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FROM NONDISCRIMINATION TO CIVIL MARRIAGE

*Elizabeth Burleson**

Denying basic civil rights to any individual denies such rights to everyone. As William Faulkner explained, we must be free not because we claim freedom, but because we practice it. This Article analyzes the continuing constitutional struggle for civil rights on the basis of sexual orientation. This Article engages in comparative constitutionalism and considers the evolution of nondiscrimination measures. This analysis concludes that recognition of constitutional civil rights on the basis of sexual orientation facilitates nondiscrimination and supports equitable relationships and parenting, and recommends that governments and civil society affirmatively recognize and support the civil rights of same-sex families.

INTRODUCTION	384
I. MARRIAGE FOR SAME-SEX COUPLES	386
A. <i>The Constitution State's Analysis of its Constitution</i> ..	386
B. <i>State-based Legal Complexities Beyond Extending</i> <i>Civil Marriage to Same-sex Couples</i>	389
C. <i>Impact of the Federal Defense of Marriage Act</i>	390
D. <i>International Recognition of Civil Marriage</i>	394
II. COMPARATIVE CONSTITUTIONALISM	396
III. EUROPEAN INTEGRATION AND IDENTITY	400
A. <i>European History</i>	401
B. <i>European Identity Based on Human Rights and the</i> <i>Global Impact of this Development</i>	402
IV. THE SEARCH FOR A COMMUNAL IDENTITY	406
V. THE UNITED STATES: RECOGNIZING THE CIVIL RIGHTS OF LGBT PEOPLE	408
VI. STATE NONDISCRIMINATION STATUTES	413
A. <i>Varying Construction of State Statutes</i>	414
B. <i>Anti-Gay Language</i>	416

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VII. BALANCING THE PROTECTION OF GAYS AND LESBIANS VIS	
À VIS THE PROTECTION OF RELIGIOUS FAITH	417
A. <i>Religious Exemptions under Statewide</i>	
<i>Nondiscrimination Statutes</i>	418
B. <i>Religion and the United States Constitution</i>	420
C. <i>Scriptures in Context</i>	422
D. <i>Lessons from Religious Accommodations</i>	426
CONCLUSION	427

INTRODUCTION

Currently, five states allow same-sex couples to marry:¹ Connecticut,² Iowa,³ Massachusetts,⁴ New Hampshire,⁵ and Vermont.⁶ New York recognizes marriages by same-sex couples legally entered into in other jurisdictions.⁷ Five states and the District of Columbia⁸ provide the

¹ See Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, Sept. 1, 2009, at 1, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf [hereinafter Human Rights Campaign, *Marriage Equality*].

² See CON. GEN. STAT. 46b-38bb (2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008) (holding that Connecticut's statutory prohibition against same-sex couples marrying violated substantive due process and equal protection rights guaranteed under the state constitution). See generally Bennett Klein & Daniel Redman, *From Separate To Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. L. REV. 1381 (2009).

³ See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); see also *Iowa Judge Approves Gay Weddings*, BBC NEWS, Aug 31, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6971696.stm> ("The Iowa decision came after six gay couples sued Polk County in 2005 after it refused to give them marriage licences."). See generally Ian C. Bartrum, Commentary, *Same-Sex Marriage in the Heartland: The Case for Legislative Minimalism in Crafting Religious Exemptions*, 108 Mich. L. Rev. First Impressions 8 (2009), <http://www.michiganlawreview.org/assets/fi/108/bartrum.pdf>.

⁴ See MASS. GEN. LAWS ch. 207 (2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that restricting access to the protections and benefits of civil marriage violates the Massachusetts Constitution); see also Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 36 (2009).

⁵ See N.H. REV. STAT. ANN. § 457-1-a (2009); Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19 ("The New Hampshire legislature approved revisions to a same-sex marriage bill on Wednesday, and Gov. John Lynch promptly signed the legislation, making the state the sixth to let gay couples wed.").

⁶ See An Act to Protect Religious Freedom and Promote Equality in Civil Marriage, H.B. 275 (Vt. 2007); *PBS Newshour: Iowa, Vermont Push Gay Marriage Rights Forward* (PBS television broadcast Apr. 8, 2009), available at http://www.pbs.org/newshour/bb/law/jan-june09/gaymarriage_04-08.html [hereinafter *PBS Newshour*] ("Vermont's legislature and the top court of Iowa delivered legal victories in recent weeks to those seeking the right of same-sex couples to marry.").

⁷ See Robin Shulman, *N.Y. to Recognize Other Jurisdictions' Gay Marriages*, WASH. POST, May 30, 2008, at A2.

⁸ See Theo Emery, *Bid to Block Recognition of Unions Fails*, N.Y. TIMES, June 15, 2009, at A13 ("The District of Columbia Board of Elections and Ethics rejected a proposed ballot question intended to block city recognition of same-sex marriages from other places. Last month, the City Council voted 12 to 1 to recognize same-sex marriages from other jurisdictions, a decision widely seen as a prelude to an inevitable vote on legalizing same-sex

equivalent of state-level spousal rights to same-sex couples.⁹ California had been the second state to allow same-sex couples to marry.¹⁰ Yet in November of 2008, after a \$35 million campaign by opponents of same-sex marriage,¹¹ California voters approved Proposition 8 to add the following sentence to the state constitution: "Only marriage between a man and a woman is valid or recognized in California."¹² Proposition 8 renders the California state constitution in conflict with itself, stating that marriage between same-sex couples is illegal while the California Supreme Court has otherwise held that the state constitution's equal protection clause would be violated by a ban on same-sex marriage.¹³ The constitutional struggle for civil rights on the basis of sexual orientation continues.

This Article analyzes constitutional principles regarding the recognition of civil rights on the basis of sexual orientation. Part I addresses civil marriage for same-sex couples, particularly Connecticut's recent expansion of rights under its constitution. This part also addresses the federal Defense of Marriage Act's impact on same-sex couples that marry in Connecticut. Part II engages in comparative constitutionalism, assessing Canada's struggle to be inclusive. Part III analyzes European integration and identity generally, and European citizenship based on human rights in particular. Part IV addresses the evolution of recognizing civil rights on the basis of sexual orientation in the United States, with Part V assessing federal and Part VI analyzing state nondiscrimination measures. Part VII considers minority civil rights protection in light of constitutional provisions addressing religion. This Article concludes that the means are the ends—recognition of constitutional civil rights on the basis of sexual orientation facilitates nondiscrimination and supports equitable relationships and parenting. Governments and civil society should recognize

marriages in the capital. Pastors opposing same-sex marriage sought the citywide referendum in hopes of reversing that decision, but the election board said the referendum was not allowed under the city's 1977 Human Rights Act.").

⁹ See Human Rights Campaign, *Marriage Equality*, *supra* note 1 (listing California, the District of Columbia, Nevada, New Jersey, Oregon, and Washington); see also Nancy J. Knauer, *LGBT Elder Law: Toward Equity In Aging*, 32 HARV. J. L. & GENDER 1, 43 n.275 (2009) ("In 2006, the Supreme Court of New Jersey held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution, but it did not require the state to permit same-sex couples to marry. . . . In response, the New Jersey state legislature enacted the Civil Union Act which extends all the benefits of marriage to same-sex couples who enter a civil union.").

¹⁰ See *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (ruling that sexual orientation is insufficient grounds upon which to preclude or restrict the fundamental right to marry pursuant to the California Constitution); Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. TIMES, June 17, 2008, at A19.

¹¹ See PBS Newshour, *supra* note 6.

¹² CAL. CONST. art. I, § 7.5.

¹³ See *In re Marriage Cases*, 183 P.3d 384.

and support the civil rights of same-sex families. As William Faulkner explained, "We must be free not because we claim freedom, but because we practice it."¹⁴

I. MARRIAGE FOR SAME-SEX COUPLES

A number of states have concluded that restricting civil marriage to heterosexual couples violates same-sex couples' rights to constitutional equal protection under their respective state constitutions.¹⁵ For example, the Connecticut Supreme Court ruled that discrimination against gay and lesbian persons is subject to intermediate scrutiny, which has historically been used to review laws that employ quasi-suspect classifications such as those based on gender.¹⁶

A. *The Constitution State's Analysis of its Constitution*

In 2008, the Connecticut Supreme Court, in *Kerrigan v. Commissioner of Public Health*,¹⁷ ruled that discrimination on the basis of sexual orientation is a quasi-suspect classification under the equal protection provisions of the Connecticut constitution, and thus subject to heightened judicial scrutiny.¹⁸ In 2004, Gay & Lesbian Advocates & Defenders (GLAD), on behalf of eight gay and lesbian Connecticut couples who had been denied marriage licenses, filed suit in *Kerrigan* based upon the equal protection and due process provisions of the Connecticut constitution.¹⁹ While *Kerrigan* was still being litigated, Connecticut passed leg-

¹⁴ WILLIAM FAULKNER, *GO DOWN, MOSES* 255 (Vintage 1990) (1942).

¹⁵ See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that Iowa code Section 595.2, which restricted marriage to heterosexual couples, violated the equal protection provision of the Iowa constitution); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that laws that restrict civil marriage to heterosexual couples violate same-sex couples' state constitutional equal protection rights); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that limitations on protections, benefits, and obligations of civil marriage to opposite sex individuals lacked rational basis and violated state equal protection principles).

¹⁶ See *Kerrigan*, 957 A.2d at 412.

¹⁷ 957 A.2d 407.

¹⁸ See *id.* at 412. The court remanded the case with instructions to grant summary judgment and injunctive relief to the plaintiffs, who were eight same-sex couples denied marriage licenses by the town clerk of Madison, Connecticut. See *id.* at 411. The court noted that "for purposes of determining whether a group is entitled to suspect or quasi-suspect class status—and, in contrast to the considerations of historical discrimination and whether the group's distinguishing characteristic bears on the ability of its members to participate in and contribute to society—immutability is not a requirement, but a factor." *Id.* at 428 n.20 (internal citation omitted).

¹⁹ See *id.* at 412–13; GLAD, *HOW TO GET MARRIED IN CONNECTICUT* 1 (2009), <http://www.glad.org/uploads/docs/publications/how-to-get-married-ct.pdf>.

isolation that allowed same-sex couples to enter into civil unions.²⁰ GLAD argued in *Kerrigan*, however, that this separate scheme was still unequal, in violation of the Connecticut constitution.²¹ The Connecticut Supreme Court agreed with the plaintiffs, and held:

Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.²²

The court continued:

[R]eligious autonomy is not threatened by recognizing the right of same sex couples to marry civilly. Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations. Because, however, marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage.²³

Kerrigan clarified further that extending marriage to same-sex couples does not impact the rights of opposite sex couples: “[R]emoving the barrier to same-sex marriage is no different than the action taken by the United States Supreme Court in *Loving v. Virginia*, when it invalidated laws barring marriage between persons of different races.”²⁴ *Kerrigan* found that “the bigotry and hatred that gay persons have faced are akin to, and, in certain respects, perhaps even more severe than, those

²⁰ See Act Concerning Civil Unions, Pub. Act 05-10, 2005 Conn. Acts 13 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. §§ 46b-38aa to 46b-38pp (West 2009)); see also GLAD, *supra* note 19, at 1.

²¹ See *Kerrigan v. State*, 909 A.2d 89, 90 (Conn. Super. Ct. 2006), *rev'd*, 957 A.2d 407 (Conn. 2008).

²² See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008).

²³ *Id.* at 475.

²⁴ *Id.* at 475–76 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

confronted by some groups that have been accorded heightened judicial protection.”²⁵ The court concluded:

Like the political gains that women had made prior to their recognition as a quasi-suspect class, the political advances that gay persons have attained afford them inadequate protection, standing alone, in view of the deep-seated and pernicious nature of the prejudice and antipathy that they continue to face. Today, moreover, women have far greater political power than gay persons, yet they continue to be accorded status as a quasi-suspect class. . . . We conclude, therefore, that, to the extent that gay persons possess some political power, it does not disqualify them from recognition as a quasi-suspect class under the state constitution in view of the pervasive and invidious discrimination to which they historically have been subjected due to an innate personal characteristic that has absolutely no bearing on their ability to perform in or contribute to society.²⁶

The Connecticut legislature responded and passed the Marriage Codification Bill, which Governor Rell signed into law.²⁷ In addition to

²⁵ *Id.* at 446.

²⁶ *Id.* at 461. The court highlighted the limits of gay persons’ political clout in Connecticut:

[A]lthough the legislature eventually enacted the gay rights law, its enactment was preceded by nearly a decade of numerous, failed attempts at passage. In addition, the bill that did become law provides more limited protection than the proposals that had preceded it, all of which would have added sexual orientation to the existing nondiscrimination laws and would have treated the classification in the same manner as other protected classes. . . . [T]he legislation that ultimately emerged from this process passed only after a compromise was reached that resulted in, inter alia, an unprecedented proviso expressing the position of the legislature that it does not condone homosexuality. Thus, to the extent that those civil rights laws, as well as the civil union law, reflect the fact that gay persons wield a measure of political power, the public policy articulated in § 46a–81r is clear evidence of the limits of that political influence.

Id. at 449–50; *cf. id.* at 477 n.42 (“Although we recognize that Connecticut is a leader in terms of the number of openly gay and lesbian lawmakers elected to the legislature, we view that fact as indicative of the political weakness of gay persons nationwide, and not as indicative of the political strength of gay persons in this state.”); Matt Foreman, *Gay is Good*, 32 NOVA L. REV. 557, 567 (2008) (“[L]ess than one-tenth of one percent (0.08%) of all elected officials in this country are openly LGBT.”).

