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# A MIDDLE-GROUND TREATISE ON SAME-GENDER AND RELIGIOUS MARRIAGE

*J. Braden Fraser*<sup>1</sup>

As proponents of same-sex marriage grow increasingly vocal in their appeal for equal rights and social status, they seem increasingly at odds with the religious communities who hold that only marriage between a man and a woman should be legally recognized. In return, these religious groups express concern about maintaining their religious freedoms. While the interests of these two groups are both important, many solutions proposed up to this point only serve the apparently irreconcilable interests of one group or the other.<sup>2</sup>

In the course of this review I will highlight some important aspects of the current debate and suggest a possible resolution. Section 1 will address the current state of the same-sex marriage debate. Section 2 will focus on the potential economic, religious, and social ramifications of legalizing same-sex marriage. In light of these potential ramifications, Section 3 will highlight the system used by other countries, namely legalizing only those marriages solemnized by a government authority. In addition, it will propose a solution which may satisfy both same-sex and traditional marriage advocates based on the models of these other countries. I propose that, to resolve this issue, states should separate civil marriage ceremonies from religious marriage ceremonies. This will allow state govern-

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1 J. Braden Fraser is a senior majoring in philosophy, and he graduates in April 2012. Upon graduation, he plans to start working in Seattle before pursuing a Masters of Business Administration degree. Braden would like to thank his editors Andres Gonzalez, Whitney Evans, Brandon Christensen, Katherine Dew Rhodes, and Raleigh Williams for all the time they put in to make this paper a reality.

2 See Lou Dematteis, *Same Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, Feb. 24, 2012, [http://topics.nytimes.com/top/reference/timestopics/subjects/s/same\\_sex\\_marriage/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html).

ments to decide who can be joined civilly, which will likely lead to the legalization of same-sex marriage across the nation. It will also separate civil and religious marriage, thus protecting religious institutions from the economic and legal consequences that would follow the legalization of same-sex marriage.

## I. Background

### *A. Is Same-Sex Marriage On the Rise?*

Currently seven states and Washington, D.C. have legalized same-sex marriage.<sup>3</sup> Proposition 8, which was added to the California Constitution in 2008, is under national scrutiny for stipulating that heterosexual marriages are the only marriages recognized in California.<sup>4</sup> Proposition 8 was a 2008 ballot initiative in which the people of California voted to add the phrase, “Only marriage between a man and a woman is valid or recognized in California,” to the state constitution.<sup>5</sup> Supporters of Proposition 8 were concerned about maintaining the traditional definition of marriage, and, while not all of them oppose same-sex couples living together, they maintain that same-sex marriage advocates should not be allowed to force their views of marriage on those who oppose calling same-sex unions “marriage.”<sup>6</sup> *Perry v. Schwarzenegger*, the lawsuit filed against California in response to Proposition 8, appeared before the U.S. District Court of Appeals in February of 2012, confirming an earlier decision by the California Supreme Court that overturned Proposition 8.<sup>7</sup> The *Perry* case could potentially go before the Supreme Court sometime in the next year, so California could soon be added to the list of

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3 *See Id.*

4 *See Id.*

5 CAL. CONST. art. I, § 7.5.

6 *See Ballot Arguments*, PROTECT MARRIAGE, (Feb. 21, 2012), <http://www.protectmarriage.com/about/ballot-arguments>.

7 *See Prop. 8 Defenders Appeal to Full 9th Circuit*, ALLIANCE DEFENSE FUND (Feb. 21, 2012), <http://adfmedia.org/News/PRDetail/3618?AspxAutoDetectCookieSupport=1>.

states in which same-sex marriage is legal. According to available poll data, the nation is split on whether same-sex marriage should be legalized, but sixty percent of those questioned in a recent poll fall in the combined category of believing same-sex marriage should be legalized or believing same-sex couples should be granted civil unions.<sup>8</sup> It is possible that opinions on this issue, which seemed to be dominated by those opposed to such unions, may eventually shift sufficiently to allow same-sex couples equal opportunity to marry or enter into civil unions.

