding of marriage; and (3) the appeal to tradition is not sufficient to justify denying individuals the right to marry (an anti-majoritarian argument). These arguments overlap, but I will attempt to discuss them thematically. I will also consider how this brief looks when run through Sandel's framework, that is, does it make virtue-based arguments about the worth of same-sex marriage or rights-based arguments that eschew questions of goods or worth, or both types of arguments? I will argue that we find appeals both to goods and to rights, specifically, to the civil right to marry the person of one’s choice.
1. Challenging a religious consensus on traditional marriage and presenting religious support for civil marriage equality.

One express aim of this amicus curiae brief is to counter the assertion made by in the friend of the court brief by The Church of Jesus Christ of Latter Day Saints et al at the appellate court level that “‘the vast majority of faith traditions within California understand marriage in essentially the same way.’”). Rather, the brief counters that “no such consensus exists among California’s faith traditions, nor is the conscience of California’s faith traditions as one-sided as these religious organizations appear to believe . . . It is fundamental to a wide variety of faith traditions and religious leaders from every part of California that same-sex couples should be allowed to marry under the state’s civil marriage regime.”

(a) Statements of interests by religious organizations and clergy

In articulating this support for marriage equality, the brief contains assertions about the worth of same-sex partnerships, or what Sandel might call virtue-based arguments, side by side with rights arguments. For example, the brief begins with “interest statements” of the various national and state religious organizations joining the brief. I will pick some illustrative statements. The United Church of Christ (UCC) recounts a history of prior resolutions (starting in 1996) in favor of “equal rights for same sex couples who choose to marry and share fully and equally in the rights, responsibilities and commitment of legally recognized marriage.” This statement of interests speaks of a commitment to equal or full civil rights and appeals to the UCC’s history of standing “in solidarity with the marginalized and oppressed – calling for the
abolition of slavery, for recognizing women’s rights, for honoring mixed-race marriage, and for the full civil rights of all persons.”

The Union for Reform Judaism also announced “equal rights for all people, including the right to a civil marriage license.” It ties this support to an underlying moral or teleological argument in support of diversity and against discrimination:

As Jews we are taught in the very beginning of the Torah that God created humans b’tselem Elohim, in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). We oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being.

The Buddhist Community, Soka Gakkai International-USA similarly appeals to “the recognition of human diversity” as a ground for embracing, back in the 1990s, “Buddhist wedding ceremonies for lesbian and gay couples.”

An appeal to worth and dignity features in the statement of interest by the Unitarian Universalist Association of Congregations (UUA), which explains that Unitarian Universalist ministers have “for decades performed marriages and ceremonies of union for same-sex couples.” Further, both because Unitarian Universalists “affirm the inherent worth and dignity of every person” and “because marriage is held in honor among the blessings of life,” the UUA’s General Assembly passed a resolution in 1996 to support “legal recognition for marriage between members of the same-sex.”
At the state level, the California Council of Churches, with a constituency of “over 4000 congregations,” relates its long support to “marriage equality and gay rights” to “faith teachings,” such as the belief that “God’s message is universal love of and for all people.” The Council also asserts that “our commitment to religious liberty for all and equal protection under the law leads us to assert that the State may not rely on the views of particular religious sects as a basis for denying civil marriage licenses to same-gender couples.” A second example: the Reconciling Ministries Clergy of the California Nevada Conference of the United Methodist church, clergy whose ministry focuses on full inclusion of persons of all sexual orientations and gender identities in the church’s life, expresses a conviction that “God has called as to speak a clear word concerning human sexuality” – that it is a “good gift from God,” and that “responsible use of sexuality is not dependent on the gender of a partner,” but on “faithful, mature, loving, and mutually respectful expression of that gift.” Based on that understanding of sexuality, the Reconciling Ministries Clergy supports legal recognition of same-sex marriage.

Individual clergy also offered statements of interest. Of particular interest in showing the dual appeal to rights and worth is the statement by a UCC minister, Reverend Michael Schuenemeyer. He chronicles the UCC’s move toward marriage equality as a “natural evolution” consistent with a thirty year period of “biblical study, theological reflection and social policy actions concerning the welcome and full inclusion of lesbian, gay, bisexual and transgender persons in church and society.” He appeals to
the goods of marriage and to the worth of same-sex persons and their relationships:
“Marriage is about relationships, and the movement toward marriage equality has come in large measure because same-gender, loving relationships have been made increasingly real and visible.”83 He also makes a “your friends and neighbors” argument about equality: as UCC members have “come to know the integrity of the lives and the loves of lesbian, gay, bisexual, and transgender persons who sit next to them in the pew, serve with them in the mission of the church and as leaders on councils, boards and committees,” it became clear to them that “they could not sit next to and across from their brothers and sisters and vote for discrimination.” This personal dimension made the cost of discrimination more visible, such that through these “stories” of the impact of marriage discrimination, people have come to know that such discrimination is costly, unfair, as well as “unjust and inconsistent with the values of life, liberty, and the pursuit of happiness that we hold dear as a nation and project to the world.” He concludes that church and society should recognize “that civil marriage equality is right and discrimination is wrong.”84

To offer a second example, Rabbi Arthur Waskow, of The Shalom Center, discusses the evolution of Biblical Judaism’s basic precepts for “proper sexual ethics” and how a modern understanding of these can support same-sex marriage. He speaks of the “worth of marriage as a carrier of holiness and community” and speaks of how the refusal of the state to provide a legal framework for same-sex marriage greatly burdens the religious communities that celebrate those marriages. The couples can approximate
the benefits and obligations available under civil marriage law only through elaborate personal contracts.\textsuperscript{85}

Some individual statements stress the many different understandings of marriage found in Biblical and Christian traditions over time, concluding that “access to the legal contract of civil marriage in the United States today cannot be governed by these widely diverse religious perspectives on marriage.” Thus, religion scholar Mary A. Tolbert so argues, pointing out the practice of polygamy in the Old Testament and competing traditions within Christianity over whether marriage was a sacrament or belonged in the civil or religious sphere. She concludes that, “while communities of faith disagree on the religious meaning of marriage, they ought to agree, and for religious reasons, on redressing the injustice of excluding same-sex couples from the legal benefits and responsibilities of civil marriage.”\textsuperscript{86}