²⁷ An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, Pub. Act 09-14 (codified at CONN. GEN. STAT. ANN. §§ 17b, 45a, 46a, 46b (West 2009)); *see also* Chase Matthews, *Connecticut Gov. Signs Gay Marriage into Law*, CHI. PRIDE, Apr. 23, 2009, available at <http://www.chicagopride.com/news/article.cfm/articleid/7272400> (“The Marriage Codification Bill, which now redefines marriage in Connecticut as ‘the legal union of two people,’ passed 28-7 in the Senate and 100-44 in the House of Representatives. Previously, the law was defined as the union of a man and a woman.”).

codifying the Connecticut Supreme Court's *Kerrigan* decision, the statute also promulgates that civil unions will convert into marriages on October 1, 2010.²⁸ Currently, Connecticut uses BRIDE/GROOM/SPOUSE on its marriage licenses.²⁹ The Connecticut Department of Public Health explains that

Connecticut General Statutes §§ 46b-21 through 46b-35 govern the requirements for marriage, and shall apply equally to all marriages. Furthermore, same sex couples who were married in Massachusetts will be recognized as married in Connecticut as will those of California during the period in which marriages between same sex couples were legal³⁰

Kerrigan is an important decision, recognizing the civil right to marry and extending this right to same-sex couples. This case provides a model for other jurisdictions to recognize and support the civil rights of same-sex families.

B. *State-based Legal Complexities Beyond Extending Civil Marriage to Same-sex Couples*

In 2002, Connecticut adopted Public Act 02-105, allowing an adult designator to name an adult designee to make certain decisions on his or her behalf, and giving the designee certain rights and responsibilities.³¹ In nursing homes, for example, the designee must receive advance notice

²⁸ See An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples § 12, 2009 Conn. Legis. Serv. Pub. Act 09-14 (West) (codified at various sections of CONN. GEN. STAT.); see also Associated Press, *Conn. Lawmakers Make Gay Marriage Official*, CBS NEWS, Apr. 23, 2009, <http://www.cbsnews.com/stories/2009/04/23/national/main4963235.shtml> (noting that "religious organizations and associations are not required to provide services, goods or facilities for same-sex wedding ceremonies," but that the "bill also strips language from a 1991 state anti-discrimination law that says Connecticut does not condone 'homosexuality or bisexuality or any equivalent lifestyle,' require the teaching of homosexuality or bisexuality 'as an acceptable lifestyle,' set quotas for hiring gay workers or authorize recognition of same-sex marriage.").

²⁹ See, e.g., State of Connecticut, Department of Public Health, License and Certificate of Marriage, available at <http://www.glad.org/uploads/docs/publications/ct-marriage-license.pdf>.

³⁰ State of Connecticut, Department of Public Health, Frequently Asked Questions About Same-Sex Marriages, http://www.ct.gov/dph/lib/dph/communications/pdf/faqs_for_same_sex.pdf; see also id. ("The requirements for entering into a same-sex marriage are the same for those entering into an opposite-sex marriage.").

³¹ An Act Authorizing the Designation of a Person to Assume Ownership of a Motor Vehicle upon the Death of the Owner and Authorizing the Designation of a Person for Certain Other Purposes, 2002 Conn. Legis. Serv. P.A. 02-105 (West) (codified at various sections of CONN. GEN. STAT.); see GLAD, *supra* note 19, at 30-35. For instance, the designation document must be honored in the workplace. Employers must call the employee's designee in case of emergency. See CONN. GEN. STAT. § 31-51jj (2003).

and consultation of involuntary, non-emergency room transfers.³² The designee has the right to private visits with the patient.³³ In order to allow same-sex partners to share financial, medical, and end-of-life decisions, same-sex couples should review their existing legal documents to comply with Public Act 02-105 since the rights and responsibilities to which the designee is entitled under the Act overlap with some of those set forth in bundled documents often called "Health Care Instructions, Appointment of Health Care Agent, Appointment of Attorney in Fact for Health Care Decisions, Designation of Conservator for Future Incapacity and Document of Anatomical Gift."³⁴ These provisions set forth a framework for recognizing the civil rights of same-sex families that should be available beyond a single state.

C. *Impact of the Federal Defense of Marriage Act*

Maneuvering the legal challenges of marriage for same-sex couples remains fraught with unnecessary and discriminatory legal complexities due to the federal Defense of Marriage Act (DOMA).³⁵ The protections that marriage equality afford in the five states that allow same-sex couples to marry do not extend to the federal realm and can disappear when couples leave these five states. In response to the Hawaii Supreme Court decision in *Baehr v. Levin*, which held that the state's prohibition on same-sex marriage constituted discrimination,³⁶ Congress passed and President Clinton signed the Defense of Marriage Act.³⁷ DOMA established a federal definition of "marriage" and "spouse" in Title 1 of the United States Code by providing that for all federal purposes, marriage must be between "one man and one woman as husband and wife."³⁸ DOMA further promulgated that no state would be required to recognize same-sex marriage entered into lawfully in other states.³⁹ Since this time, Matt Foreman notes that "forty-one states have passed laws or state constitutional amendments to prohibit the recognition of same-sex mar-

³² CONN. GEN. STAT. § 19a-550 (2003); see GLAD, *supra* note 19, at 32.

³³ CONN. GEN. STAT. § 19a-550 (2003); see GLAD, *supra* note 19, at 32.

³⁴ See GLAD, *supra* note 19, at 35; cf. JULIE JASON, JULIE JASON'S GUIDE TO CONNECTICUT PROBATE 317 (AuthorHouse 2006).

³⁵ Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006)).

³⁶ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); see also Human Rights Campaign, Hawaii: *Baehr v. Lewin*, http://www.hrc.org/laws_and_elections/13011.htm ("[T]he Supreme Court of Hawaii held that a statute excluding same-sex couples from marriage was discrimination on the basis of sex. The court sent the case back to trial to decide whether the statute could survive strict scrutiny.").

³⁷ Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C; see also 142 CONG. REC. S10100-02 (daily ed. Sept. 10, 1996) (statement of Sen. Burns referring to the *Baehr* decision as the impetus for passing DOMA).

³⁸ Defense of Marriage Act, § 3(a), 1 U.S.C. § 7.

³⁹ Defense of Marriage Act, § 2(a), 28 U.S.C. § 1738C.

riage—that is, to deprive a tiny minority of a right the majority sees as a fundamental human right.”⁴⁰

Even with a valid marriage from one of the five states that now offers marriage, a same-sex couple is currently ineligible for the 1,138 federal statutory provisions dependent upon marital status due to DOMA.⁴¹ Nancy J. Knauer explains:

Regardless of how individuals choose to order their lives and their relationships, the law continues to privilege those relationships defined by blood, marriage, and adoption. In the absence of recognition of same sex relationships, a same sex partner is a legal stranger because there is no way to make a same sex partner legal family. For LGBT elders with a chosen family, this legal disability extends beyond just their partner and includes all of their potential caregivers. A same sex partner will be considered “next of kin” to some extent in eleven states, but the other members of a chosen family remain legal strangers in all fifty states.⁴²

For example, an employee of the State of Connecticut, a Connecticut county, or a Connecticut municipality will be able to extend health insurance to his or her same-sex spouse whether they are married or within a civil union.⁴³ Due to DOMA, however, federal health plans will not be extended to same-sex spouses of federal employees.⁴⁴ Self-employed individuals in Connecticut can buy health insurance coverage for a same-sex spouse identical to a self-employed heterosexual married individual.⁴⁵ Private sector employees are in a more complex position since employers may not have to extend health insurance to same-sex partners. Similarly, for tax purposes, GLAD states that

[a]lthough a same sex married couple will need to file as “single” on the federal income tax return, GLAD recommends that each member of the couple indicate the marriage in some way on his or her federal return. This can

⁴⁰ Foreman, *supra* note 26, at 565.

⁴¹ See *id.* at 561 (citing Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>).

⁴² Knauer, *supra* note 9, at 43; see also Anthony Faiola, *Civil Union Laws Don't Ensure Benefits: Same-Sex N.J. Couples Find That Employers Can Get Around New Rules*, WASH. POST, June 30, 2007, at A3 (“[W]hen companies choose to follow federal laws, they often cite the 1996 Defense of Marriage Act, which defines marriage as a union between a man and woman as a reason to deny coverage to same-sex couples.”).

⁴³ See GLAD, *supra* note 19, at 25.

⁴⁴ See *id.*

⁴⁵ See *id.*

be done either by attaching a sheet that explains this or by putting an asterisk after single and indicate that he or she is in a same sex marriage and provide the date of the marriage. This way no one can later claim that you fraudulently indicated your marital status. This is especially important since income tax returns are often used for other purposes, such as to qualify for a mortgage, etc.

However, a same sex married or civil union couple will be able to file a Connecticut state income tax return in the same manner as a different-sex married couple (i.e., either jointly or married filing separately). In order to do this, the couple will need to fill out a "dummy" federal income tax return as married (this return will never be filed) and enter the figures from this return on the Connecticut state income tax return.⁴⁶

Same-sex couples continue to be disadvantaged by the need for potentially costly legal advice to navigate the remaining patchwork of marriage recognition.

DOMA is patently unfair, if not unconstitutional, and should be struck down or repealed.⁴⁷ Advantages of doing so are numerous for issues determined by federal recognition of marriage. Many issues determined by state law already hinge on recognition of marriage.⁴⁸ First, children of same-sex families would have far greater access to health care benefits. Second, spouses would be able to speak on behalf of an ill partner. A same-sex partner would be assured hospital visitation rights since a patient's legally recognized spouse or next-of-kin is allowed to visit a patient. Third, a partner would have a better chance of becoming the guardian of the couple's child as courts generally appoint a person's legal spouse in preference to other people. An unmarried partner is a legal stranger in such proceedings. Fourth, members of a same-sex family would be able to make use of the federal Family Medical Leave Act to take care of sick family members.⁴⁹ Fifth, same-sex partners would be

⁴⁶ *Id.* at 27.

⁴⁷ See Press Release, Human Rights Campaign, Human Rights Campaign Delivers Survey to Congress Showing Overwhelming Support for Repealing Defense of Marriage Act (Sept. 10, 2009), available at <http://www.hrc.org/13508.htm> (noting that the HRC "delivered to Congress nearly 50,000 survey responses showing the concrete harms DOMA brings to the lives of LGBT Americans and their families"); see, e.g., LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS (Apr. 13, 2004) (explaining how the invalidity of same-sex marriages limits health care benefits for children of same-sex families).

⁴⁸ Cf. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954–57 (Mass. 2003) (surveying the benefits of government recognition of marriage).

⁴⁹ See Family and Medical Leave Act (FMLA), 29 U.S.C. § 2611(13) (2006) ("The term 'spouse' means a husband or wife, as the case may be.").

able to make use of second parent adoption provisions more easily since the married spouse of a person has the unquestioned right to adopt that parent's child without terminating the first parent's rights.⁵⁰ Finally, there would be an enormous societal benefit from simply promoting equality.

There are other legal hurdles for same-sex parents that DOMA exacerbates, even in jurisdictions that recognize same-sex marriage. For example, if both same-sex spouses to a Connecticut marriage or civil union were already legal parents through joint or second-parent adoption then they remain parents.⁵¹ Yet, if one spouse was not a legal parent before, then the marriage or civil union would not turn that spouse into a legal parent; the non-legal parent would need to adopt the child.⁵² An adoption decree from a court is a legal judgment that would be recognized widely beyond Connecticut.⁵³ Further, while "[i]n Connecticut, a child born into a marriage or civil union is presumed to be the child of both parties[,] . . . this is just a presumption and does not have the same effect as a court judgment."⁵⁴ Indeed, in light of DOMA, this same-sex marriage may not be recognized by other states.⁵⁵

Equality would be facilitated by automatically establishing legal parenthood on the state level, greatly enhancing parents' abilities to make medical and financial decisions on behalf of their children.⁵⁶ Co-

⁵⁰ Human Rights Campaign, Second-Parent Adoption, <http://www.hrc.org/issues/parenting/adoptions/2385.htm> (last visited Feb. 14, 2010) [hereinafter Human Rights Campaign, Second-Parent Adoption].

⁵¹ GLAD, *supra* note 19, at 23.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* ("Entering into a marriage or civil union may complicate matters if you are in the process of adopting a child or considering adoption in the future.")

⁵⁵ *Id.*

⁵⁶ *Cf. id.*; see also Aaron Xavier Fellmeth, *State Regulation Of Sexuality In International Human Rights Law And Theory*, 50 WM. & MARY L. REV. 797, 812 (2008). Many countries, including several that prohibit same-sex marriage, now allow same-sex couples or single homosexuals to assume custody of their own or their partners' children, or to adopt unrelated children, on a nondiscriminatory basis. Fellmeth, *supra*, at 864 (listing Belgium, Brazil, Canada, Denmark, Finland, Israel, the Netherlands, South Africa, Spain, Sweden, the United Kingdom, and some provinces of Australia as allowing this). Fellmeth further notes, "In [several countries in] Europe, the custody of a sexual minority's biological child can be shared with nonbiological same-sex parents. In some cases, these rights are even automatic, as in the Netherlands, where a woman upon marriage to another woman acquires joint custody of the other's prior children without any formalities." *Id.* at 864–65; *cf. E.B. v. France*, App. No. 43546/02, Eur. Ct. H.R. 29 (2008) (holding that member states are not permitted to discriminate on the basis of sexual orientation in adoption proceedings); see also Kathleen A. Doty, *From Fretté to E.B.: The European Court of Human Rights on Gay and Lesbian Adoption*, 18 LAW & SEXUALITY 121, 138 (2009) ("With respect to relationship recognition, European Legislation is all over the map. Of the forty-seven Member States of the Council of Europe, four States allow marriage, twelve have some system of registered domestic partnerships, two recognize registered co-habitation, nine allow for unregistered co-habitation, and twenty-six provide no legal recognition for gay and lesbian relationships at all.").

parent adoption for any current non-legal parents can serve in the meantime to minimize future legal disputes. A majority of states allow second-parent adoption.⁵⁷ Yet only by a repeal of DOMA could the civil rights of same-sex families be fully recognized.