With this possibility in mind, religious institutions and other entities opposed to such unions must consider the effect legalizing same-sex marriage will have on their organizations. These institutions will likely be affected socially, religiously, and economically. Social issues revolve primarily around the tension between same-sex marriage advocates and opponents. As this tension is not likely to be resolved even if same-sex couples are allowed to participate in civil unions, I will not address the social issue further. Religiously these institutions face the possibilities of anti-discrimination lawsuits and of being forced to perform same-sex marriages. The primary economic factor which concerns religious institutions is losing their tax exempt status on property. These two categories of potential problems will be addressed in subsequent sections of the paper.

### *B. A State or Federal Issue?*

Currently the power to decide the scope of civil marriage belongs to the states; however, as the interests of traditional marriage and same-sex marriage advocates become more disparate, the federal government may be tempted to interfere. I argue that the right to marry should remain with the states since the purview of marriage is not specifically granted to the federal government in the Constitution, except in cases regarding the interstate recognition of marriages and civil unions. Since same-sex marriage legislation does involve

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8 See *Same-sex Marriage*, POLLINGREPORT.COM, (Feb. 21, 2012) <http://www.pollingreport.com>; see generally *The Decline Of Marriage and Rise of New Families*, PEW RESEARCH CENTER (NOV. 18, 2010), <http://pewresearch.org/pubs/1802/decline-marriage-rise-new-families>.

federal laws (First Amendment, The Religious Freedom Reformation Act, Fourteenth Amendment, etc.) which are being interpreted on a state level, interstate conflicts are likely to arise, highlighting the need for a neutral third party like the federal government to manage the dispute.

The aforementioned *Perry v. Schwarzenegger* case and other cases that have or will likely arise from this divisive issue may influence the rights of religious institutions to practice their beliefs. This is a Constitutional issue. Thus, while it is important that the power to create laws regarding marriage remains a state issue, the federal government may need to step in and decide whether current and forthcoming state laws are in keeping with the First Amendment. To further this discussion it is important to highlight Proposition 8 and New York Senate Bill A8354, a 2011 bill that legalized same-sex marriage in that state.

## II. Religious Ramifications

The First Amendment protects one of the most essential liberties: religious freedom. In recent history religious groups have called upon this constitutional protection in their push to reserve marriage rights solely between a man and a woman. Some of these religious groups fear that, if same-sex marriage is legalized, those with the ecclesiastical authority to perform traditional marriages will be required to perform same-sex marriages as well.<sup>9</sup> However, this fear is not legally grounded, since government interference in religious activities violates the Free Exercise Clause of the First Amendment, the second of two clauses which compose the right to religious freedom. This clause states, “Congress shall make no law . . . prohibit-

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9 See Interview by David Masci with Ira “Chip” Lupu, F. Elwood and Eleanor Davis Professor of Law, The George Washington University Law School & Robert W. Tuttle, David R. and Sherry Kirschner Berz Research Professor of Law and Religion, The George Washington University Law School (May 21, 2009), available at <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/A-Clash-of-Rights-Gay-Marriage-and-the-Free-Exercise-of-Religion.aspx>.

ing the free exercise [of religion].”<sup>10</sup> A law that prohibits religious institutions from the free exercise of their religion would violate this clause. To establish this we will first examine the Religious Freedom Restoration Act to show what the government must prove in order to require religious institutions to perform these marriages.

According to The Religious Freedom Restoration Act of 1993 (RFRA), “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless government can prove “that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>11</sup> The Supreme Court has not always held the RFRA to be a legitimate test for whether or not something violates the Free Exercise Clause.<sup>12</sup> However, in a 2006 decision the Court used the language of the RFRA to assert that it was illegal for the State of New York to restrict illegal drug use in the religious ceremonies of the O Centro Espirita Benficiente Uniao Do Vegetal church.<sup>13</sup> In *Gonzales v. O Centro Espirita Benficiente Uniao Do Vegetal (O Centro)*, the Supreme Court held that it is illegal to unduly burden religious institutions in cases where government officials cannot establish both that the burden furthers a compelling government interest and that it does so in the least restrictive way possible.<sup>14</sup> Therefore, even if the Supreme Court considers the RFRA to be unconstitutional, they still hold that the language of the bill serves as an effective test for compelling government interests.

Prior to the passage of New York Senate Bill A8354 in July of 2011, Republican state senators urged Governor Andrew Cuomo to include broader protections for religious institutions. The legis-

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10 U.S. CONST. amend. I.