(b) Legal arguments about religious support for marriage equality

Turning from amici’s statements of interest to their legal arguments, we see a clear reliance on a rights-based argument. Amici assert that, whatever their underlying, diverse viewpoints and practices concerning marriage, they “are united . . . in the conviction that civil marriage is a fundamental civil right and that all Californians – regardless of their sex or sexual orientation – are entitled to exercise the fundamental right to marry the person of their choice.”\textsuperscript{87} Amici appeal to the California Constitution’s Religion clauses (as I elaborate below) forbidding the establishment of religion and guaranteeing free exercise. They argue: “Protecting religious freedom and nurturing a
broad pluralism, the Religion clauses flatly prohibit imposing by law, on all people of this
state, what amounts to the religious orthodoxy of some sects concerning who may
marry.” Amici argue that many of them come from faith traditions “whose deeply held beliefs compel them to celebrate marriage
between people of the same sex on the same terms as ‘traditional’ different-sex
marriages.” They make this argument to counter the claim by other amici that “Judeo-
Christian” traditions and values support “traditional” marriage and support maintaining
the one man-one woman definition of civil marriage. This section of the brief details
the evolution toward supporting equality in the rights of civil marriage as well as
supporting religious ceremonies blessing same-sex unions and celebrating their
marriages.

The amici also challenge the asserted “universal” definition offered by opponents
of marriage equality by pointing out a “long and noble history” of marriages between
people of the same-sex in various societies at earlier times in history. They cite to John
Boswells’ work on a Christian blessing ceremony for same-sex couples and to William
Eskridge’s argument (drawing on Boswell) that “in Europe, the Christian Church
recognized same-sex marriage as far back as the Fifth Century.” They assert that
marriages of same-sex couples in California “were recognized and accepted before the
Spanish conquest.” Examples from around the world and from different eras feature
in support of their argument that “the so-called ‘traditional’ definition of marriage
excluding same-sex couples is neither fixed nor ‘universal.’"
2. Distinguishing civil and religious marriage and respecting the separation of church and state

A further aim of the brief is to argue that, to respect the separation of church and State under California’s state constitution and under the U.S. Constitution, and to avoid Establishment Clause problems, the Supreme Court of California must “interpret California’s marriage laws neutrally without favoring one religious tradition over another.” To protect “religious freedom” and nurture a “broad pluralism,” the brief explains, these religious clauses “flatly prohibit imposing by law, on all people [of California], what amounts to the religious orthodoxy of some sects concerning who may marry.” Rather, what is at issue in the litigation is access to civil marriage:

This case must be primarily about civil marriage, which is a legal status conferred by the State, and not about endorsing or preferring any particular doctrine regarding religious marriage—such as the rule prevailing in some sects that marriage may be only between a man and a woman. . . . [T]o impose such views, drawn from religious doctrine, as state law would be both to endorse religion generally and to prefer some religions over others—and, in so doing, to trample the religious freedom of believers and non-believers having different views of who may marry and to whom.

Amici use the language of rights to argue for equal access to civil marriage: “Amici believe that same-sex couples should be afforded the same fundamental right as different sex-couples to participate in the State-sanctioned institution of marriage.” They also use the language of neutrality: the court should “interpret California’s marriage laws neutrally without favoring one religious tradition” and without discriminating against others of equal dignity.
Amici point out that a free exercise argument featured in the earlier attack on California’s antimiscegenation law, which the California Supreme Court, in *Perez v. Sharp*, struck down in 1948 – nearly two decades before the U.S. Supreme Court would strike down Virginia’s antimiscegenation law in *Loving v. Virginia* (1967). In *Perez*, an interracial couple argued that their own Roman Catholic faith permitted interracial marriage, but the state of California forbade such marriage. California’s law, in turn, fit the beliefs of many non-Catholic denominations that believed God ordained various races and that they should not mix. The California high court countered that a law that is “directed at a social evil and employs a reasonable means to prevent that evil” would be valid regardless of its incidental effect on “particular religious groups;” however, if the law is “discriminatory and irrational,” as it found the antimiscegenation law to be, “it unconstitutionally restricts not only religious liberty but the liberty to marry as well.” Amici further quote *Perez*’s language that “legislation infringing such rights must be based on more than prejudice and must be free of oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.”

Amici draw on *Perez* to argue that the law denying same-sex couples the fundamental right to marry similarly unconstitutionally restricts “not only religious liberty but the liberty to marry as well.” They argue that “the State cannot enmesh itself in religious tradition by endorsing the ‘traditional’ view of those sects that would limit the right to marry to different-sex couples.” They praise the language of the Supreme Judicial Court of Massachusetts, in *Goodridge v. Department of Public Health* (which,
in turn, adapted the language of the U.S. Supreme Court’s opinion in *Lawrence v. Texas*), acknowledging that “many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral,” just as “many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their neighbors.” However, the *Goodridge* court continues (quoting *Lawrence*): “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Sandel might take issue with this invocation of *Lawrence* since it seems to employ the strategy of bracketing moral questions by suggestions the scope of constitutional liberty may be determined without resolving the conflicts among these “deep-seated religious, moral, and ethical convictions” concerning marriage and homosexuality. To understand why amici believe this strategy is necessary, we must learn more about their arguments concerning neutrality and how a definition of marriage that excludes same-sex couples from civil marriage raises constitutional questions under the religion clauses.

Amici invoke the Jeffersonian image of a “wall of separation between church and state,” an idea familiar to the U.S. Supreme Court’s and the California high court’s religion clauses jurisprudence. How do the Religion Clauses constrain the state in defining marriage? Amici argue: “The Religion Clauses of our federal and state charters
prohibit official acts, like the marriage laws here at issue, that place or appear to place the State in one religious camp over another.” Amici draw on precedents striking down prayer in public schools to explain how the doctrine of religious neutrality guards against the risk that “powerful sects or groups might bring about a fusion of governmental and religious functions.”