D. *International Recognition of Civil Marriage*

The Netherlands,⁵⁸ Belgium,⁵⁹ Spain,⁶⁰ South Africa,⁶¹ Norway,⁶² Sweden,⁶³ and Canada⁶⁴ have extended civil marriage to same-sex couples.⁶⁵ Noting that Canada did not recognize Catholic and Jewish marriages until 1847 and 1857, respectively, Glass and Kubasek explain the importance of government recognition of marriage:

[M]arriage is taken for granted as a primary institution in which unpaid caretaking work of one partner is subsidized or supported by the market work of the other partner One's marital status continues to impact significantly one's access to a wide variety of private and public social benefits, including joint and survivor pension benefits, tax exemptions, parental rights and benefits, automatic inheritance, income support programs, and joint insurance and property ownership. . . . As a result of this state-provided security and of the continuing significance of the marriage contract in private and public social provisioning, married individuals in the United States and Canada earn more, accumulate more wealth over the life course, and are better protected

⁵⁷ See Human Rights Campaign, Second Parent Adoption, *supra* note 50.

⁵⁸ See Wet Openstelling Huwelijk (Act on the Opening up of Marriage), Staatsblad van het Koninkrijk der Nederlanden [Stb.] nr.9 (2001) (Neth.).

⁵⁹ See Pew Forum on Religion & Public Life, *Same-Sex Marriage: Redefining Marriage Around the World* (Jan. 22, 2009), available at <http://pewforum.org/docs/?DocID=235>.

⁶⁰ The Spanish parliament approved full same-sex marriage in June 2005. See *Spanish MPs Approve Gay Marriages*, BBC News, June 30, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4636133.stm>; Jennifer Green, *Spain Legalizes Same-Sex Marriage*, WASH. POST, July 1, 2005, at A14.

⁶¹ The South African Constitutional Court held the common law prohibition on same-sex marriage unconstitutional. See *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) (S. Afr.). The South African parliament adopted marriage for same-sex couples in November 2006. See Civil Union Act (Act 17 of 2006); see also Fellmeth *supra* note 56, at 854.

⁶² See Pew Forum on Religion & Public Life, *supra* note 59.

⁶³ See *id.*

⁶⁴ See 2005 Civil Marriage Act, C-38, 38th Parliament, 1st Sess. (2005) (codified at 33 Stat.) (Can.); see also Fellmeth *supra* note 56, at 854.

⁶⁵ Cf. GLAD, *supra* note 19, at 4, 9 (noting that while Connecticut, Massachusetts, Iowa, Vermont, New Hampshire, and Canada have no residency requirement for same sex couples to become married, the Netherlands, Belgium, Spain, South Africa, Sweden, and Norway allow same-sex couples to marry, but most of these countries have requirements that make it difficult for non-citizens to marry).

against economic risk than are non-married individuals.⁶⁶

Canadian family law is nationally legislated. As a result, lesbian, gay, bisexual, and transgender (collectively LGBT) people did not have to request equality provisions from separate state legislatures as has occurred in the United States.⁶⁷ Section 15 of the Canadian Charter of Rights and Freedoms states, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."⁶⁸ Glass and Kubasek explain:

Much of the justification for finding that limiting marriage to opposite-sex partners violates the equal treatment guaranteed by Section 15 of the Canadian Charter similarly supports a claim that so limiting marriage violates the Equal Protection Clause of the U.S. Constitution.⁶⁹

This same rationale was employed by the Massachusetts Supreme Court. In finding that the state lacked a rational basis for denying marriage licenses to same-sex couples,⁷⁰ the court cited the Canadian courts then looked to relevant state constitutional provisions.⁷¹

⁶⁶ Christy M. Glass & Nancy Kubasek, *The Evolution Of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143, 155 (2008); see also John G. Culhane, *Marriage Equality? First, Justify Marriage (If You Can)*, 1 DREXEL L. REV. 485 (2009); Fellmeth, *supra* note 56, at 847–48 (noting that governments subsidize marriage: "[T]he state typically grants many benefits to the married couple in the form of rights to community property, pensions, tenancy rights, inheritance, immigration rights, tax benefits, prison and hospital visitation rights, and the right to refuse to testify against one's spouse in a criminal prosecution."); Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1401–02 (2008) ("Despite the abrogation of coverture and the renegotiation of women's citizenship status within the modern polity, feminist legal theorists argue that marriage continues to produce inequalities, reifying gendered caregiving roles and stymieing efforts to achieve economic equality."). See generally Shah, *supra* note 41.

⁶⁷ See Glass and Kubasek, *supra* note 66, at 149 ("Canada repealed its sodomy laws in 1969 In the United States, by contrast, sodomy laws remained part of state criminal statutes until 2003 when the U.S. Supreme Court struck down criminal prohibition against homosexual sodomy at the state level.").

⁶⁸ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), c. 11, §15(1); see also Glass & Kubasek, *supra* note 66, at 163 ("In order to pursue a complaint under Section 15, a person must prove not only that a law or policy violates Section 15, but also that the discrimination he or she is seeking to rectify is not a 'reasonable limit prescribed by law.'").

⁶⁹ Glass & Kubasek, *supra* note 66, at 200.

⁷⁰ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

⁷¹ See *id.* at 966 n.31.

The Ontario Court of Appeal in *Halpern* concluded that “to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to Canada’s jurisprudence of progressive constitutional interpretation.”⁷² Section 1 of the Charter of Rights and Freedoms requires that there be proportionality and a rational connection between the objective of a law and the means selected to achieve it,⁷³ a standard on par with the lowest level of scrutiny that federal courts in the United States apply to a law passed by the federal government.⁷⁴

As governments around the globe extend recognition of civil marriage to same-sex couples, a body of law is developing from which jurisdictions can adopt best practices. In this way, LGBT individuals and families can be protected within the fields of family law, human rights, and civil liberties. Jurisdictions that have yet to do so should recognize civil marriage and nondiscrimination rights of LGBT individuals without further delay.

II. COMPARATIVE CONSTITUTIONALISM

*“We deal here not with abstractions but with people.”*⁷⁵

In 1977, Québec became the first jurisdiction in North America to prohibit sexual orientation discrimination.⁷⁶ Given the rest of Canada’s opposition to Québec’s Parti Québécois sovereigntist government, the revision of the Québec Charter of Rights to include sexual orientation attracted little attention.⁷⁷ In fact, the province was known instead for its mistreatment of sexual minorities. The Montreal police, in particular,

⁷² *Halpern v. Toronto (City)*, [2003] 65 O.R.3d 161, 162 (Can.); see also *id.* at 187 (establishing the unconstitutionality of same-sex exclusion from marriage since “no one . . . is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry.”).

⁷³ See Canadian Charter of Rights and Freedoms, §1.

⁷⁴ See Glass & Kubasek, *supra* note 66, at 203 (“The Canadian court quickly disposed of that justification, pointing out that while same-sex couples cannot biologically bear children together, the same applies to many opposite-sex couples, . . . [and] having children is clearly not the only reason people choose to marry.” (referencing *Halpern v. Toronto (City)* [2003] 65 O.R. 3d 161, 187)).

⁷⁵ DAVID RAYSIDE, *ON THE FRINGE: GAYS & LESBIANS IN POLITICS* 105 (Cornell University Press 1998) (quoting Allan Rock, Justice Minister, at the House of Commons (Apr. 30, 1996)).

⁷⁶ Sexual identity politics have played a role in the construction of Québec’s national identity. Québec’s struggle for sovereignty has allowed it to reconsider its human rights provisions. See Québec *Charté des Droits et Libertés de la Personne*, RSQ c. C-12, ss. 10, 137.

⁷⁷ In 1986 Ontario included sexual orientation in the Ontario Human Rights Code as part of omnibus bill to bring its provincial law into line with the Canadian Charter of Rights and Freedoms. As a result, Ontario became the second province, after Québec, to prohibit sexual orientation discrimination. See RAYSIDE, *supra* note 75, at 143.

gained a reputation for being hostile—especially leading up to the 1976 Olympic Games. In a 1976 raid, the police arrested everyone they encountered in a Montreal gay bar.⁷⁸ This raid “resulted in the arrests of eighty-nine men and the confiscation of a membership list of seven thousand men.”⁷⁹ A similar raid in 1977 led to the largest street demonstration in Canada’s history.⁸⁰

However, the successful province-wide revision of the Québec Charter of Rights demonstrated the support of gay rights across Québec, and undermines the argument that gay rights are a geographically isolated urban phenomenon that is alien and offensive to generally conservative agricultural communities.⁸¹ The fact that a rural Catholic community was willing to champion gay rights proves that political alignments can vary widely from traditional expectations.

Canada’s size, political decentralization, and linguistic duality have made it difficult for the country to agree upon a single national identity. Indeed, Québec has held two referenda on becoming its own nation. The first was in 1980 and the second was in 1995. While neither resulted in the succession of Québec from the Canadian federation, the 1995 referendum was extremely close. Federalists won only by a vote of 50.6 percent to 49.4 percent, illustrating just how fragile a federation Canada sought to preserve.⁸²

Criminal law in Canada is entirely within federal jurisdiction. As a result, Canada only ever had one sodomy law. The federal government revised this national law in 1969, decriminalizing private same-sex sexual conduct between consenting adults.⁸³ Canada has therefore avoided the dilemma between protecting human rights and retaining provincial state sovereignty. In this way, Canada has been able to move beyond the consideration of homosexuality in the criminal context, within which much of the world is still embedded, to address other forms of sexual orientation discrimination. Perhaps the greatest success in this area has been the addition of sexual orientation to the Canadian Human Rights Act.⁸⁴

The Canadian Human Rights Act was passed in 1976, providing equality rights for federal civil servants and employees of federally regu-

⁷⁸ See CARL F. STYCHIN, *A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS* 92–93 (Shane Phelan ed., Temple University Press 1998).

⁷⁹ *Id.* at 93.

⁸⁰ *Id.* at 92.

⁸¹ See RAYSIDE, *supra* note 75, at 133.

⁸² See STYCHIN, *supra* note 78, at 94.

⁸³ Criminal Law Amendment Act, 1968–69, S.C., ch. 38, § 7 (Can.).

⁸⁴ Canadian Human Rights Act, R.S.C., ch. H-6, § 3(1) (1985).

lated companies, such as those in the transport and banking sectors.⁸⁵ After years of controversy, the federal Parliament finally amended the Act in 1996 to include sexual orientation.⁸⁶ However, unlike the revision of the Québec Charter, amending the Canadian Human Rights Act was not a simple matter. David Rayside offers a possible explanation for the governing party's initial inability to resolve the issue, noting that "an amendment on the Canadian Human Rights Act consists of two words. Including the words 'sexual orientation' does not leave a great deal of room for compromise."⁸⁷

A number of Canadian court judgments in the early 1990s, which interpreted the equality provision of the Canadian Charter of Rights as implicitly prohibiting sexual orientation discrimination, strengthened the argument that the federal Human Rights Act should be amended to expressly protect sexual orientation.⁸⁸ In particular, 1992 saw the following decisions: the end of de facto age of consent differentials between same sex age of consent and heterosexual age of consent, the removal of the ban on gays and lesbians in the military, and the insistence that employers provide same-sex benefits to their employees.⁸⁹ Perhaps the strongest court support came with the Ontario judgment in *Haig v. Canada*,⁹⁰ in which the court noted that the federal Human Rights Act had to be interpreted to cover sexual orientation if it was to comply with the Canadian Charter.⁹¹ The Canadian Supreme Court's 1995 decision in *Egan v. Canada*,⁹² on the other hand, was more qualified.

In *Egan*, the Supreme Court of Canada decided to deny a Charter claim for benefits to two men who had been living together for 46 years, even though such benefits were available to unmarried opposite-sex couples that have been living together for one year.⁹³ On the one hand, the court finally confirmed that the Charter implicitly covers sexual orientation.⁹⁴ Writing for a unanimous court, Justice La Forest noted that

whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is

⁸⁵ *Id.* (protected categories now include "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted")

⁸⁶ See An Act to Amend the Canadian Human Rights Act, S.C. 1996, c.14 (Can.).

⁸⁷ RAYSIDE, *supra* note 75, at 135.

⁸⁸ See, e.g., *Haig v. Canada*, 16 C.H.R.R. D/226 (Ont. Can.); see also RAYSIDE, *supra* note 75, at 131.

⁸⁹ RAYSIDE, *supra* note 75, at 131.

⁹⁰ *Haig*, 16 C.H.R.R. D/226.

⁹¹ See *id.*

⁹² *Egan v. Canada*, [1995] 2 S.C.R. 513.

⁹³ See *id.*

⁹⁴ See *id.*

either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.⁹⁵

Justice La Forest's seemingly enlightened perspective is undermined, however, by his subsequent remarks that, while sexual orientation is an analogous ground to those enumerated in the Charter, it must be a ground which is an irrelevant personal characteristic.⁹⁶ He found the distinction to be relevant and therefore not arbitrary since the law's purpose is to support the heterosexual couple, regardless of marriage, since it is "the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing."⁹⁷ Yet, Justice La Forest's points are factually incorrect. Donor insemination has made it possible for same-sex couples to have children. Furthermore, dead-beat dad statistics undermine La Forest's second rationalization that only heterosexual couples generally care for the upbringing of their children.⁹⁸ Finally, with the current global population problem, it can hardly be helpful for the Supreme Court of Canada, in 1995, to be harking back to notions of the social imperative of procreation.