11 See Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (1993) (repealed 1997).

12 See *City of Boerne v. Flores*, 521 U.S. OYEZ 507 (1996).

13 See *Gonzales v. O Centro Beneficente Uniao Do Vegetal*, 546 U.S. OYEZ, 423-429 (2006).

14 *Id.* at 1.

lation had originally included exemptions for religious institutions and private charitable organizations to “provide accommodations, advantages, facilities or privileges related to the solemnization or celebration of a marriage.”<sup>15</sup> Furthermore, the bill stated that the refusal of religious groups to perform these ceremonies “would not result in any state or local government action to penalize, withhold benefits, or discriminate against such religious corporation . . . .”<sup>16</sup> However, stipulations such as these are already granted to religious entities under the Free Exercise Clause of the First Amendment. In light of similar First Amendment issues, the *compelling interest* doctrine emerged in the Supreme Court in the early 1960s.<sup>17</sup> This doctrine requires states to have a convincing reason for enacting laws that infringe on religious conduct.<sup>18</sup> For example, in *Employment Division v. Smith*, the Supreme Court ruled against the religious use of peyote, claiming that the Oregon law against peyote is a “neutral law of general applicability,” and therefore does not violate the First Amendment.<sup>19</sup> In addition, the Court prohibited “mak[ing] the professed doctrines of religious belief superior to the law of the land.”<sup>20</sup>

Although cases such as this have led to an increasingly narrow interpretation of the compelling interest doctrine, legalizing same-sex marriage directly relates to religious marriage, and attempting to require religious organizations to perform these marriages would therefore be in violation of the Free Exercise Clause. A recently decided Supreme Court case, *Hosanna-Tabor v. EEOC*, further reinforces the protections offered to religious organizations as established in the Free Exercise Clause.<sup>21</sup> This case involved a woman who was fired from a private religious university. Claiming discrim-

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15 S.B. A8354, 2011 Leg., 234th Sess. (N.Y. 2011).

16 *See Id.*

17 *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356 (2006).

18 *See Id.*

19 *See* *Employment Division v. Smith*, 494 U.S. 872 (1990).

20 *See Id.*

21 *See* *Hosanna-Tabor v. EEOC*, 565 U.S. 1 (2012).

ination, this woman appealed to the government,<sup>22</sup> and the case was recently heard by the Supreme Court. *Hosanna-Tabor* established a precedent for the ability of the government to interfere in religious matters.<sup>23</sup> It is obvious that the Federal Government will remain reticent to infringe on religious institutions' right to autonomy in hiring and firing ministers and other employees in accordance with their religious beliefs.

### III. Economic Ramifications

Legalizing gay marriage also carries a potential economic burden on religious institutions, including potential court costs and losing tax-exempt status. In his review *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, Roger Severino, legal counsel for the Becket Fund, makes note of the looming vulnerabilities religious institutions face.<sup>24</sup> Although religious exemptions exist to prevent lawsuits aimed at religious institutions who refuse to perform same-sex marriages, "a separate question, however, is whether governments must provide equal funding and access to programs to otherwise 'discriminatory' religious organizations."<sup>25</sup> State and federal anti-discrimination laws may serve as rational grounds for the dissolution of government association and subsequent assistance to these institutions if they do not comply with marrying same-sex couples. Since these religious and charitable groups would be operating in contrast to public policy, governments may be inclined to cancel funding and tax-exemption—critical for many faith-based organizations which rely upon these funds to adequately perform charitable services—on grounds of discrimination against same-sex couples.<sup>26</sup>

As stated by the California Supreme Court in 2008, "affording same-sex couples the opportunity to obtain the designation of

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22 *See Id.*

23 *See Id.*

24 *See* Roger Severino, Note, *Or For Poorer? How Same-sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007).

25 *See id.* at 972

26 *See In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008)



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 . . . .”<sup>27</sup> Furthermore, supreme courts in other states have also affirmed that the legalization of same-sex marriage would place no bearing or limits on the religious liberties of those who oppose it. Fredric J. Bold of the University of Pennsylvania Law Review argues that “there are a host of areas in which conflict seems likely: violations of anti-discrimination law in public accommodations, employment, housing, education, or charitable services; loss of tax-exempt status for violating public policy; and violation of hate-crime laws.”<sup>28</sup> Legislation may continue to assure protection from the compelled performance of these marriages, but religious organizations remain vulnerable to the other facets of federal and state law.<sup>29</sup> With increased public approval of same-sex marriage, it is reasonable to believe that “religious actors and institutions do face the prospect of losing tax-exempt status or other government privileges as a result of their advocacy against same-sex marriage or their desire to avoid the appearance of its endorsement by forced association with the practice.”<sup>30</sup>