They invoke Justice Brennan on how the wall of separation is “even more vital today,” given our “vastly more [religiously] diverse people,” than at the founding, where differences were chiefly among Protestant sects.”

Turning to the jurisprudence of justices of the California Supreme Court, amici find further support for the argument that America’s increasing and vast religious diversity makes the separation of church and state vital to protect the rights of the minority.

We could view this judicial embrace of the wall of separation as a peacemaking strategy, a way to ensure peaceful coexistence in a society characterized by diversity and pluralism.

How do these ideas about separation of church and state apply in the context of civil marriage? Amici argue that the state “violates “ precepts of individual liberty when it permits “a tenet of some religions – . . . that men can marry only women and women can marry only men – be inscribed into the law of the land.” A further violation is the State embracing, in this very marriage litigation, the argument for judicial deference to majoritarian “tradition.” Amici contend that “the exclusion of same-sex couples from
legal marriage ultimately stems, not from legitimate State interests, but rather from the views of some religious regarding appropriate gender roles.”

I will soon consider amici’s analysis of the role of “traditional” religious views in shaping the civil law of marriage and its contention that California’s marriage law does not further legitimate state interests. However, it may be helpful to understand the underlying legal test concerning religious establishment that they assert California’s marriage law fails. They assert that, to survive constitution scrutiny, a law must satisfy the three-pronged Lemon test (set forth by the U.S. Supreme Court in Lemon v. Kurtzman (1971)): “(1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster ‘an excessive government entanglement with religion.’”

On the “secular legislative purpose” prong, amici critique the state’s “purported secular purposes” of: (1) preserving the “traditional” or “common understanding” of marriage while offering same-sex couples “the different and lesser option of domestic partnership” and (2) reserving the definition of marriage for the “legislative process.” They note that the Prop 22 Legal Defense and Education Fund, “but conspicuously not the State,” asserts a “state interest in procreation and optimal child-rearing,” which is “manifestly not advanced by denying same-sex couples the right to marry.” Amici argue that these are “pretextual covers for the State’s endorsement of a particular religious view” and are therefore inadequate to justify the exclusion.” Indeed, amici assert that
state’s invocation of “tradition” and “common understanding” of marriage is “a pretext for
naked religious preference.”

3. How California’s Marriage Law Derives from “‘Traditional’ Religious Views” on
Gender Roles and Why Invoking “Tradition” is Not Enough

Like the family law of most states until recently, California’s family law did not
include a definition of marriage as between one man and one woman. That definition
came in 1977, when an amendment to the Family Code defined marriage as a “relation
between a man and a woman,” evidently in order “‘to prohibit persons of the same sex
from entering lawful marriage.’” Thus, an explicit one man-one woman definition of
marriage, previously implicit, was the result of concern over preventing same-sex
couples from gaining access to civil marriage. California voters codified this in 2000 by a
ballot initiative, Proposition 22, which was also intended to prevent legal recognition in
California of same-sex marriage entered into outside of California. By that time,
California had passed a domestic partnership law open to same-sex couples, and the
specter of judicially-imposed same-sex marriage (beginning in Hawaii and spreading
west) spurred Congress to pass, in 1996, the Defense of Marriage Act. Proposition 22
was, in effect a state mini-DOMA.

Amici argue that the exclusion, in California’s Family Code, of same-sex couples
from civil marriage cannot pass “constitutional muster.” They take on the interests
asserted by the State and the State’s amici in the litigation. They aim to show that “the
legislative history of the relevant code sections readily confirms that, at bottom, religious
preconceptions, gender stereotyping and animus against gays and lesbians have been the actual drivers of the marriage exclusion."\textsuperscript{108} They assert that the exclusion of same-sex couples from legal marriage “ultimately derives from ‘traditional’ religious views regarding appropriate gender roles.”\textsuperscript{109}

One interest that amici dismiss is the appeal to “tradition” and to “the traditional view of marriage.” They return to Perez as potent support for the proposition that a long history of state sanctioning of discrimination and “an unbroken line of judicial support” for discriminatory legislation is not constitutionally sufficient.\textsuperscript{110} The premise that tradition alone is not enough but that critical evaluation of tradition is warranted plays a key role in constitutional litigation over marriage equality. Amici draw a parallel to the language in Lawrence v. Texas (in which the U.S. Supreme Court struck down Texas’s law criminalizing same-sex sodomy): “That the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” Years ago, Sandel criticized the majority in Bowers v. Hardwick for appealing to tradition and majority conviction alone without making arguments about substantive moral goods.\textsuperscript{111} So too, legal scholar Mary Ann Glendon faulted Bowers for its simple majoritarianism.\textsuperscript{112}

Amici note that, in the Massachusetts same-sex marriage litigation, the Supreme Judicial Court of Massachusetts declared that the state cannot “under the guise of protecting ‘traditional’ values, even if they be the traditional values of the majority,
enshrine in law an invidious discrimination that our Constitution . . . forbids.”

It is a “circular” argument, amici argue, for the State of California to invoke “tradition” as the justification for the tradition of excluding same-sex couples. Moreover, they point to evolving marriage practices that now allow same-sex couples to marry; and they point out how tradition is also bound up with “the lengthy and virulent history of persecution of gays and lesbians.” Finally, they contend that the state fails to explain why excluding same-sex couples from marriage is necessary to perpetuate the tradition of different-sex marriage: will different-sex couples cease to marry or marry less often merely because “the institution includes same-sex couples”?  

Amici quickly dispense with the State’s argument that courts should defer to the legislature, pointing out that “blank deference” concerning the regulation of marriage is not the rule. Rather, as California courts explain: “the regulation of marriage and divorce is solely within the province of the Legislature except as the same may be restricted by the Constitution.”