In contrast, the Connecticut Supreme Court in *Kerrigan* found:

Because same sex and opposite sex couples have the same interest in having a family and the same right to do so, the mere fact that children of the former may be conceived in a different manner than children of the latter is insufficient, standing alone, to negate the fundamental and overriding similarities that they share, both with regard to matters relating to family and in all other respects. Thus, even though procreative conduct plays an important role in many marriages, we do not believe that such conduct so defines the institution of marriage that the inability to engage in that conduct is determinative of whether same sex and opposite sex couples are similarly situated for equal protection purposes, especially in view of the fact that some opposite sex couples also are unable to procreate, and others choose not to do so.⁹⁹

This analysis provides strong support for the United States and other nations to recognize civil rights on the basis of sexual orientation, including same-sex marriage. The more jurisdictions that facilitate nondiscrim-

⁹⁵ *Id.* at 21–22; see also ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 255 (Oxford University Press Inc. 1995).

⁹⁶ See *Egan*, 2 S.C.R. at 113; see also WINTEMUTE, *supra* note 95, at 255.

⁹⁷ *Egan*, 2 S.C.R. 513, at 25–26; see also WINTEMUTE, *supra* note 95, at 257.

⁹⁸ *Egan v. Canada*, [1995] 2 S.C.R. 513, at 25–26.

⁹⁹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 424–25 n.19 (Conn. 2008).

ination and equitable family relationships, the greater likelihood that widespread human security will be achieved. Often the greatest opportunity for progressive social policy-making is where broader legal change is already on the agenda. The possible succession of Québec from Canada provided such an opportunity, as has European integration. Both facilitated government and civil society recognition and support of the civil rights of same-sex families.

III. EUROPEAN INTEGRATION AND IDENTITY

European integration inspires some people, infuriates others, and leaves many completely indifferent. The promise of an economic giant that could compete on a global scale has motivated some people to advocate for the free movement of people and ideas across borders.¹⁰⁰ Yet, in the lifetimes of many contemporary adult Europeans, these boundaries have been fiercely and violently protected. This has left many individuals confused and often reluctant to risk losing their national traditions.¹⁰¹ Furthermore, there are still more countries where basic human rights are regularly violated than countries where such rights are effectively protected.¹⁰² However, the European integration movement stands out as a model for grounding group identity on the notion of human rights protection rather than exclusion.¹⁰³ While the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹⁰⁴ was not the first human rights instrument, it was the first to establish institutional supervision and enforcement bodies. The following discussion will briefly trace the historical conception of European unity and search for identity. While, it does not attempt to distill a single definition of

¹⁰⁰ CITIZENSHIP, DEMOCRACY AND JUSTICE IN THE NEW EUROPE 1 (Percy Lehning & Albert Weale eds., Routledge 1997) [hereinafter CITIZENSHIP].

¹⁰¹ *Id.*

¹⁰² A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 2 (Manchester University Press, 4th ed. 1997).

¹⁰³ For example, in 1984 the European Parliament adopted a resolution on sexual discrimination in the workplace, calling for European Community member states to equalize the age of consent, and recommending the EC Commission "submit proposals to ensure that no cases arise in the member states of discrimination against homosexuals with regard to access to employment and working conditions." Eur. Par. Resolution 104/46, Resolution on Sexual Discrimination in the Workplace, 1984 O.J. (C 104) 46-48 (EC). In 1989, the European Parliament called for the amendment of the Community Charter of Fundamental Social Rights to extend to sexual orientation. 1989 O.J. (C323) 46.

¹⁰⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. It is important to note that the European Convention for the Protection of Human Rights and Fundamental Freedoms significantly predates European Community and European Union legislation. The former was signed in 1953 by European countries in an effort to prevent atrocities like the Holocaust. In contrast to this human rights initiative, European Union institutions have concentrated on the economic incentives of cooperation.

what it is to be European, this analysis does seek to widen the perimeters of the European integration debate to include those who have been marginalized.

A. *European History*

Dating back to the seventh century BC, the ancient Greeks used the word “Europe” as a geographical term. Roughly the same region became known as the Christian Republic (*Respublica Christiana*) after the fall of the Roman Empire. While Christianity certainly is not by definition European, the Christian religion has played an important role in the formulation of a European identity.¹⁰⁵ As Samuel Huntington observed, “There was a well-developed sense of community among Western Christian peoples, one that made them feel distinct from Turks, Moors, Byzantines, and others”¹⁰⁶ Similarly, Ian Ward referred to Christianity as the unifying force in Europe, noting that “the first idea of Europe, and the one which casts the longest shadow, is the Catholic idea of a Holy Roman Empire.”¹⁰⁷ This marked the first reference to Europe as one entity. Yet this unity was defined, in large part, by contrasting itself with other entities.¹⁰⁸ According to Ward, the others were initially the external “barbarians” of Islam, and then increasingly internal others.¹⁰⁹ Europe defined itself as much by this “other” as by its own sense of rationality. Collectively, Europe saw itself as synonymous with progress, civilization, and Christian redemption.¹¹⁰

Slowly, the predominant political objective shifted from maintaining peace between various Catholic and Protestant regions to maintaining peace between emerging nation-states.¹¹¹ By the end of the eighteenth century, Europe consisted of an alliance of governments who all opposed the creation of a single European state.¹¹² While identity became increasingly tied to nationality, there remained a unifying effort at the European level to maintain peace through a balance of power.¹¹³

Perhaps the most well-known threat to this balance of power came during World War II. Fascism held itself out as Europe’s redeemer, promising salvation through economic integration and the predominance

¹⁰⁵ See Samuel P. Huntington, *The West Unique, not Universal*, 75 *FOREIGN AFFAIRS* 28, 30 (1996).

¹⁰⁶ *Id.*

¹⁰⁷ IAN WARD, *THE MARGINS OF EUROPEAN LAW* 10 (Palgrave Macmillan 1996).

¹⁰⁸ See *id.* at 10–11.

¹⁰⁹ See *id.* at 10.

¹¹⁰ *Id.* at 11.

¹¹¹ See *id.* at 12.

¹¹² See *id.* at 38–47.

¹¹³ See *id.*

of traditional political and cultural aspects of Europe.¹¹⁴ Yet, it proved to be a capitalist super-state that accomplished its objectives by oppressing marginalized sectors of society.¹¹⁵ Certain people in Europe went beyond simply believing that objects did not have souls to thinking that certain people did not have souls.¹¹⁶ This capacity for abstraction was a key factor that led to the Holocaust. As Samuel Pizar pointed out,

If we reflect on the fate of the Third Reich, we find that the germs of its destruction were sown in the fact that it had no room for the likes of Albert Einstein. . . . If it had had room for their likes, it would not have become the brutal and suicidal society we all knew.¹¹⁷

Following World War II, European countries sought to exchange a small degree of sovereignty for the promise of economic prosperity.¹¹⁸ Given this objective, it is not surprising that they took a minimalist approach. The desire to be unified was limited to wanting to realize economies of scale, free movement of economic goods, and competitiveness in the world economy.¹¹⁹ Yet, integration has helped produce strong human rights provisions in Europe.

B. *European Identity Based on Human Rights and the Global Impact of this Development*

*"Citizens of Europe are not simply the interpreters of traditions that they inherit, . . . they are also the potential authors of their collective fate in the light of some shared understandings about the human good."*¹²⁰

Social justice requires that everyone have rights apart from and, to some extent, at odds with a market economy that seeks only to maximize efficiency. Citizenship, however, should not be merely a legal concept involving rights and obligations. There should also be an identity component through which individuals feel that they are a part of a national and international community. The contemporary notion of citizenship is based upon the concept of the nation-state. Yet, this is not the only ap-

¹¹⁴ See *id.* at 12.

¹¹⁵ See *id.*

¹¹⁶ Samuel Pizar, *An Open Letter to Sakharov*, THE OBSERVER, Jan. 13, 1974, at 2.

¹¹⁷ *Id.*

¹¹⁸ See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; WARD, *supra* note 107, at 27. The promise of the Treaty of Rome was expanded in 1986 when twelve European countries signed the Single European Act that committed the signing nations to "the free movement of goods, persons, services and capital" throughout the member nations. Single European Act art. 13, Feb. 17, 1986, 1987 O.J. (L 169) 1.

¹¹⁹ Cf. WARD, *supra* note 107, at 41-47 (discussing the "Common Market").

¹²⁰ See CITIZENSHIP, *supra* note 100, at 6.

proach. An alternative vision of citizenship could be based on the notion of human rights.

The economic arena is no longer confined to the nation-state. Rather, the international community now operates in a global market. At the same time, power has been consolidated into macroeconomic units. Harold Laski points out that the “demands of modern global economics render the nation-state economically untenable as a discrete economic unit.”¹²¹ The driving force of European integration is certainly an economic one—inspired by a vision of a transnational capitalist order. However, there are a number of advocates calling for human rights to have a central role as well. As Carl Stychin notes, freedom, democracy, and autonomy have been “universalized and essentialized as what it means to be European.”¹²² He goes on to note that “[i]n the economic model of citizenship, there has been little recognition of a role for the citizen other than as a rationally self-interested, wealth-maximizing actor.”¹²³ Yet, the European Union has sought to establish a minimum floor of social rights. It has done so particularly by requiring new members of the Council of Europe to ratify the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 8(1) of the ECHR states, “Everyone has the right to respect for his private and family life, his home and his correspondence.”¹²⁴ Article 8(2) goes on to provide:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹²⁵

The fact that there is a clear textual basis for the ‘right to privacy’ in Article 8 of the European Convention reduces controversy over a court recognizing rights on the basis of sexual orientation. This is in contrast to countries that only have an implicit right to privacy rather than an express privacy clause.¹²⁶

¹²¹ See WARD, *supra* note 107, at 27.

¹²² STYCHIN, *supra* note 78, at 122.

¹²³ *Id.* at 124.

¹²⁴ ECHR, *supra* note 104, art 8.

¹²⁵ *Id.*

¹²⁶ On the other hand, the ECHR has a rather limited scope in relation to its equal protection measures. Article 14 prohibits discrimination only in “[t]he enjoyment of the rights and freedoms set forth in [the] Convention.” ECHR, *supra* note 104, art. 14. Article 14 does not have an independent status and therefore cannot be breached by itself. Instead, an Article 14

In the 1981 *Dudgeon v. United Kingdom* decision, the European Court of Human Rights found that Northern Ireland's sodomy law could not be justified under Article 8(2) as necessary in a democratic society for the protection of morals or the rights and freedoms of others.¹²⁷ In reaching this conclusion, the European Court of Human Rights looked to the fact that the majority of the member states of the Council of Europe did not have similar laws.¹²⁸ It went on to note that Northern Ireland itself had not enforced the law.¹²⁹ In similar cases brought against the Republic of Ireland and against Cyprus, the European Court of Human Rights reached the same conclusion in 1991 and 1993, respectively. In *Norris v. Ireland*, the European Court of Human Rights went on to reject the notion that a government such as Ireland's could claim that "the moral [fiber] of a democratic nation is a matter for its own institutions."¹³⁰ In *Modinos v. Cyprus*, the court held that the fact that Cyprus's law had not been enforced was irrelevant to the country's obligation to repeal the law.¹³¹

Europe has become a leader in recognizing human rights. As new countries have sought membership in the European Union, each has had to address the substantial level of discrimination against sexual minorities that remained pervasive and legally sanctioned within its borders.¹³² Between 1989, when the Council of Europe began expanding into Eastern Europe, and 1993, compliance with the *Dudgeon* decision was seen as a condition upon which membership into the Council of Europe depended.¹³³ Hungary, the Czech Republic, Slovakia, Poland, Bulgaria, and Slovenia decriminalized sodomy before applying for membership.¹³⁴ In fact, these countries had changed their laws prior to the *Dudgeon* decision.¹³⁵ Other countries, including Estonia (1992), Latvia (1992), and Lithuania (1993) revised their laws before or just subsequent to their membership applications being accepted.¹³⁶ Romania, on the other hand,

violation can only occur in conjunction with the violation of another Article of the Convention or Protocols. See *Abdulaziz v. United Kingdom*, 7 Eur. H.R. Rep. 471, 499 (1985); see also *WINTERMUTE*, *supra* note 95, at 91.

¹²⁷ See *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, 165 (1981).

¹²⁸ See *id.* at 164; *WINTERMUTE*, *supra* note 95, at 93.

¹²⁹ *Dudgeon*, at 158.

¹³⁰ *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, 199 (1991).

¹³¹ *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485, 490–91 (1993); see also *B.B. v. United Kingdom*, 39 Eur. H.R. Rep. 30 (2004); *L. & V. v. Austria*, 36 Eur. H.R. Rep. 55 (2003); *SL v. Austria*, 37 Eur. H.R. Rep. 39 (2003).

¹³² See *WINTERMUTE*, *supra* note 95, at 95.