The loss of an organization’s tax-exemption would truly become a substantial threat due to several stipulations within the Internal Revenue Code.<sup>31</sup> This code is comprised of Federal statutory tax law that covers domestic tax areas such as income tax and gift taxes. In accordance with section 170 and section 501 (c) (3) of the Internal Revenue Code, tax-exempt organizations must not engage in any activity contrary to settled “public policy.”<sup>32</sup> Shifting political tides

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27 *See id.*

28 *See* Fredric J. Bold, Note, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179, 186 (2009).

29 Severino, *supra* note 23, at 943.

30 Bold, *supra* note 27, at 199.

31 *See id.* at 201.

32 *See id.*

indicate the inevitability of same-sex marriage becoming legalized throughout the nation, effectively making it public policy. Religious institutions that refuse to perform these marriages will face conflict as they operate in defiance of public government policy. This issue is similar in scope to that of religious adoption agencies like the Catholic Charities. The State of Illinois requires Catholic Charities and other adoption agencies to consider same-sex couples when deciding where to place foster children.<sup>33</sup> If these groups fail to comply, the State Government is authorized to reduce the amount of state funding they receive.<sup>34</sup> This is particularly a concern for religious institutions because their extensive tax-exempt holdings could be at stake if current trends regarding same-sex marriage continue.<sup>35</sup> Along with this, religious institutions face the potential withdrawal of funding from state and federal governments on grounds of discrimination; state and federal anti-discrimination laws would serve as rational grounds for the dissolution of government association and subsequent assistance to these institutions.<sup>36</sup> Since these religious and charitable groups would be operating contrary to public policy by not performing same-sex marriages if these unions were pronounced legal, governments may be inclined to cancel funding and critical tax exemptions that faith-based organizations rely upon to adequately perform charitable services.<sup>37</sup>

This action could have a significant impact on the charitable arms of these religious institutions and the lives of those whom these organizations help. The Catholic Church is one such institution that would be negatively affected by such action. Catholic Charities USA funds many disaster relief efforts and poverty campaigns across the nation. According to “Catholic Charities: At A Glance,” a sta-

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33 See Laurie Goldstein, *Bishops Say Rules on Gay Parents Limits Freedom of Religion*, N.Y. TIMES (December 28, 2011), <http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?pagewanted=all>.

34 See *id.*

35 Bold, *supra* note 27, at 199.

36 Severino, *supra* note 23, at 943.

37 Severino, *supra* note 23, at 943; Bold, *supra* note 27, 199.

tistical analysis produced by Catholic Charities USA in 2009, the organization “provided help and created hope for 9,164,981 (unduplicated) people regardless of their religious, social or economic backgrounds.”<sup>38</sup> If the tax-exempt status of these organizations were revoked for their stance against same-sex marriage, it could significantly affect the service-oriented branches of these religious institutions and others like them.

#### IV. Separating Civil and Religious Marriages

As the movement for same-sex marriage progresses and the norms of anti-discrimination laws broaden, society must ask how a pluralistic society can “commit to both equality and tolerance of religious differences.”<sup>39</sup> Past social movements for racial and gender equality led to the creation of civil rights laws and government authority to enforce them.<sup>40</sup> Proponents of marriage equality have pursued this legislation on similar premises and have subsequently encountered mixed reactions from a government that constantly struggles to balance their interests with those of religious groups.<sup>41</sup> As Minow argues, “the protection of religious freedom is itself a civil right, and working out room for both religious freedom and freedom from discrimination should motivate government officials and advocates who care about civil rights, restrained government, and respect across differences.”<sup>42</sup>

In light of these issues I propose that every marriage be preceded by a civil union and that the state governments be given exclusive control over such unions. To explain why my proposal is relevant I will discuss again *Hosanna-Tabor v. EEOC*. As stated previously, this case involves a woman who was fired from a private religious

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38 CATHOLIC CHARITIES, CATHOLIC CHARITIES: AT A GLANCE 1, available at <http://www.catholiccharitiesusa.org/page.aspx?pid=1308> (2009).