As I explained earlier in this paper, the federal constitution, as interpreted by the Supreme Court, also places limits on judicial deference to regulation of the family by state legislatures and, for that matter, by Congress. Perez again surfaces in support of amici’s argument – if the state constitution did not constrain legislative power, then on what basis could the court strike down an antimiscegenation law?
Amici also reject the “responsible procreation” rationale offered by some amici but not by the State of California. (California’s disavowal of the “responsible procreation” rationale is similar to marriage litigation elsewhere and to the Obama Administration’s stance on DOMA.) Amici contend that this argument has no rational relationship to the marriage exclusion. For example, it is underinclusive in excluding only “nonprocreative” same-sex couples from marriage, while allowing different sex couples to marry, whether they are “impotent” or “barren” or can only procreate with the assistance of a third person. Amici make an important move: they link the responsible procreation rationale to the constitutionally suspect singling out of an unpopular group. They conclude that the marriage exclusion fits within the type of suspect singling out condemned by the U.S. Supreme Court in Romer v. Evans (1996), which struck down a constitutional amendment that prohibiting homosexuals from the protection of antidiscrimination laws). Romer in turn drew on an earlier case, Department of Agriculture v. Moreno, where the Court struck down a food stamp restriction aimed at communes, stating that equal protection of the law means “at the very least . . . that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”116 In marriage equality litigation (including both challenges to state marriage law and to DOMA), it is impossible to overstate the significance of Romer as a precedent invoked in support of such equality. Opponents of same-sex marriage, in turn, seek to find ways to differentiate the animus or bare desire to harm condemned in Romer from a legitimate or important governmental interest in maintaining marriage as a one man-one woman institution.117
Why do amici find *Romer* applicable? Readers may find particularly interesting the brief’s argument that the circumstances surrounding the 1977 amendment to California’s Family Code support a conclusion that the marriage restriction reflects hostility toward gay men and lesbians, as well as religious preferences and gender stereotypes. The brief explains that the California legislature removed certain sex-specific references from the Family Code in the 1970s, in keeping with evolving Equal Protection norms that took a closer look at sex-based classifications (for example, different ages of consent to marry for men and women). Several years later, a legislator (Assemblyman Nestande) introduced a bill, at the request of county clerks responsible for issuing marriage licenses, to limit the definition of marriage to opposite-sex couples “to avoid the costs of litigation that might result from denying same-sex couples marriage licenses.” (In the early 1970s, some same-sex couples did bring (unsuccessful) lawsuits in other states challenging the denial of a marriage license.)

Amici employ letters that constituents sent to Nestande as evidence that the motive for the change rested in gender stereotypes and hostility toward homosexuals. They offer some fairly persuasive material: one person wrote of seeing on a television news show that two men had applied for a marriage license “but fortunately” were “refused.” She was “disgusted” by seeing them kissing on camera and expressed the wish that she could “send my highest congratulations also to Anita Bryant,” a popular singer who became a pivotal public figure in rallying support – on grounds of decency,
family, and Christian morality – for quashing antidiscrimination laws that would protect sexual orientation and for supporting laws against homosexuals. Other constituents praised Anita Bryant’s courage and supported Estande’s bill “from a Biblical point of view,” commenting on the threat to the nation’s morality of “the opposite of God’s plan for men and women and the family is allowed.” Particularly powerful evidence is that, in response to a letter thanking Nestande for the bill and saying, “The Bible goes on and on about Homosexuals . . . I resent these people calling themselves Gay . . . God calls them abomination and I call them queers . . . because their sex acts are queer and against [sic] nature,” Assemblyman Nestande replied: “Thank you for your recent letter regarding homosexual activities. I am pleased to know that we share the same views.”

Amici marshal this historical material to conclude that “the real motivations” for the marriage exclusion were “clearly to reinforce impermissible gender stereotypes and demonize gays and lesbians, often on the basis of less-than-rational interpretations of scripture or ‘God’s design.’” Amici then solidify their argument about how “some people’s religious view of marriage” are connected to the marriage exclusion by citing to the appellate level friend of the court brief filed by the Church of Jesus Christ of Latter-Day Saints, the California Catholic Conference and others (what they call the “Starr Brief” because Kenneth Starr was the attorney who filed their belief, as he also was on their Supreme Court brief, which I discuss earlier in this paper). The Starr Brief expressly appeals to “cultural and religious” traditions about “male-female marriage”
predating the state of California and notes the history of informal cooperation between
the state and religious institutions, just as it warns of negative consequences if a new
definition of marriage departs from this cooperation (I detailed similar arguments in their
Supreme Court brief). Amici quote a particular striking passage from the Starr Brief on
the importance of congruence: “Religious support for the civil institution of marriage is
possible and given without reservation only because the current legal definition of
marriage corresponds to the definition of most religions.” Amici fault the Starr Brief for
“blindness” to “competing religious viewpoints” about whether marriage may encompass
same-sex relationships, even if those faiths don’t constitute a majority.

4. Putting it All Together: Why the Marriage Exclusion Implicates the
Entanglement of Church and State

We are now able to assess in a more informed way amici’s argument that the
marriage exclusion in California’s family law raises serious constitution concerns under
the California Constitution’s religion clauses. This argument appeals to the state
constitution’s guarantee of religious neutrality. Amici argue that the California
Constitution – and its interpretation by California’s high court – establishes “three
bedrock principles concerning the right to marry”: (1) “the essence of the right to marry
is freedom to join in marriage with the person of one’s choice” (Perez); (2) the right of
wives “to retain separate property and participate equally in the marital contract;” and
(3) “the right to marry is the right to enter into a civil contract that the State must
recognize as valid without regard to its ‘conformity to the requirements of any religious
sect.’”121 With respect to the second principle, amici effectively show how this
“egalitarian” principle, which rejected the loss of women’s rights upon marriage, prevailed over opposition that the “independence” of the wife from the husband was “contrary to the laws and provisions of nature” and that the husband must be ‘head” and “master” in every household.

How is the law at issue really based on some religions? Amici point out that, pursuant to California’s constitution, government “shall make no law respecting an establishment of religion.” Given the religious diversity of the nation, as discussed earlier, it is vital that government not “place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question.” Amici content that, in violation of this tenet, California puts such a stamp on a “particular religious practice” (“limiting marriage to couples consisting only of a man and a woman” and “appears to take a stand” on a religious question – whether two people of the same- sex should be allowed to marry.