¹³³ *Id.* at 94.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

had not changed its penal code when it was admitted into the Council of Europe in October 1993.¹³⁷

Pursuant to Article 200 of the Romanian Penal Code,¹³⁸ both lesbians and gay men could be convicted of consensual sexual conduct and go to prison for up to five years.¹³⁹ Beyond the conventional religious and public morality arguments for sodomy laws, Article 200 proved to be a strategic tool against political opponents. At a time when Amnesty International and other human rights organizations had yet to recognize individuals imprisoned on the basis of sexual orientation as “prisoners of conscience,” the Romanian government could charge people under Article 200 without being the subject of international criticism.¹⁴⁰ When asked about Article 200, the Romanian government responded that the sodomy provisions were no longer enforced; only through the work of international monitoring organizations did it become clear that the Romanian government was not telling the truth in this regard.¹⁴¹

Beyond criminalizing private sexual conduct between consenting adults, Article 200 prohibited speech and association supporting homosexual identity. In the course of amending Article 200 in 1996, language was added to paragraph 5 to punish “inciting or encouraging a person to the practice of sexual relations between persons of the same-sex, as well as propaganda or association or any other act of proselytism,” with up to five years in prison.¹⁴² When asked whether gay and lesbian rights organizations could exist under Article 200, Senator Vasile noted that “I can hardly believe that they could obtain legal status. They are associations. Paragraph 5 makes associations illegal.”¹⁴³ Magazines, publications, and public events would similarly be prohibited under paragraph 5 of Article 200.¹⁴⁴ While the Romanian government portrayed these changes as liberalizing and in full compliance with the Council of Europe’s requirements for admittance into the European Union, private consensual conduct could still be punished since it need only become known for it

¹³⁷ Romania entered the Council of Europe, yet entry was made conditional on the fact that Romania would bring its law into accordance with the European Convention on Human Rights. The Parliamentary Assembly of the Council of Europe recommended admission with the understanding that “Romania will shortly change its legislation in such a way that . . . Article 200 of the Penal Code will no longer consider as a criminal offense homosexual acts perpetrated in private between consenting adults.” *Id.*

¹³⁸ Romanian Penal Code Art. 200, law no. 140/1996.

¹³⁹ *Id.*

¹⁴⁰ See HUMAN RIGHTS WATCH, PUBLIC SCANDALS: SEXUAL ORIENTATION AND CRIMINAL LAW IN ROMANIA 12 (1998).

¹⁴¹ *Id.* at 30.

¹⁴² Romanian Penal Code Art. 200, law no. 140/1996.

¹⁴³ HUMAN RIGHTS WATCH, *supra* note 140, at 60.

¹⁴⁴ See Romanian Penal Code Art. 200, law no. 140/1996.

be illegal. Only after substantial international efforts did Romania eventually repeal Article 200.¹⁴⁵

Sovereignty and individual human rights are not mutually exclusive, but state recognition of human rights has evolved slowly. Ward notes that "[t]here is nothing God-given about the nation state. They are merely the residue of a particular European history, . . . simply 'a way of imagining the world.'"¹⁴⁶ In contrast, the Soviet paradigm saw nothing God-given about individual human rights. It did not recognize natural rights upon which the state may not infringe. Instead, citizens were placed in a position of obedience to the state. The following observations by Samuel Pisar concerning the Soviet Union remain poignantly relevant: "Human liberty stands higher than all commerce in the world. On this score there must be no ambiguity. The new doubts in our minds are over whether political détente and economic cooperation are being built on the backs of the oppressed."¹⁴⁷

IV. THE SEARCH FOR A COMMUNAL IDENTITY

*"Only time, familiarity, and education can make room for harmless nonconformity and enable the majority to distinguish between those forms of atypical behavior which actually are destructive of the social order and those which are not."*¹⁴⁸

Expanding international human rights law can come through human rights bodies broadly interpreting existing treaty language.¹⁴⁹ In this regard, it is important to remember that the nondiscrimination language of human rights instruments is not exhaustive. Sexual orientation could be found to fall within the "other status" classification of many existing treaties.¹⁵⁰ In this manner jurisdictions can strengthen recognition of the civil rights of same-sex families.

Support from mainstream human rights organizations, both governmental and non-governmental, can be instrumental in raising broad pub-

¹⁴⁵ See Council of Europe, Written Question No. 367 to the Committee of Ministers by Mr. Van der Maelen: "Homosexual rights in Romania," CM/AS(2003)Quest367 final (March 31, 2003), available at <https://wcd.coe.int/ViewDoc.jsp?id=31821&Site=COE&BackColorIntranet=BDDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

¹⁴⁶ See WARD, *supra* note 107, at 68.

¹⁴⁷ See Pisar, *supra* note 116, at 1.

¹⁴⁸ See WINTERMUTE, *supra* note 95, at 241.

¹⁴⁹ Of course, it is also possible to add additional protocols to existing human rights treaties that would expressly prohibit sexual orientation discrimination. Alternatively, the international community could agree on an entirely new treaty to address discrimination on the basis of sexual orientation. Expanding the existing language of treaties has the advantage of building upon existing case law.

¹⁵⁰ Aaron X. Fellmeth, Essay, *Nondiscrimination as a Universal Human Right*, 34 YALE J. INT'L L. 588, 591 (2009).

lic support for the protection of minority groups. State party reporting obligations under the International Covenant on Civil and Political Rights (ICCPR) provide an important forum in which to challenge discrimination on the basis of sexual orientation. Article 40 of the ICCPR requires all state parties, including those that have not ratified the Optional Protocol allowing for individual standing, to report on the progress that the country has made in protecting the rights ensured by the ICCPR.¹⁵¹ In addition, Amnesty International and other non-governmental organizations have a powerful capacity to augment official state reports with human rights materials that document sexual orientation discrimination.

Just as social upheaval can provide an opportunity to start over in drafting legal provisions, the formation of new federations can offer a similar occasion for establishing human rights provisions. European integration has its federation-forming aspects even if its members do not wholeheartedly support the description of a federal system. The people of Europe have experienced the social upheaval of World War II that occurred as a result of ignoring human rights concerns. The European Convention, which this war prompted European nations to create, is an effort to avoid any future unifying rationale from blinding Europe to the tragedy of human deprivation. The Québec Charter and the South African Constitution demonstrate that some of the most progressive change can come at the national or even provincial level. South Africa illustrates how seemingly irreconcilable groups of individuals, even those with a violent history of intolerance, can come together to enact a constitution protecting rights on an unprecedented scale.¹⁵²

Both World War II and South African apartheid illustrate how consensus for some of the most fundamental human rights provisions often only occurs as a result of sobering personal experience with systemic human rights atrocities. Ultimately, there is no world leader in the protection against sexual orientation discrimination. Rather, there seem to be a series of political pendulums. International pendulums can cause the realignment of national and provincial pendulums. Québec's protection of sexual minorities might be linked to its federal pendulum. In an effort to distinguish itself from what its people viewed as a national disregard for human rights, Québec may have been motivated to be more

¹⁵¹ International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. This process enables individuals and organizations to raise awareness about sexual orientation discrimination. For example, the American Bar Association has submitted a report on "Discrimination Based on Sexual Orientation" reflecting issues it believed the United States State Department had not addressed. Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 94 (1996).

¹⁵² See STYCHIN, *supra* note 78, at 196.

progressive than it might otherwise have been in confronting sexual orientation discrimination.

Broader recognition of civil rights can result when a society puts aside prejudices and comes to terms with what it means to live in a pluralistic civil society. South African apartheid illustrates the danger of seeking cultural homogeneity. Recognizing that the defining of a national character is a process can help a nation establish an inclusive identity. In establishing a new legal order, South Africa discovered that, excluding any minority on the grounds of tradition could not be justified in a country with such a tragic history of human rights abuses. For this reason, and perhaps because it is easier to implement entirely new aspects of social change when legal reform is already occurring on a broad basis, South Africa has among the most progressive national sexual orientation anti-discrimination provisions in the world. In 1996, South Africa became the first nation to guarantee explicit constitutional equal protection and prohibit discrimination on the basis of sexual orientation.¹⁵³ This covers discrimination by both the government and private entities. Chapter 9(1) of the South African Constitution states, "Everyone is equal before the law and has the right to equal protection and benefit of the law."¹⁵⁴ Chapter 9(3) goes on to provide: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."¹⁵⁵ Chapter 9(4) expands this prohibition to private persons.¹⁵⁶

South Africa's constitutional protection on the basis of sexual orientation is the first of its kind and demonstrates that if one of the most divided nations in recent history can overcome a record of intense intolerance, other countries around the world can do likewise.

V. THE UNITED STATES: RECOGNIZING THE CIVIL RIGHTS OF LGBT PEOPLE

In a rapidly changing world it is no wonder that societies are struggling to retain a collective sense of identity. However, as Ward notes, "We are all 'others', all particular, all different and all, to some degree, excluded from one another."¹⁵⁷ If we study history to avoid repeating past mistakes, one lesson is clear: Defining a national character by means

¹⁵³ See Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2796 (2009).

¹⁵⁴ S. Afr. Const. ch. 9(1).

¹⁵⁵ *Id.* at ch. 9(3).

¹⁵⁶ See *id.* at ch. 9(4).

¹⁵⁷ WARD, *supra* note 107, at 116.

of essentialism has dangerous ramifications. The exclusion of “others” who are seemingly incompatible with a traditional vision of society does not only harm those who are excluded, it also exhausts those who exert their energy into rejecting people with whom they feel they cannot cope. On a national level, a country that clings to such a means of identity is fragile. Ultimately, change is the only constant. Recognizing that society is in process rather than a fixed entity enables a community to move beyond exclusion to regain the original protective rationale for having a society. In this way, provinces, countries, and the international community as a whole can protect and integrate not only those already included, but also suppressed members of society. This is particularly true in the United States, which has moved haltingly in this direction.

Recently, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009¹⁵⁸ added sexual orientation to the protected classes under the federal hate crimes law, and enabled the United States government to offer financial and other assistance to localities that are investigating and prosecuting anti-LGBT hate crimes, and to step in when local authorities cannot, or will not, do so themselves.¹⁵⁹

Twenty-one states and the District of Columbia prohibit discrimination based on sexual orientation.¹⁶⁰ Everyone has a sexual orientation. The fact that not everyone has the same kind of sexual orientation has led to a great deal of anger and prejudice. While anger and prejudice are not illegal, violence and discrimination often are. There is little opposition to the claim that there is widespread anger and prejudice against gays and lesbians. Whose liberty and equality is society willing to protect? What is a legal system’s response when one group argues that the only way to protect its beliefs is for the system to refrain from protecting another

¹⁵⁸ Matthew Shepard Hate Crimes Prevention Act, S. 909, 111th Cong. (1st Sess. 2009), was signed into law by President Obama on October 28, 2009 as part of the Defense Authorization Act. See Margaret Talev, *Obama Signs Federal Gay Rights Law*, NEWSDAY, Oct. 29, 2009, at A39. The law expands the federal hate-crime law to include crimes motivated by a victim’s actual or perceived gender, sexual orientation, or gender identity. See *id.*

¹⁵⁹ See Ben Pershing, *Senate Passes Measure that Would Protect Gays: Obama is Expected to Sign Legislation on Hate Crimes*, WASH. POST, Oct. 23, 2009, at A12.

¹⁶⁰ Human Rights Campaign, *Statewide Employment Laws & Policies*, http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (last updated Feb. 17, 2010) (noting that the following twelve states and the District of Columbia have laws prohibiting discrimination on account of sexual orientation and gender identity: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. The following nine states prohibit discrimination on account of sexual orientation: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin. In addition, six states “have an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity and 3 states prohibit discrimination against public employees based on sexual orientation only. In 22 states and the District of Columbia state employees are provided with domestic partner benefits.”).

group's civil rights? Understanding the context of this conflict is an important part of answering these questions.

By the mid 1970s, the Federal Civil Service Commission removed homosexual conduct as a basis for disqualification.¹⁶¹ This development stood in stark contrast to the climate of the early 1950s, when Senator Joseph McCarthy and his colleagues caused thousands of federal workers to be fired on allegations of homosexuality.¹⁶² In 1991, Amnesty International broadened its mandate to include in its definition of "prisoners of conscience" anyone arrested because of their homosexual identity or for engaging in consensual private same-sex conduct.¹⁶³ In its 1994 "Breaking the Silence" campaign, the organization strongly criticized the United States for its high rate of anti-gay hate crimes.¹⁶⁴

Today, more than two million federal employees are protected by the various federal policy statements that have prohibited sexual orientation discrimination in public employment. Furthermore, a number of states have already forbidden sexual orientation discrimination in public employment.¹⁶⁵ While this does not provide uniform protection from public employment discrimination, it demonstrates that progress is underway in this field. Ending government-sanctioned employment discrimination in the military, on the other hand, has met with little success, despite the high profile that the issue has received.¹⁶⁶ A number of countries do not prohibit military service on the basis of sexual orientation, including: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Israel, Italy, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.¹⁶⁷

¹⁶¹ DEBORAH RHODE & DAVID LUBAN, *LEGAL ETHICS* 97 (Foundation Press, 1995).

¹⁶² See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 433 n.25 (Conn. 2008) (noting the history of "overt discrimination against gay persons by the United States government," and that "[i]n the 1950s and 1960s literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian.") (quoting G. CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 6 (Basic Books 2004)).

¹⁶³ Helfer & Miller, *supra* note 151, at 90. Other human rights organizations have since followed suit.

¹⁶⁴ Rudy Serra, *Sexual Orientation and Michigan Law*, 76 MICH. B. J. 948, 950 (1997).

¹⁶⁵ See *id.* at 949.

¹⁶⁶ Knauer, *supra* note 9, at 52 ("The 'Don't Ask, Don't Tell' policy mandates that all LGBT military personnel stay in the closet under threat of separation of service and loss of benefits."). This policy also affects the estimated one million plus LGBT veterans. See *id.* at 53-54 ("LGBT [veterans] report that the existence of the 'Don't Ask, Don't Tell' policy provides added pressure to be closeted when interacting with VA health care providers. They are less likely to discuss matters involving sexual orientation or gender identity, and they are less likely to include their partners in decision making.").