39 Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?* 48 B.C. L. REV. 781, 783 (2007).

40 *See id.*

41 *See id.*

42 Minow, *supra* note 38, at 815.

university. Claiming discrimination, she appealed to the government. As a friend-of-the-court brief stated, filed in defense of the religious institution involved, “The reason for the church’s decision is beside the point. The point is that under our constitutional structure, *who* decides the question is determinative, not *what* is decided or *why*.”<sup>43</sup> The Supreme Court’s recent decision matches the sentiments of the friend-of-the-court brief by asserting that while deciding how to meet the frequently conflicting demands of the Establishment and Free-Exercise Clauses of the First Amendment, “both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”<sup>44</sup> This supports the claim that the federal government is continuing to ensure that religious organizations maintain their autonomy. However, to create additional protections for these institutions regarding their decisions on who to marry, the powers to solemnize civil and religious marriage ceremonies should be separated. I will now discuss similar systems in other countries which may highlight why adopting such a system is a viable option.

### *A. Examples Outside the United States*

It’s important to examine the satisfaction of both same-sex and religious groups in the countries that have separated civil and religious marriages so that we can speculate how effectively this policy will solve our current problems. Germany has allowed registered partnerships for same-sex couples since 2001.<sup>45</sup> Although registered partnerships give same-sex couples equality in inheritance, alimony, health insurance, immigration, and name change, they do not grant same-sex couples tax benefits.<sup>46</sup> As a result, the people of Germany are calling for a change to the current policy. The majority of Ger-

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43 Brief for Petitioner at 4, *Hosanna-Tabor v. EEOC*, 565 U.S. 1 (2012) (No. 10-553).

44 *Hosanna-Tabor v. EEOC*, 565 U.S. 1 (2012).

45 See Paul Canning, *Gay Marriage in Germany and France?*, Care2.com (Mar. 16, 2012), <http://www.care2.com/causes/gay-marriage-in-germany-and-france.html>.

46 See *id.*

mans favor marriage equality, and a marriage equality bill has been introduced to the German legislature to change the policy and allow marriage for same-sex couples.<sup>47</sup>

Brazil is another country that requires civil processes for marriage. While a couple can have a religious marriage, they are not considered legally binding.<sup>48</sup> A civil marriage must be performed in order for the marriage to be recognized by law. In May of 2011, Brazil's Supreme Court voted unanimously to recognize civil unions.<sup>49</sup> Although civil unions give same-sex couples all of the same 112 rights given to straight married couples, same-sex couples in Brazil are fighting for marriage.<sup>50</sup> In June 2011, a Brazilian state judge decided to uphold a same-sex marriage, based upon the Supreme Court's May decision, the Brazilian Constitution's objective of "promot[ing] the good of everyone," and provisions in the Constitution that allow the conversion of a civil union to a marriage.<sup>51</sup> It is obvious, then, that Brazil's homosexual couples want more than just civil unions, but that they are not trying to force religious institutions to perform marriages for them. While gay couples still want more rights, the separation of civil and religious marriages seems to have alleviated the tension between religious and gay groups. Perhaps with similar policies in the United States, conflicts between religious and gay communities will dissipate.

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47 *See id.*

48 U.S. Diplomatic Mission to Brazil, *Information Regarding Marriage in Brazil*, U.S. Embassy to Brazil, (Mar. 16, 2012), <http://brazil.usembassy.gov/marriage-info.html>.

49 Taylor Barnes, *Brazil becomes largest nation yet to legalize civil unions*, THE CHRISTIAN SCIENCE MONITOR, (Mar. 16, 2012), <http://www.csmonitor.com/World/Americas/2011/0506/Brazil-becomes-largest-nation-yet-to-legalize-civil-unions>.

50 Gustavo Gantois, *Casos gays conquistam 112 direitos com decisão do STF*, R7 Notícias, (Mar. 16, 2012), <http://noticias.r7.com/brasil/noticias/supremo-tribunal-federal-reconhece-uniao-estavel-gay-20110506.html>.

51 Steve Williams, *Brazilian Judge Oks Gay Civil Union to Become Marriage*, Care2.com, (Mar. 16, 2012), <http://www.care2.com/causes/brazilian-judge-oks-gay-civil-union-to-become-marriage.html>.