I find this claim – that whether same-sex couples may marry is at root a religious question – not entirely persuasive, since the definition of marriage for purposes of civil law is a question of civil law. But I take the point to be that the reasons for opposing same-sex marriage are, at root, religious ones and so it is a religious question. Amici basically make this argument when they contend that there is no “secular legislative purpose,” as required by the Lemon test, for the marriage exclusion. They point to the fact that the concurring opinion in the appellate court opinion in In re Marriage Cases
recognized that “the opposition to same-sex partnerships comes from biblical language and religious doctrine. This reality is nothing to avoid, and we must acknowledge it if we are to proceed honestly.” The dissent observed: “This reasoning rests upon a religious doctrine that cannot influence the civil law and, in any case, is not universally shared.”122

Amici reiterate that “tradition” – in and of itself – cannot provide a legitimate secular purpose, but even if it could, the failure of the State to acknowledge “this state’s diverse array of marriage traditions” renders the appeal to tradition problematic. The brief chronicles the move, dating back to the 1970s, by many faiths and religious organizations toward marriage equality “Amici’s own statements . . . evidence many traditions recognizing the marriages of same-sex couples.” Amici chronicle evolution within religious practice toward celebrating weddings or commitment ceremonies by same-sex couples. “The State also fails to take into account the evolving understanding of marriage around the world, as evidenced in such places as Massachusetts, the Netherlands, Belgium, Spain, Canada, and South Africa.” They cite Justice O’Connor on the point that “The apparent newness of some of these traditions does not deprive them of constitutional significance.”123 They appeal to uncovered history: “Extensive evidence exists of socially-accepted marriages between individuals of the same sex both throughout history and throughout the world, including here in California, and historians are just beginning to reconstitute this rich and noble tradition.”124 Amici’s
language here to of a “noble tradition” signals a view about the moral worth of such traditions, in line with Sandel’s notion of appealing to moral argument.

Amici argue that even if tradition were enough to justify the one man-one woman definition of marriage, the State’s domestic partnership (DP) scheme, “whatever its merits, simply does not bear the same significance as marriage.” In condemning the two-track approach, amici invoke powerful tropes from the racial segregation context on why separate is not equal, but harness it to a free exercise argument: many amici cannot fully practice their own religion if same-sex couples are relegated to domestic partnership status. On the significance point, Metz’s distinction between the meaning versus material benefits side of marriage helps: the DP approach, even if it provided “all the tangible rights and benefits of marriage,” is constitutionally infirm because a DP does not carry the same meaning as marriage. To what extent do amici appeal to the civil understanding of marriage or its religious, spiritual connotations stemming from religion? “Amici attest to the spiritual significance of marriage, not domestic partnership, within their own religious traditions.”

Amici also argue that the marriage law’s limiting marriage only to opposite-sex couples has the “primary effect” of advancing some religious view and inhibiting others. The state, in doing so, sends an exclusionary message – an evil against which the Establishment Clause guards:

Family Code section 300 . . . lacks any identifiable secular purpose and without a doubt lends the prestige, authority, and resources of the State to
religions that reject marriage between people of the same sex. By placing its stamp of approval on faiths disapproving of marriage between individuals of the same sex, the State is effectively ‘send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’

Amici also argue that “the current marriage regime” fosters “excessive government entanglement with religion.” They note the “deep and passionate debate about the meaning of marriage” taking place in California and throughout the United States. When the state is “pulled into the sectarian fray,” and supports one side, which would allow “only marriages between a man and a woman,” the state is “clearly endorsing the views of some orthodox religions and barring Amici from legally solemnizing marriages that they are called upon by their religions to perform.” Amici observe: “The state is entangled with religion through its marriage licensing, registration and solemnization scheme,” by which “clergy are authorized to solemnize only those marriages that satisfy the state’s requirements,” for example, that the couple be of different gender. Amici argue: “Through the operation of California’s interlocking statutory marriage and solemnization provisions, clergy . . . are pressed into making sex-based distinctions before solemnizing marriages. . . . Forcing clergy to make an up-or-down decision on whether couples can marry on the basis of their sex creates a dilemma for Amici, the seriousness of which cannot be gainsaid: These clergy are forced to choose between obeying their faith and obeying the State.” Some clergy resolve this tension by declining to sign any marriage licenses until California recognizes marriage equality.
The basic point is that “the State’s marriage statutes impose requirements on clergy that may, and often do, conflict with their religious tradition and conscience.” It bears mention here that, if California permitted same-sex couples to marry, clergy whose religious traditions did not permit such marriages would have First Amendment protection against performing the marriages. Thus, there is not any easy converse argument that allowing marriage equality will raise a similar entanglement problem. Religious exemptions in marriage equality laws make this explicit; however, such First Amendment protection would exist under free exercise even without an explicit exemption. Amici recognize and make this very point:

Importantly, the State’s imprimatur will not be placed on either side of the debate if civil marriages between people of the same sex are authorized. Both opposite-sex and same-sex couples will be allowed to marry legally, just as Catholics can legally divorce and remarry, or Jews can legally marry people of different faiths, despite Catholic and Jewish traditions opposing such practices. . . . Neutral application of the laws will permit couples of the same sex to marry without compelling any religion and clergyperson to perform such marriages. This is the very essence of the religious neutrality guaranteed by the California Constitution . . . .