¹⁶⁷ Human Rights Campaign, *Impact of Lifting the Ban: Other Agencies and Countries that Allow Open Service*, <http://www.hrc.org/issues/4882.htm> (last visited Feb. 10, 2010); see also Smith & Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (1999) (ECHR finding that the

HeinOnline -- 19 Cornell J. L. & Pub. Pol'y 410 2009-2010

In the context of employment, such federal legislation as Title VII of the Civil Rights Act of 1964,¹⁶⁸ the Age Discrimination in Employment Act of 1967 (ADEA),¹⁶⁹ the Equal Pay Act of 1973 (EPA),¹⁷⁰ the Rehabilitation Act of 1973,¹⁷¹ and Title I of the Americans with Disabilities Act of 1990 (ADA)¹⁷² provide ample evidence that the federal government has the power to enact laws in the area of employment discrimination.¹⁷³ Passage of the federal Employment Non-Discrimination Act (ENDA) would prohibit discrimination in employment based on sexual orientation.¹⁷⁴ The American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, the National Education Association, and the American Federation of Teachers all recommend including sexual orientation in civil rights laws.¹⁷⁵ Nancy Knauer explains that “according to an analysis of the 2000 Census data, married elder couples earn 4.3 times more than elder same-sex couples. In addition, elder same-sex couples have 34.7 percent less retirement income than senior married opposite-sex couples.”¹⁷⁶ The federal government has the authority and broad-based support to add sexual orientation to protected “suspect” or “quasi-suspect” classifications in federal civil rights laws.¹⁷⁷

United Kingdom’s preclusion of gays and lesbians from military service violated article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms); David Landau, Note, *Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union*, 4 DUKE J. COMP. & INT’L L. 335, 342 (1994); PBS NewsHour: *Pace Remarks Renew ‘Don’t Ask, Don’t Tell’ Debate* (PBS television broadcast Mar. 16, 2007), available at http://www.pbs.org/newshour/bb/military/jan-june07/pace_03-16.html (“While we struggle to find and keep soldiers we need, to the point of lowering our recruiting standards and allowing people with criminal records to enter our Armed Forces, we’re actually turning away highly effective people because of a policy of discrimination. This is a matter of our own national security interest.”).

¹⁶⁸ 42 U.S.C. § 2000e–2000e-17 (2006).

¹⁶⁹ 29 U.S.C. § 621–34 (2006).

¹⁷⁰ *Id.* at § 206(d).

¹⁷¹ *See id.* at §§ 701–96.

¹⁷² *See* 42 U.S.C. §§ 12101–12213.

¹⁷³ *See* Landau, *supra* note 167, at 350–52.

¹⁷⁴ *See* Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (1st Sess. 2007); David Herszenhorn, *House Backs Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A1 (noting that a bill with language covering sexual orientation was passed by the House in November 2007).

¹⁷⁵ *See* Serra, *supra* note 164, at 950.

¹⁷⁶ Knauer, *supra* note 9, at 11; *see also id.* at 13 (“Ninety percent of LGBT elders reported that their primary support group consisted of close friends. . . . [S]uch chosen family structures are not recognized by the law, and this produces a host of difficulties when trying to organize and coordinate eldercare.”). Restrictions are set out in various sections of federal law. *See id.* at 41 n.269 (citing examples).

¹⁷⁷ *See* Landau, *supra* note 167, at 350.

In 1990, Congress passed the Hate Crimes Statistics Act (HCSA), requiring the United States Department of Justice to compile and publish statistics on hate crimes concerning race, religion, ethnicity, and sexual orientation.¹⁷⁸ While HCSA compiles incidences of violence, it lacks provisions concerning perpetrators of hate crimes and fails to establish a cause of action for victims. HCSA may mark the first protective reference to homosexuality at the federal legislative level, but the first explicit indication of federal commitment to end discrimination on the basis of sexual orientation did not come until the Supreme Court decision in *Romer v. Evans*.¹⁷⁹

In *Romer v. Evans*, the United States Supreme Court held that Amendment 2 to the Colorado constitution violated the Equal Protection Clause of the federal Constitution.¹⁸⁰ Incorporated into the Colorado constitution by statewide referendum in 1992, Amendment 2 banned nondiscrimination laws on the basis of sexual orientation, at any level of the Colorado government.¹⁸¹ Like many anti-gay voter initiatives, Amendment 2 attempted not only to repeal a law, but also to prevent the legislature from ever reenacting a gay rights statute.

By applying rational basis review under the Equal Protection Clause, the Supreme Court found that Amendment 2 did not meet the United States Constitution's "commitment to the law's neutrality where the rights of persons are at stake"¹⁸² Rational basis review is applied when a fundamental right is not burdened nor a suspect class targeted.¹⁸³ For a law to be upheld under rational basis review, the law must have a rational connection to a legitimate governmental end.¹⁸⁴ In a six to three decision, the Court found that Amendment 2 lacked this rational relationship to a legitimate end on two grounds. First, homosexuals had no legal recourse since they were enjoined from challenging discrimination on the basis of sexual orientation.¹⁸⁵ Second, Amendment 2 did not meet federal constitutional requirements because the stated objective appeared to be "inexplicable by anything but animus toward the class."¹⁸⁶ The fact

¹⁷⁸ See 28 U.S.C. § 534 (2006).

¹⁷⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁸⁰ See *id.* at 623.

¹⁸¹ See *id.* at 623–24 (quoting Amendment 2 to the Colorado State Constitution prohibiting any level of government in Colorado to "enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.").

¹⁸² See *id.* at 623.

¹⁸³ See *id.* at 631.

¹⁸⁴ See *id.*

¹⁸⁵ See *Romer v. Evans*, 517 U.S. 620, 629 (1996).

¹⁸⁶ See *id.* at 632.

that LGBT individuals were targeted because they were politically unpopular did not sufficiently justify the state constitutional amendment. Thus, the Court found that rather than furthering a legitimate legislative goal, Amendment 2 rendered homosexuals unequal to everyone else.¹⁸⁷

Beyond simply invalidating Amendment 2, the Supreme Court rejected special rights rhetoric, noting that the Court finds nothing special in protecting homosexuals from employment, housing, and other forms of discrimination. As Justice Kennedy recognized, “These are protections taken for granted by most people either because they already have them or do not need them.”¹⁸⁸ Thus, *Romer v. Evans* represents long sought after federal recognition of LGBT civil rights.¹⁸⁹ In the aftermath of *Romer*, however, voter initiatives can still repeal a gay rights law provided that they do not try to preclude the legislature from reenacting the law.

Broader federal recognition of civil rights on the basis of sexual orientation would provide a bulwark against such anti-gay actions. Such federal recognition has developed significantly over the past several decades, and the federal government should build on this progress and continue to strengthen provisions to provide equality for LGBT individuals and families.

VI. STATE NONDISCRIMINATION STATUTES

In the four decades since the 1969 Stonewall Riots,¹⁹⁰ the enactment of statewide nondiscrimination statutes covering sexual orientation has changed the legal reality for gays and lesbians in the United States.¹⁹¹ The first protection against sexual orientation discrimination was established on the local level by a 1972 ban on employment discrimination against gays and lesbians in East Lansing, Michigan.¹⁹² Since the early

¹⁸⁷ See *id.* at 635.

¹⁸⁸ See *id.* at 631.

¹⁸⁹ See Thomas M. Keck, *Beyond Backlash: Assessing The Impact Of Judicial Decisions On LGBT Rights*, 43 LAW & SOC'Y REV. 151, 180 (2009) (noting the LGBT rights movement's response to a rash of similar bans on antidiscrimination laws “with multiple state and federal legal challenges, raising both procedural and substantive objections to these antigay initiatives. After several preliminary victories in state courts, this litigation campaign culminated in *Romer v. Evans*, the 1996 Supreme Court decision invalidating Colorado's Amendment 2.”).

¹⁹⁰ The Stonewall Riots are widely seen as the symbolic start of the gay rights movement in the United States. See, e.g., Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1, 4 n. 14 (2009).

¹⁹¹ Cf. Keck, *supra* note 189, at 178–79 (“For at least 30 years—since the Gallup Poll began asking the question in 1977—a majority of the public has agreed that ‘homosexuals should . . . have equal rights in terms of job opportunities.’ For the past 15 years, the level of support has exceeded 80 percent.”).

¹⁹² See Safe School Coalition, *A Living Memory LGBT History Timeline*, available at www.safeschoolscoalition.org/LivingMemory-lgbtHistoryTimeline.pdf

1970s many municipalities have extended such protection. Efforts to broaden protection beyond the local level, on the other hand, remained largely unsuccessful until the 1990s. Until the late 1980s, only Wisconsin was able to enact a statewide nondiscrimination statute covering sexual orientation.¹⁹³ In 1989, Massachusetts became the second state to protect gays and lesbians through a statewide general nondiscrimination statute.¹⁹⁴ As of 2009, twenty-one states had such laws.¹⁹⁵ Additionally, the District of Columbia has similar provisions.¹⁹⁶

A. *Varying Construction of State Statutes*

Many states have added the term “sexual orientation” to existing nondiscrimination laws. California provides an illustrative example. While California’s Fair Employment and Housing Act (FEHA)¹⁹⁷ provides a general prohibition of discrimination, it originally did not extend to sexual orientation.¹⁹⁸ Sections 1101 and 1102 of the California Labor Code, on the other hand, had been read to cover sexual orientation discrimination.¹⁹⁹ The Labor Code provisions did so by protecting LGBT rights as rights of employees to engage in “political activity” pursuant to the California Supreme Court’s 1979 holding in *Gay Law Students Association v. Pacific Telephone & Telegraph Company*,²⁰⁰ where the court concluded that openly expressing one’s homosexuality falls within the Labor Code’s definition of a political activity. Lower courts in California subsequently extended such coverage to all homosexuals, regardless of whether or not a specific person is openly gay.²⁰¹ In 1992, the California legislature codified *Gay Law Students*, and its protection of gays and lesbians from discrimination, by enacting section 1102.1 of the La-

¹⁹³ See *id.*

¹⁹⁴ See 1989 Mass. Acts 516 (An Act Making It Unlawful to Discriminate on the Basis of Sexual Orientation).

¹⁹⁵ See National Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.*, http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf (last updated July 1, 2009).

¹⁹⁶ D.C. CODE ANN. § 2-1402 (Lexis 2009).

¹⁹⁷ CAL. GOV’T CODE §§ 12900–12996 (West 2005).

¹⁹⁸ *Development in the Law: Employment Discrimination, Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1627 (1996) [hereinafter *Development in the Law*].

¹⁹⁹ See CAL. LAB. CODE § 1101–02 (West 2005); *Development in the Law*, *supra* note 198, at 1627–28.

²⁰⁰ *Gay Law Students Ass’n v. Pacific Telephone & Telegraph Company*, 595 P.2d 592, 599 (Cal. 1979); see *Developments in the Law*, *supra* note 198, at 1627–28.

²⁰¹ See, e.g., *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, 36 (Cal. Ct. App. 1993); see *Developments in the Law*, *supra* note 198, at 1627–28.

bor Code,²⁰² and in 1999, it ultimately incorporated sexual orientation into FEHA.²⁰³

Generally, states have taken one of the following two approaches: incorporate a Title VII-like statute into their state legislation and include sexual orientation in the list of protected groups, or enact a freestanding statute covering sexual orientation discrimination. Minnesota's statute demonstrates the first approach. The Minnesota law provides that it is an unfair employment practice

[f]or an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age, (1) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) to discharge an employee; or (3) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.²⁰⁴

Since sexual orientation is incorporated into the existing general employment nondiscrimination statute, courts can use existing case law pursuant to the statute as guidance in interpreting cases that concern sexual orientation.

Similarly, New Hampshire's general employment nondiscrimination statute was amended to provide that

[n]o person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of the person's political opinions, religious beliefs or affiliations, age, sex, or race. In addition, no person shall have any such employment action taken on account of such person's sexual orientation.²⁰⁵

While New Hampshire has attached an entire sentence to the list of protected classifications, the effect is comparable to that of Minnesota. Thus, by adding the term "sexual orientation" to an existing statute, states such as Minnesota and New Hampshire have the advantage of

²⁰² See CAL. LAB. CODE § 1102.1(a), repealed by 1999 Cal. Stat. ch. 592, § 12 (prohibiting discrimination "or different treatment in any aspect of employment or opportunity for employment based on sexual orientation"); see *Developments in the Law*, *supra* note 198, at 1627–28.

²⁰³ See, e.g., CAL. GOV'T CODE, § 12920, 12921 (West 2005).

²⁰⁴ MINN. STAT. ANN. § 363A.08 (West 2004).

²⁰⁵ N.H. REV. STAT. § 21-I:52 (2005).

dealing with employment discrimination entirely within one statutory scheme.

In contrast, Connecticut's statute demonstrates the second, free-standing approach. Connecticut General Statute Section 46a-81c provides that

[i]t shall be a discriminatory practice in violation of this section: For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation or civil union status.²⁰⁶

The statute also prohibits employment agencies, labor organizations, and private persons from similar discriminatory employment acts based on sexual orientation.²⁰⁷

While it is easier to verse oneself on the legal treatment of gays and lesbians under Connecticut law, since various forms of sexual orientation discrimination are conveniently located within a single statute, courts do not have as strong an argument to look to existing case law under the general nondiscrimination statute when interpreting a case concerning sexual orientation. For instance, a court does not necessarily need to look to bona fide occupational qualification analysis under Title VII²⁰⁸ or the general Connecticut nondiscrimination statute for guidance when interpreting what the Connecticut sexual orientation statute means by "need." Instead, courts may choose to grant broad discretion when determining what an employer must do to show need. Ultimately, each approach has its advantages and disadvantages that will become increasingly clear as a body of case law continues to develop from courts interpreting these statutes.