Laws such as these may quell tensions that arise when religious beliefs conflict with the laws of the state. In accordance with the Establishment Clause of the Constitution, the ability of the government to establish a religion by law was denied.<sup>52</sup> Furthermore, cases that followed set precedents for the distinct separation between church and state affairs. The landmark decision in the 1962 Supreme Court case of *Engel v. Vitale* was based on the conclusions that “the Establishment Clause’s first and immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”<sup>53</sup> My solution, modeled after systems found both in Europe and South America, would truly allow moral and religious-based arguments to “continue to apply with full force on religious marriage, but no longer carry such great weight in the argument over who is entitled to civil marriage.”<sup>54</sup> While recognizing the limitations in resolving the entire issue at hand, this solution would provide benefits to both sides as the religious sacrament of marriage would be “preserved in whatever form a particular sect deems holy” and same-sex partners would be able to be married.<sup>55</sup>

### *B. Adopting a Similar System*

In an opinion piece in the New York Times in 2009, David Blankenhorn and Jonathan Rauch asserted that to find a common ground in this issue the Federal Government needs to take action and legalize same-sex civil unions while strongly maintaining the freedoms of religious institutions to not condone or perform such marriages.<sup>56</sup> If states do choose to separate religious and civil unions, the Federal Government would not need to become involved in this issue. Under

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52 U.S. CONST. amend. I.

53 Hobson, *supra* note 46, at 21.

54 Hobson, *supra* note 46, at 25.

55 Amelia A. Miller *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2215 (2005).

56 David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK 11.

this system, individuals would be required to marry civilly under state authority and would then be able to participate in religious marriage ceremonies as long as they meet the requirements set by the particular religious institution through which the desired additional ceremony would be performed. Thus, religious institutions will be free to perform religious marriage ceremonies as they see fit. This would allow them to continue to set reasonable requirements on such ceremonies, separating such practices from the legal process.

The exclusive right to perform civil marriages should be given to state governments, rather than federal, in order to limit federal government regulation and preserve state autonomy in this sensitive issue. The Tenth Amendment to the Constitution states “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>57</sup> Marriage is not a right delegated to the United States through the Constitution; therefore, it must belong either to the States or to the people. Currently it is in the jurisdiction of the States to decide how to regulate marriage and as a result, some states have already legalized same-sex marriage.

Allowing state governments to exercise exclusive marriage rights may benefit society. It seems that if state governments remain responsible for performing marriages, many states will move in the direction of legalizing same-sex marriage. However, religious institutions would not need to fear being forced to perform ceremonies for same-sex couples because the government would lack a compelling interest to interfere in those ceremonies. This option would represent a compromise which would allow both sides to have most of what they want. Supporters of same-sex marriage would have their marriage, and government would not interfere in the religious ceremonies of institutions opposed to the practice.

One possible contention against allowing the federal and state governments to have exclusive marriage rights is that this may not appease same-sex marriage advocates as it is intended to. Should we believe these advocates would be appeased by the state government legalizing same-sex marriages? It is reasonable to suppose that this

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57 U.S. CONST. amend. X.

might not stop them from trying to force religious institutions to perform religious ceremonies for same-sex couples. People who support this assertion might say that the problem with granting same-sex couples the right to marry is that the social momentum by which same-sex marriages became legal would then become active in pursuing laws that would require religions to accommodate same-sex couples in religious ceremonies. However, I do not believe that such a situation necessarily follows from granting government the right to perform marriages.

Another objection may be that taking the right to solemnize civil marriages from religious institutions would remove a right that religious institutions originated and would present it to those who are antagonistic to their views. This is not the case. In granting government the exclusive right to perform civil marriages, religious institutions would be placing that right in the power of an institution entrusted with the protection of their religious rights as well as the rights of same-sex marriage advocates.

## V. Conclusion

I suggest that state governments seriously consider this option as a means of appeasing some of the demands of those on both sides of the same-sex marriage debate. Although the government would never force religious institutions to perform same-sex marriages, there may be other social and economic ramifications that these institutions should be aware of. Granting government exclusive rights to perform civil marriages may allow an adequate separation between church and state which would mitigate these negative ramifications while serving as a means to appease same-sex marriage advocates. With this policy, religious institutions would also be free to perform their own religious marriage ceremonies as they see fit. This would protect religious institutions and enable a peaceful resolution to the same-sex marriage debate.