Amici finally turn to the “no preference” clause of California’s Constitution, that “Free exercise and enjoyment of religion without discrimination or preference are guaranteed.” They refer to this as a “sweeping statement of the principle of governmental impartiality in the field of religion.” Free exercise encompasses beliefs and action. Amici note that while courts have upheld limits on free exercise to advance state efforts to uproot discrimination, never have courts held that free exercise rights must yield “to the government’s interest in propagating such discrimination.” To the
contrary, the state has no legitimate interest in discriminating based on sex or sexual orientation in its marriage laws.\textsuperscript{132}

Amici invoke second-class citizenship to argue that when the state sanctions “only marriages between a man and a woman,” while “granting equal access to marriage for all couples is a crucial matter of conscience and faith for Amici,” the State expresses a preference for certain faiths and “relegates the beliefs and practices of Amici’s religions, denominations, and clergy to second class status.”\textsuperscript{133} Amici offer as example the Unitarian Universalist Church’s practice of making marriage available to all adult couples regardless of sex, rooted in its affirmance of “the inherent worthy and dignity of every person and calls for justice, compassion and equity in human relations.” Ministers in that tradition experience a “substantial” burden on their ability to exercise their religious beliefs. Here amici refer to some of the testimonials offered in the statements of interest about the practical impact the marriage exclusion has on clergy’s ability to help same-sex couples approximate the legal protections of marriage by other means.

Amici conclude by drawing analogies to the California courts applying the “no preference” clause to require removal of crosses and other religious displays from public land. They point out that, like marriage laws, these displays went unchallenged for decades but are now being challenged “as society changes and individuals realize that their rights are being burdened by the state’s symbolic endorsement of religion.
They contend: “The State would do well to heed Chief Justice Bird’s entreaty that ‘faith flourishes more freely in a sanctuary protected from the dictates of the majority.’ They conclude that: “[I]t is time to remove the State statutes that express a preference for certain religious over others and burden Amici’s ability to fully practice their own religions.”

In this lengthy explication of the arguments made by a coalition of religious groups in support of marriage equality, I have shown the interplay of appeals to goods and rights, the insistence upon the distinction between civil and religious marriage, and the argument that when government embraces a definition of marriage in harmony with some religious sects and not others, this offends principles of constitutional neutrality.

IV. The California Supreme Court Opinion: Religion, Conflict, and Peacemaking Concerning Civil Marriage?

I will conclude this paper by turning to the Supreme Court of California’s opinion in *In re Marriage Cases* and asking (1) whether the opinion explicitly refers to either of these friend of the court briefs or takes up their arguments; (2) how it frames the relationship between civil and religious marriage and issues of religious freedom; and (3) whether it illustrates any strategies for peacemaking in the face of conflict. The opinion itself is lengthy and a full explication is beyond the aims of this paper. Thus, this final section will be a focused, rather than exhaustive, look at the Court’s analysis.
The Court makes one reference to the amicus briefs filed by religious groups. In a footnote, it acknowledges that it has “received 45 extensively-researched and well-written amicus curiae briefs,” filed on behalf of state legislators, large cities in California, and “scores of organizations, including a variety of commercial, religious, and mental health groups, bar associations, and law professors,” and that it “has benefited from the considerable assistance” provided by these briefs “in analyzing the significant issues presented by this case.” It states: “The religious groups, like some of the others, are divided in their support of the respective parties in this proceeding.”

Thus, if nothing else, the UUA et al amicus brief in support of marriage equality succeeded in its aim of challenging a supposed consensus among religious organizations in favor of the one man-one woman definition of marriage. Thus, the religion briefs, read together, revealed conflict over, or a lack of consensus about, the issue of allowing same-sex couples to enter into civil marriage.

But is that conflict among religious groups of constitutional relevance for the Court? Not really. The Court explains that civil marriage, not religious marriage, is the issue before it. After examining the relevant California law, which confirms that “from the beginning of California’s statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman,” the Court adds this footnote: “From the state’s inception, California law has treated the legal institution of civil marriage as distinct from religious marriage.” In support, it quotes the provision of California’s Constitution of 1849 also cited by the UUA amici brief as one of the
“bedrock” constitutional principles concerning marriage and now codified in its Family Code: “No contract of marriage, if otherwise duly made, shall be invalidated by want of conformity to the requirements of any religious sect.”

The relationship between religious and civil marriage makes one more appearance in the Court’s opinion, and here we see parallels to the argument made in the UUA brief. After concluding that the state has not shown a compelling state interest, for equal protection purposes, in excluding same-sex couples from access to marriage, the Court lists a number of consequences that will not follow from extending such access to same-sex couples. It rejects the argument that opening up civil marriage will somehow alter “the substantive nature of the legal institution of marriage.” It further states:

Finally, affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.” (In support, the Court cites to California’s constitutional protection of freedom of religion.)

This insistence that allowing same-sex couples access to the designation of marriage will neither harm the institution of civil marriage nor infringe upon religious liberty is an implicit rejection of arguments made by amici Church of Jesus Christ of Latter-Day Saints and others about the importance of maintaining a supposed
congruence or harmony between civil and religious understandings of marriage and the dangers to society and to the institution of marriage from upsetting that harmony.

These, in the Court’s lengthy opinion, are the few explicit references to religious groups’ stances about marriage and to the relationship between civil and religious marriage. Religion most frequently appears in the Court’s opinion when it includes sexual orientation and religion as forbidden bases of discrimination under California law and describes the “pernicious and sustained hostility” and “immediate and severe opprobrium” suffered by homosexuals as comparable to that experienced by racial and religious minorities.¹³⁸

Nonetheless, some of the arguments made by religious amici – as well as by other parties – do receive extensive attention. I note two here: the role of channeling and of rights versus tradition and policy. First, on the one hand, the Court rejects an appeal to the channeling function of family law and marriage’s supposed procreative purpose as reasons to exclude same-sex couples. These, as we saw, featured prominently in the amici brief in support of California. The Court points out how California family law already accords gay men and lesbian parental rights and responsibilities, not only through domestic partnership law but also through adoption law, child support law, and the like. On the other, the Court does acknowledge the many individual and societal goods that marriage advances, but argues that bringing same-sex couples into marriage’s protective umbrella can secure, rather than hinder, those
goods. Sandel would find here, I submit, a blend of rights and goods arguments, for example, marriage matters because families are intermediate institutions that transmit values and families are sites that shape our sense of moral and civic duty.

Second, the Court emphasizes that access to civil marriage is a matter of constitutional rights. Thus, it is not a question to be answered as a matter of policy (contra the Latter-Day Saints brief argument) nor by “tradition.” Like the UUA brief, the Court relies heavily on Perez to show that history and tradition alone are not sufficient to justify a discriminatory practice.