B. *Anti-Gay Language*

A regretful component of the state statutes that have extended non-discrimination coverage to gays and lesbians is the inclusion of language that undermines the very nondiscriminatory nature of these statutes. For example, Minnesota and Rhode Island insist that passage of their nondiscrimination statutes does not mean that these states condone homosexu-

²⁰⁶ CONN. GEN. STAT. ANN. § 46(a)-81(c) (West 2009).

²⁰⁷ See *id.*

²⁰⁸ The bona fide occupational qualification permits discrimination (that would generally not be allowed under Title VII) if the discrimination is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C 2000e-2(e)(1) (2006).

ality.²⁰⁹ Beyond being insulting, this language codifies the very prejudice that the statutes seek to address. Mixner argues against such institutionalized discrimination and notes that we can

tip-toe through so that they don't notice us this year. If you want that strategy, we can do it. But please stand up if you are willing to give up your social security rights. Please stand up if you would like not to be by the bedside of your partner when they die. Please stand up if you would like to pay more taxes because you are gay. . . . You know I grew up in my time, in a town where there were signs for white and colored drinking fountains. And there were white and black sections in the movie theaters, and at the bus stations and so forth, and everyone assumed that that's just the way it was, and it was going to be that way forever. Guess what, they were wrong, and they were wrong because people refused to accept the deformation that they had for us.²¹⁰

Despite the rationales for a cautious approach, the fact remains that how one asks for protection affects what kind of protection one will receive.

VII. BALANCING THE PROTECTION OF GAYS AND LESBIANS VIS À VIS THE PROTECTION OF RELIGIOUS FAITH

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"²¹¹ Through the Fourteenth Amendment's incorporation doctrine, these provisions protect religious autonomy from state as well as federal government intervention. At the very least, the words of the Establishment Clause and the Free Exercise Clause together create a zone of protection for religious faith.²¹² In the free exercise context,

²⁰⁹ See MINN. STAT. ANN. § 363A.27 (West 2004) ("Nothing in this chapter shall be construed to . . . mean the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle."); R.I. GEN. LAWS § 28-5-6(15) (2001) ("'Sexual orientation' means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. . . . This definition does not confer legislative approval of that status, but is intended to assure the basic human rights of persons to obtain and hold employment, regardless of that status.").

²¹⁰ David B. Mixner, *A Public Lecture: It Is Time to Tell The Truth*, 32 NOVA L. REV. 541, 551–52 (2008). See generally Darren Lenard Hutchinson, *Sexual Politics And Social Change*, 41 CONN. L. REV. 1523 (2009).

²¹¹ U.S. CONST. amend. I.

²¹² See *id.*

laws that infringe religious autonomy must at least be neutral and generally applicable.²¹³

The nation is sharply divided over when formally neutral laws should have religious exemptions and when providing basic civil rights constitutionally justifies infringing on religious faith. Can state nondiscrimination statutes stand alone without religious exemptions and if not, where must the boundaries of such exemptions fall in order for the statute to survive constitutional attack?

A. *Religious Exemptions under Statewide Nondiscrimination Statutes*

Provisions to allow religious exemptions from nondiscrimination statutes on the basis of sexual orientation have varied widely from state to state. For instance, Vermont offers a very restricted exemption, allowing religious organizations to give preference to their members in employment matters, but otherwise it prohibits discrimination. The Vermont statute provides:

The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained.²¹⁴

Vermont's exemption is narrowly defined compared to other states, such as New Jersey.

The New Jersey employment discrimination statute states that

it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establish-

²¹³ See *Employment Div. v. Smith*, 494 U.S. 872, 880 (1990).

²¹⁴ VT. STAT. ANN. tit. 21, § 495 (West 2007).

ing and utilizing criteria for employment of an employee.²¹⁵

In contrast to Vermont, New Jersey exempts social clubs and fraternities as well as religious groups.

In contrast to New Jersey's broad coverage, New Hampshire simply added a vague statement to its classification of sexual orientation as protected status under its anti-discrimination laws. In defining sexual orientation as "having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality," Section 21:49 of the New Hampshire anti-discrimination statute goes on to state that this does not "impose any duty on a religious organization."²¹⁶ This ambiguity will require significant judicial interpretation before residents of New Hampshire will know the parameters of the exemption.

While judicial interpretation is needed to identify what these various statutes permit, the following spectrum provides a rough comparison between religious exemptions. States such as Vermont fall at one end of the spectrum, providing a very narrow religious exemption with respect to sexual orientation.²¹⁷ Other states, including New Jersey and New Hampshire, fall at the opposite end of the spectrum, providing broad religious exemptions.²¹⁸ Rhode Island and California appear to have taken the middle road in allowing preferential hiring of individuals who are of the same religion, but only with regard to employment related to the organization's religious activities.²¹⁹ Connecticut may also fall within this middle category. In Section 46a-81p of its employment nondiscrimination statute, Connecticut states that

[t]he provisions of sections 4a-60a and 46a-81a to 46a-81o, inclusive, shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.²²⁰

²¹⁵ N.J. STAT. ANN. § 10:5-12(a) (West 2007).

²¹⁶ N.H. REV. STAT. § 21:49 (2005).

²¹⁷ See *supra* note 214 and accompanying text.

²¹⁸ See *supra* notes 215–16 and accompanying text.

²¹⁹ R.I. GEN. LAWS § 28-5-6(7)(ii) (2009); CAL. GOV'T. CODE § 12922 (West 2005) (exempting religious organizations for jobs "involving the performance of religious duties").

²²⁰ CONN. GEN. STAT. ANN. § 46a-81p (West 2009).

Given this language, it is conceivable that a court will assess the religious nature of a job rather than the religious status of the organization, potentially limiting the nondiscrimination exemption.

B. *Religion and the United States Constitution*

Prior to 1990, the Free Exercise Clause was understood to require that any statute that substantially burdened religious activity must have a compelling state interest.²²¹ The 1990 Supreme Court holding in *Employment Division v. Smith* severely restricted use of the compelling state interest test.²²² *Smith* concluded that a generally applicable state law that is facially neutral does not infringe upon the Free Exercise Clause.²²³ Religious beliefs cannot justify violating a generally applicable, neutral law. Instead, a religious individual or organization will only prevail on a free exercise challenge if the law in question is directed at religious practice. Congress reacted to the *Smith* decision by enacting the Religious Freedom Restoration Act of 1993 (RFRA).²²⁴ This statute had the direct intention of overturning *Smith* and reinstituting the use of the compelling state interest test for laws that burden religious activity under the Free Exercise Clause.²²⁵ Under RFRA, if a justification for a state or federal law that substantially burdened a religious activity was not compelling, then it fell under RFRA's automatic statutory exception. Yet, RFRA has been ruled unconstitutional with respect to state governmental actions by *City of Boerne v. Flores*.²²⁶

A spectrum of authority has developed in regard to the intersection of claims of religious exemptions and otherwise generally applicable law. On one end of the spectrum, the government has authority over activity that is commercial in nature.²²⁷ At the other end of the spectrum,

²²¹ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

²²² See *Employment Div. v. Smith*, 494 U.S. 872, 885–89 (1990).

²²³ See *id.* at 879–80, 882–85.

²²⁴ See 42 U.S.C. § 2000bb–2000bb-4 (2006).

²²⁵ Section 2000bb-1 of RFRA stated that:

(a) In general: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates 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.

Id. § 2000bb-1.

²²⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding that Congress had surpassed its Fourteenth Amendment, Section Five power because it did not properly “enforce” the free exercise law set forth in *Smith*).

²²⁷ See David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1180 (1994).

religious organizations have authority over their own doctrinal transmission activities.²²⁸ When religious activity has commercial components it has been hard to determine where along the spectrum the case falls.

Religious beliefs are not a total bar to government regulation. As the Supreme Court held in *United States v. Lee*, each individual does not enjoy unlimited protection of religious faith.²²⁹ Furthermore, when religious individuals choose to engage in commercial activity, the limits they impose on their own activity cannot be imposed upon the generally applicable statutory scheme.²³⁰ Lee was a member of the Old Order Amish.²³¹ Both he and his Amish employees felt compelled by their religious beliefs to refrain from partaking in the social security system.²³² Thus, Lee did not withhold social security taxes from his employee's wages and he did not pay the employer's share of his worker's social security taxes.²³³ In response to an IRS bill for the unpaid taxes, Lee brought a free exercise claim that the government was precluded from requiring social security payments.²³⁴ While the Supreme Court agreed that Lee's religious beliefs would be infringed, the Court found that it was constitutional to do so since the government had an overriding interest in a workable tax system.²³⁵

While *Lee* clarifies that within a commercial zone the government has broader discretion to act in ways that may infringe upon religious beliefs, there also exists a zone of doctrinal transmission in which the government cannot interfere, under the Free Exercise Clause.²³⁶ Instead, religious individuals and organizations have much authority over individuals with whom they will associate and what communication will be permitted.²³⁷ This zone includes such activities as preaching, praying, proselytizing, and worshipping within a group.²³⁸ For example, in *Cantwell v. Connecticut*, three Jehovah's Witnesses were convicted of breaking a Connecticut law that prohibited religious solicitations without approval from local authorities.²³⁹ The Supreme Court noted that, while

²²⁸ See *id.* at 1201; see also *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

²²⁹ See *United States v. Lee*, 455 U.S. 252, at 258–61 (1982) (rejecting a free exercise challenge brought by a member of the Old Order Amish against a federal tax); see also *Smith*, 494 U.S. at 880. .

²³⁰ *Lee*, 455 U.S. at 261.

²³¹ See *id.* at 254.

²³² See *id.* at 254–55.

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See *United States v. Lee*, 455 U.S. 252, 256–61 (1982).

²³⁶ See *Cruz*, *supra* note 227, at 1201.

²³⁷ See *id.*

²³⁸ *Id.* 1203.

²³⁹ See *Cantwell v. Connecticut*, 310 U.S. 296, 300 (1940) (holding that the fundamental Fourteenth Amendment notion of liberty encompasses "the liberties guaranteed by the First Amendment"); see also *Cruz*, *supra* note 227, at 1201–02.

governmental authority may infringe upon religious conduct, Connecticut was not permitted to give an official an unrestricted right to refuse licenses for religious solicitation.²⁴⁰ In reversing the convictions, the Court went on to find that the breadth of Connecticut's breaching the peace provisions "unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."²⁴¹ The Court held that governmental regulation in the zone of doctrinal transmission must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."²⁴² Thus, *Cantwell* and the cases that follow do not afford religious individuals and institutions a general exemption from regulation.²⁴³ Instead, it clarifies the limitations to governmental infringement within the zone of doctrinal transmission.

Religious exemptions from employment nondiscrimination statutes appear to be permissible primarily within the limited sphere of doctrinal transmission activities, such as gays and lesbians in the ministry.²⁴⁴ Determining when a person's religious faith leads to the violation of other people's basic civil rights is not a unique question to the gay rights debate. Similar religious objections have been brought against race and gender civil rights measures.²⁴⁵

C. *Scriptures in Context*

While Leviticus expressly permits slavery, we no longer find this text to be a sufficient reason for enslaving people.²⁴⁶ Yet, this section of the Bible is regularly used to condemn LGBT people.²⁴⁷ Jay Michaelson discusses the evolutionary understanding of religious development and proposes that only by entering into a conversation that discusses religious

²⁴⁰ See *Cantwell*, 310 U.S. at 305–06; see also Cruz, *supra* note 227, at 1201–02.

²⁴¹ *Cantwell*, 310 U.S. at 308; Cruz, *supra* note 227, at 1202.

²⁴² *Id.* at 311; Cruz, *supra* note 227, at 1203.

²⁴³ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

²⁴⁴ Cruz, *supra* note 227, at 1205.

²⁴⁵ *Id.* at 1179 n.13 (citing *E.E.O.C. v. Pac. Press Publ'n Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982) (denying a free exercise claim against Title VII's ban on sex discrimination); *Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 312 (5th Cir. 1977) (denying a free exercise claim against prohibition of racial discrimination in 42 U.S.C. § 1981)).

²⁴⁶ See, e.g., *Leviticus* 25:44–46 (King James).

²⁴⁷ Foreman, *supra* note 26, at 563 (stating that the Bible was once used to justify slavery and that "[t]oday, seven of the more than one million verses in the Bible are deliberately misinterpreted to justify anti-gay animus, and the airwaves are full of preachers misquoting *Leviticus* and *Saint Paul* . . .") (citing DANIEL A. HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY* (Alamo Square Press 1994) (concluding that a proper examination of The Bible reveals that it cannot legitimately be used to support the condemnation of homosexuality); MEL WHITE, *WHAT THE BIBLE SAYS—AND DOESN'T SAY—ABOUT HOMOSEXUALITY*, <http://www.soulforce.org/pdf/whatthebiblesays.pdf> (explaining that many Americans misconstrue the Biblical verses that mention same-sex behavior and that these verses neither condone nor disparage homosexuality)).

categories and assumptions can personal experience transcend those assumptions.²⁴⁸ The number of people who said they knew no gays or lesbians dropped from 54% to 27% over the past two decades.²⁴⁹ Michaelson contends, "What is required is not third person argumentation but first-person testimony."²⁵⁰ Bishop Gene Robinson²⁵¹ explains that "those who believe that the 2,000-year tradition against homosexuality argues against change forget that the Church has changed its understanding of some very important teachings that it has held for countless centuries. For instance, the Church for nearly 2,000 years took seriously Jesus' words that remarriage after divorce was adultery."²⁵²

Four of the biblical passages most commonly cited to indicate that the Bible holds a position against homosexuality forbid worshipping foreign gods.²⁵³ Only through an inaccurate translation of the Hebrew term "qadheshim" into the word "sodomite" have these passages come to be associated with condemning homosexuality.²⁵⁴ "Qadheshim" means "holy," and in these texts, the term refers to the "sacred ones" who were temple prostitutes in Canaanite fertility ceremonies. As God's "chosen people," Israelites were bound to God by a covenant. This pact required Jewish people to refrain from participating in the religious practices of Gentiles. This included not taking part in conduct, such as male homosexual activity, which was associated with Canaanite rituals.²⁵⁵

²⁴⁸ See Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 MICH. J. GENDER & L. 41, 113–19 (2008).