If we characterized the peace-making strategy in the Court's opinion, it would be to reassure that extending civil marriage to same-sex couples will not harm the institution of civil marriage or the opposite-sex couples who already enter into it. Nor will it harm such couples’ children. Nor will it impinge upon religious freedom, given that California, since statehood, distinguishes civil and religious marriage. Thus, the fact that religious groups disagree about marriage equality indicates conflict about the issue, but it is not a conflict the court must resolve. As noted above, the fact that religious clergy need not perform marriage ceremonies that violate their religious beliefs might seem to be a form of peacemaking built into California’s – and the federal – constitutional structure. However, subsequent developments in California demonstrate that such a peacemaking strategy was not sufficient. As I will explore in the next phase of this project (my paper for the 2011-2012 Religion Fellows program), In re Marriage Cases
was just one act in a longer, and ongoing, drama in California over civil marriage. The role of religious groups in mobilizing to nullify *In re Marriage Cases* at the polls and to stop same-sex marriage in California, through Proposition 8, is the next act in that drama. A further act is the subsequent successful federal challenge, by same-sex couples, to Prop 8 under the U.S. constitution. (Whether this will be the final act depends upon whether the U.S. Supreme Court will review the 9th Circuit’s affirmation of the district court.) The role of moral disapproval – and fear of homosexuals and same-sex marriage – as a basis for Prop 8 proved to be a central issue in that trial, in the district court’s ruling, and in the 9th Circuit’s affirmation. In this next stage of the conflict, religious groups, as I will elaborate in further work, again weighed in on both sides of the issue in court. Cries that these rulings threaten religious liberty and banish religious voices from the public square emanate from many of the amici who submitted arguments in defense of California’s marriage law in *In re Marriage Cases* and in the subsequent federal litigation. So too, religious groups who support marriage equality added their voices to that litigation and spoke out in support of those rulings.

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*I prepared this working paper while a Faculty Fellow during the 2010-2011 Religion Fellows Program, while the theme was “Religion, Conflict, and Peacemaking.”*

2 *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).
4 *Marriage Cases*, 183 P.3d at 451 (“[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.”); *Varnum*, 763 N.W.2d at 904-05 (“Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.”); *Goodridge*, 798 N.E.2d at 948 (“Our concern is with
the Massachusetts Constitution as a charter of governance for every person properly within its reach.


6 D.C. CODE § 46-406 (2011) (“No priest, imam, rabbi, minister, or other official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage.”); N.H. REV. STAT. ANN. § 457:37 (2010) (“Each religious organization, association, or society has exclusive control over its own religious doctrine, policy, teachings, and beliefs regarding who may marry within their faith.”); N.Y Bill No. A8354 (2011), available at http://public.leginfo.state.ny.us/menugetfcgi (“Provided that no clergyman or minister as defined in Section Two of the religious corporations law, or society for ethical culture leader shall be required to solemnize any marriage when acting in his or her capacity under this subdivision.”); VT. STAT. ANN. tit. 18, § 5144 (2010) (“This section does not require a member of the clergy authorized to solemnize a marriage as set forth in subsection (a) of this section, nor societies of Friends or Quakers, the Christadelphian Ecclesia, or the Baha’i Faith to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action.”).


8 183 P.3d 384 (Cal. 2008), nullified in part by Proposition 8. For the successful challenge to Proposition 8, see Perry v. Schwarzenegger, 704. F. Supp. 2d 921 (N.D. Cal. 2010), affirmed sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). These further developments are the subject of my working paper for the 2011-2012 Religion Fellows program.

9 As noted above, I continue this project in my paper for the 2011-2012 Religion Fellows program. I elaborate this larger project in JAMES E. FLEMING AND LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (Harvard University Press, 2012).


11 Robert George, Timothy George & Chuck Colson, Manhattan Declaration: A Call of Christian Conscience, MANHATTANDECLARATION.ORG (Nov. 20, 2009), http://manhattandeclaration.org/pdfs/ManhattanDeclaration.pdf [hereinafter Manhattan Declaration].

12 Id. at 4.

13 Id.

14 Id. at 5-6

15 Id. at 7.

16 See Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 479 (Conn. 2008) (“Furthermore, discrimination against one group also cannot be justified merely because the legislature prefers another group.”); Varnum, 763 N.W.2d at 901 (“Consequently, a classification that limits civil marriage to opposite-sex couples is simply not substantially related to the objective of promoting the optimal environment to raise children. This conclusion suggests stereotype and prejudice, or
some other unarticulated reason, could be present to explain the real objectives of the statute.”); 
Goodridge, 798 N.E.2d at 968 (“The absence of any reasonable relationship between, on the one 
hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, 
on the other, protection of public health, safety, or general welfare, suggests that the marriage 
restriction is rooted in persistent prejudices against persons who are (or who are believed to be) 
homosexual.”).

17 Id.
18 Id.
19 Id.
20 Id.
21 Id. at 1.
22 Id.
23 Id. at 8-9.
24 Id. at 9.
25 See Most Rev. William E. Lori, Address on Religious Liberty, Nov. 2011, 
http://usccb.org/.../archbishop-lori-religious-liberty-november-2011-address.cfm; Joan Frawley 
Desmond, Bishops Fight Threats to Religious Liberty, NATIONAL CATHOLIC REGISTER, Oct. 17, 
26 SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et 
al. eds. 2008).
27 Marc D. Stern, Same-Sex Marriage and the Churches, in SAME-SEX MARRIAGE AND 
28 In re Marriage Cases.
29 Id. at 401-02.
30 CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized 
in California.”); see Goodwin Liu, The Law and Prop. 8, L.A. TIMES, Nov. 10, 2008, 
Brown, 671 F.3d 1052 (9th Cir. 2012).
32 Id. at 927.
33 See Linda C. McClain, Civil Marriage, “Moral Disapproval,” and Tensions Between Religious 
34 See, e.g., Linda C. McClain & James E. Fleming, Respecting Freedom and Cultivating Virtues 
35 Id. at 1325-27.
37 Id. at 248-49.
38 Id. at 250 (quoting Obama, “Call to Renewal Keynote Address”).
39 Id. at 251.
41 Application for Permission to File Amici Curiae Brief and Amici Curiae Brief of the Church 
of Jesus Christ of Latter-Day Saints et al. in Support of Respondent State of California, In re 
http://www.courts.ca.gov/documents/calcathconfamicus.pdf. [hereinafter: Brief for Church of 
Jesus Christ of Latter-Day Saints et al.] The brief is listed at In Re Marriage Cases, 183 P.3d at 
60
389. Many other religious groups filed friend of the court briefs in support of California’s defense of its marriage law, but I picked this one because of the prominence of the denominations represented and their prominent role in opposing same-sex marriage.

42 Brief for Church of Jesus Christ of Latter-Day Saints et al., at 3.

43 Id. at 3 n.1.

44 Id. at 43-44.


47 Id. at 114-19.

48 Brief for Church of Jesus Christ of Latter-Day Saints et al., supra note 41, at 44.

49 Id. at 318-319 (giving examples of tensions between civil and religious law concerning gender equality).


51 Id. at 318-319 (giving examples of tensions between civil and religious law concerning gender equality).

52 Brief for Church of Jesus Christ of Latter-day Saints et al., at 7-8 (citing DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 91 (2007); WILLIAM J. DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 8-9 (2d ed. 2002) (“Marriage exists in virtually every known human society. . . . As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . .”)).

53 Id. at 9.


55 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. And George Lawrence, trans.) (1969), at 590, 592, 600-603.

56 Brief of the Church of Jesus Christ of Latter-Day Saints, at 9.

57 See JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997).

58 381 U.S. 479 (1965).


61 Brief for Church of Jesus Christ of Latter-Day Saints et al., supra note 41, at 9.

62 Id.

63 COTT, PUBLIC VOWS.


66 Brief for Church of Jesus Christ of Latter-Day Saints et al., at 9.

67 Id. at 40.

68 Id. at 24-25.
69 See In re Marriage Cases, 183 P.3d at 398-99 (“It also is important to understand at the outset that our task in this proceeding is not to decide whether we believe, as a matter of policy, that the officially recognized relationship of a same-sex couple should be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships violates the California Constitution.”).

70 Brief for Church of Jesus Christ of Latter-Day Saints et al., at 26-27.


72 Brief for Church of Jesus Christ of Latter-Day Saints et al., at 26.


74 See In re Marriage Cases, 183 P.3d at 393-397 (listing all the parties to the brief).

75 See id. at 388-397 (listing all the friend of the court briefs filed and the signatories to each brief).


77 Id. at 10.

78 Id. at 11.

79 Id. at xii.

80 Id. at xiii.

81 Id. at xvi.

82 Id. at xviii.

83 Id. at xxii.

84 Id. at xxiv.

85 Id. at xxv.

86 Id. at xxxvi.

87 Id. at 1.

88 Id. at 2.

89 Id. at 3.

90 Id. at 3-7.

91 Id. at 7-9.

92 Id. at 10.

93 Id. at x.

94 Id. at 2.

95 Id. at 2-3.

96 Id. at ix.

97 Id. at x.

98 Id. at 11-12.

99 Id. at 12-13.

100 Id. at 13-14 (quoting Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003)).

101 Id. at 14 (quoting federal and state cases expressing this idea).
102 Id. at 14.
103 Id. at 15.
104 Id. at 16.
105 Id. at 16-17.
106 Id. at 37-38 (citing California cases applying the Lemon test, set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971)).
107 Id. at 17 (quoting __).  
108 Id. at 18-19.
109 Id. at 17.
110 Id. at 19-20.
113 Brief of UUA at el for Marriage Equality, at 20 n. 10.
114 Id. at 21-22.
115 Id. at 22-23 (emphasis in brief).
116 Id. at 23-24 (citing Romer v. Evans, 517 U.S. 620 (1996); Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).
117 Contrast, for example, the majority and dissenting opinions in Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), where the 9th Circuit affirmed, on narrow grounds, the lower court ruling (in Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)) that Prop 8 violated the federal constitution.
118 See Mark D. Jordan, Recruiting Young Love (2011), at 129-149.
119 Brief of UUA at el for Marriage Equality, at 28-30.
120 Id. at 31.
121 Id. at 36.
122 Id. at 38-39.
123 Id. at 39 and n. 17 (quoting Justice O’Connor’s concurrence in McCreary County v. American Civil Lib. Union of Ky., 545 U.S. 844, 884 (2005)).
124 Id. at 7.
125 Id. at 41.
126 Id. at 40.
127 Id. at 43-44 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).
128 Id. at 45-46.
129 Id. at 46-47.
130 Id. at 11 n.6.
131 Brief of UUA et al for Marriage Equality, at 48 (quoting State Attorney General).
132 Id. at 49.
133 Id. at 49.
134 Id. at 52 (quoting Fox v. City of Los Angeles, 587 P.2d 663, 670 (1978) (Bird, C.J., concurring)).
135 In re Marriage Cases, 183 P.3d at 407 n.10.
136 Id. at 407 & 407 n. 11 (quoting Article IX, section 12 of 1849 Constitution, now codified in Family Code section 420, subdivision ( c)).
137 183 P.3d at 451-452.
For an elaboration, see Fleming and McClain, Ordered Liberty, chap. 7.

In re Marriage Cases, 183 P.3d at 422, 423 n. 36, 424 n. 38.

The concurring and dissenting opinion by Justice Baxter is more sympathetic to the types of arguments advanced by religious amici in defense of California’s marriage law. For example, Baxter charges the majority with ignoring the “universally understood definition of marriage,” citing not to amici but to various dictionaries. In re Marriage Cases, 183 P. 3d at 460 and n. 6. Baxter also faults the court for resolving the matter as one of rights, despite the absence of any deeply rooted right to same-sex marriage, instead of leaving it to the realm of the legislature. It does not read Perez as requiring the majority’s holding, since that case did not alter the definition of marriage. Id. at 462-463.