²⁴⁹ *Id.* at 116.

²⁵⁰ *Id.*

²⁵¹ Robinson was the first openly gay bishop appointed to the Episcopal Church, whose appointment has caused a schism in the church. See Laurie Goodstein, *Episcopal Vote Reopens a Door To Gay Bishops*, N.Y. TIMES, Jul. 15, 2009, at A11.

²⁵² V. Gene Robinson, *A Public Lecture: Why Religion Matters in the Civil Rights Debate for Gays and Lesbians*, 32 NOVA L. REV. 573, 582 (2008). Robinson also notes:

According to the Holiness Code of Leviticus, many things were an "abomination" to God, including the eating of pork. That was not to say that eating pork was innately wrong, but that it was to be one of the ways Jews were constantly reminded that they were different, a separate chosen people of God, and in so observing these dietary laws, would be reminded of this special relationship to God. Likewise, they were not to eat shellfish, plant two kinds of seed in the same field, or wear two kinds of cloth simultaneously.

Id. at 579–80.

²⁵³ MICHAEL NAVA & ROBERT DAWIDOFF, *CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA* 106 (St. Martin's Press 1994) (noting that the four biblical passages are Deuteronomy 23:17, I Kings 14:24, I Kings 22:46, and II Kings 23:7).

²⁵⁴ THOMAS C. CARAMAGNO, *IRRECONCILABLE DIFFERENCES?: INTELLECTUAL STALEMATE IN THE GAY RIGHTS DEBATE* 48 (Praeger 2002); see also *id.* at 48–50.

²⁵⁵ HELMINIAK, *supra* 247, at 100; see also CARAMAGNO, *supra* note 254, at 48; Michaelson, *supra* note 248, at 60–61 (noting that "the 'sin of Sodom' is not on its face, and was almost never understood by other Biblical texts or Biblical commentators, to be such. . . . Scholars have generally understood the sin of Sodom as selfishness and inhospitality.").

Leviticus is a Holiness Code proscribing the manner in which the Israelites were to set themselves apart from Gentile culture. In the King James Bible translation of Leviticus 18:22 and 20:13, male homosexuality is called an abomination.²⁵⁶ The Hebrew word for abomination, however, does not mean something fundamentally evil. Rather, the term is used in relation to something that is ritually unclean for a Jewish person, such as eating pork.²⁵⁷ Chapter 18 of Leviticus begins by saying, "After the doings of the land of Egypt, wherein ye dwelt, shall ye not do: and after the doings of the land of Canaan, whither I bring you, shall ye not do."²⁵⁸ People misinterpret the Bible when they turn a matter of Jewish cultural convention into a universal ethical issue.

Those who repeatedly refer to Leviticus as condemning homosexuals ignore other requirements promulgated in Leviticus. These requirements include not eating pork, not planting two different kinds of seed in the same field, and not weaving two different kinds of fiber together.²⁵⁹ If fundamentalists seek to advocate that Americans live by the purity laws of Leviticus then they should be equally adamant in eradicating the practice of eating ham or bacon. Similarly, everyone should throw away any article of clothing that is not woven entirely from a single kind of fabric.²⁶⁰

Contemporary fundamentalists relying on biblical quotations to justify anti-gay sentiment is as fatuous as quoting Leviticus to justify slavery. It would be preposterous to argue in favor of such a position, despite such passages of Leviticus as:

Both thy bondmen, and thy bondmaids, which thou shalt have, shall be of the heathen that are around about you; of them shall ye buy bondmen and bondmaids. . . . And ye shall take them as an inheritance for your children after you, to inherit them for a possession, they shall be your bondmen forever. . . .²⁶¹

²⁵⁶ See *Leviticus* 18:22 (King James) ("Thou shalt not lie with mankind, as with woman-kind; it is abomination."); *id.* 20:13 ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be upon them.").

²⁵⁷ NAVA & DAWIDOFF, *supra* note 253, at 106.

²⁵⁸ *Leviticus* 18:3 (King James).

²⁵⁹ See *id.* at 11:7 (prohibition on pork), 19:19 (prohibition on "mingled seed" and garments "garment mingled of linen and woolen").

²⁶⁰ In the desert region, where Sodom was located, it could be fatal to remain outside all night. Thus, people were responsible for upholding a very strict rule of hospitality that forbade anyone from harming someone who had been offered shelter for the night. HELMINIAK, *supra* note 247, at 41 (noting that, understood in its historical context, 1 Corinthians and 1 Timothy teach that abusive forms of both homosexual and heterosexual conduct is forbidden).

²⁶¹ *Leviticus* 25:44–46 (King James).

Those who condemn gays and lesbians based upon passing biblical references to homosexual conduct ignore lengthy passages, including the entire epistle to Philemon, that appear to support slavery.²⁶² This is not to say that the Bible should be read literally and that slavery should be reinstated. Rather, it demonstrates the inherent inconsistency that results from relying on fundamental, literal interpretations of the Bible for moral guidance.

The Bible serves as an approach to moral guidance. Just as it has throughout history, the Bible will continue to direct individuals to diverging perspectives and choices. The Constitution exists to protect the free exercise of religious beliefs, but it also protects the individuals who hold them from other people's effort to require a different interpretation. Regardless of one's interpretation of the Bible or any other religious text, the role of law in a secular state is not to criminalize one religion's notion of sin, even if the majority of the nation belongs to a religion that condemns a given conduct.²⁶³

Liberal democracy consists of two important components. The first part is the liberal notion of freeing the people and the second part is the democratic notion of empowering the people. Liberal democracy provides both "demo-protection," which protects people from tyranny, and "demo-power," which implements popular rule.²⁶⁴ John Locke noted that rights naturally belong to each person, and because they have not been given to the community, they cannot be restricted or refused by the state.²⁶⁵ There are a number of arguments used to justify the notion that rights are inalienable. One approach is to derive such inalienability from the Bible, which identifies God-given rights. Christianity, however, does not provide a universal foundation for morality. While there is no universal religious truth, as Robertson and Merrills point out, "[t]he idea of individual worth can be found in the work of sages, philosophers, prophets and poets from different countries and many faiths in all continents. . . ."²⁶⁶ In an effort to provide an expression of a universal truth,

²⁶² See *Philemon* (King James); see also *Ephesians* 6:5–9 (King James); *Colossians* 3:22–24 (King James); *1 Timothy* 6:1–2 (King James); *1 Peter* 2:18 (King James) (referring to "servants").

²⁶³ See Serra, *supra* note 164, at 951.

²⁶⁴ Giovanni Sartori, *How Far Can Free Government Travel?*, J. DEMOCRACY, July 1995, at 101–02; see also Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

²⁶⁵ See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge University Press 1960) (1690) (arguing that people have a natural right to life, liberty, and property, and that legitimate government exists by the consent of the people through the social contract theory).

²⁶⁶ ROBERTSON & MERRILLS, *supra* note 102, at 8.

Kant secularized the notion that people have inalienable rights, basing his theory on the fact that humans are rational beings.²⁶⁷

To Kant, rights are universal and are based upon the combined notions of freedom and equality.²⁶⁸ He explained that the notion of freedom provides a foundation of universal ethics based upon reciprocal duty.²⁶⁹ This notion can be found in the New Testament of the Bible in the form of Christ's expression of the Golden Rule: Do unto others as you would have them do unto you.²⁷⁰ The Analects of Confucius says never do to the other what you would not like them to do to you.²⁷¹ Kant's secular version says to act only if you want your actions to be universal.²⁷²

Kant explained that rights are indivisible.²⁷³ In other words, one's own right is exactly the same right as the right of the "other."²⁷⁴ Hannah Arendt reworked Kant's theory in relation to participatory democracy.²⁷⁵ Arendt notes that to achieve total domination, a state will attempt to treat humanity as if it is merely one individual.²⁷⁶ The first step in this process is to exclude the "other" from the legal process.²⁷⁷ Ultimately, however, denying legal rights to any individual denies legal rights to everyone.²⁷⁸

D. *Lessons from Religious Accommodations*

Making a distinction between sexual orientation and sexual conduct does not legitimize discrimination. Just as religion has long been an invisible yet contentious characteristic, sexual orientation has become "morally polarizing."²⁷⁹ The United States has made significant strides in coming to terms with religious diversity. The notion that there is more than one valid religious approach and that the path one chooses is not the

²⁶⁷ See generally IMMANUEL KANT, CRITIQUE OF PURE REASON (Norman Kemp Smith trans., St. Martin's Press 1965) (1781) (arguing that because all people are rational beings, all people are equal).

²⁶⁸ IMMANUEL KANT, KANT'S POLITICAL WRITINGS 74 (Hans Reiss ed., H.B. Nisbet trans., 1971).

²⁶⁹ *Id.*

²⁷⁰ Cf. MATTHEW 7:12 (King James).

²⁷¹ See THE ANALECTS OF CONFUCIUS XV 24 (Burton Watson trans., Columbia University Press 2007).

²⁷² RHODE & LUBAN, *supra* note 161, at 147.

²⁷³ See generally KANT, *supra* note 267.

²⁷⁴ Cf. HANNAH ARENDT, ON REVOLUTION (Viking Press 1965) (1963) (arguing that the state aims to protect the interests of all citizens by suppressing the individual's ability to act).

²⁷⁵ See *id.*

²⁷⁶ RHODE & LUBAN, *supra* note 161, at 97.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ William N. Eskridge, Jr., *A Jurisprudence Of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2411 (1997).

deciding factor to moral worth is now widely held. Yet, a similar consensus does not exist that it is acceptable to have a variety of equally valid sexual orientations. Furthermore, many Americans have yet to embrace the notion that one's sexuality is irrelevant to one's moral worth.

Many current mainstream religious organizations today were once targets of hatred and prejudice. It is no more true to claim that the majority sexual orientation is universally true and that other orientations are immoral than it was to claim that the majority religion was universally true and that other religions were immoral.

CONCLUSION

*"[P]eople all over the world risk machine gun fire, long lines, beatings, to vote and change this world for a better place."*²⁸⁰

Human rights are universal, interrelated, interdependent, and indivisible. Governments should ensure that that all persons are accorded legal capacity in civil matters and that no one is arbitrarily deprived of life or security of the person, whether inflicted by government officials or by any individual or group.²⁸¹

A community can be assessed not only by the characteristics that make up its majority, but by the way in which it treats its minorities. It is a sad commentary that it took an event as horrendous as the Holocaust to establish something as basic as The Universal Declaration of Human Rights. It is well known that the Nazis targeted Jewish people. Yet fewer people are aware of the fact that homosexuals were also singled out for extermination.²⁸² Approximately one hundred thousand men were identified as gay and sent to concentration camps.²⁸³ These men were made to wear a pink triangle. Several thousand lesbians were also among the many shot, gassed, worked, or starved to death in the camps.²⁸⁴ These women were not identified as homosexuals, but rather as "anti-social elements."²⁸⁵ They wore black triangles, as did vagrants and petty criminals.²⁸⁶ Protecting the rights of individuals based on sexual orientation would advance the "equal and inalienable rights" pursuant

²⁸⁰ Mixner, *supra* note 210, at 549.

²⁸¹ See THE YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 10–11 (2007), available at http://www.yogyakartaprinciples.org/principles_en.pdf (recognizing, *inter alia*, the rights to universal enjoyment of human rights, and equality and non-discrimination).

²⁸² See AMNESTY INTERNATIONAL, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 7 (Ennusfield Print and Design 1997) (1994).

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ *Id.*

²⁸⁶ See *id.*

to the Universal Declaration.²⁸⁷ Protection of civil society generally, and minority groups in particular, is crucial to achieving good governance.

Recognition of the civil rights of same-sex families can become universal through the expansion of general non-discrimination statutes that provide protection on the basis of sexual orientation, as well as through broad recognition of same-gender civil marriages. Jurisdictions that have yet to pass such provisions should look to existing state statutes and best practices around the world to establish a legal framework with which to secure the civil rights of LGBT individuals, families, and communities. This can be done by replacing discriminatory laws like DOMA with equitable laws that recognize legal relationships within same-sex families, including medical consent and inheritance. The institution that already establishes broad legal recognition of such relationships is civil marriage. This constitutional right²⁸⁸ can be extended to same-gender couples without further delay, as can non-discriminatory second parent adoption provisions. Ultimately, all jurisdictions should explicitly clarify that LGBT individuals and same-sex families have the same civil rights as other members of society.

This Article has considered a range of ways in which sexual orientation has been addressed at provincial, national, and international levels. It has looked at decriminalization of same-sex activity between consenting adults, nondiscrimination measures, and civil marriage for same-sex couples. Recognizing these rights can help alter the emphasis from negative stereotypes to an appreciation that there are multiple approaches to leading a moral life. This realization has already caused significant legal climate change. Some people think the glacial pace of progress is chilling. Others swear that we are already fanning the flames of Hell. Courts will play an important role over the next several years in weighing the concerns of sexual orientation and religious protection. May they find the wisdom to recognize and protect the rights of LGBT people and may members of society find common ground to live together equitably. Governments and civil society can facilitate such understanding by working towards universal recognition of the civil rights of LGBT individuals and same-sex families.

²⁸⁷ See G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

²⁸⁸ Cf. *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing the right to marry in the context of overruling state anti-miscegenation law).