

THE RELIGIOUS LIBERTY ARGUMENT FOR SAME-SEX MARRIAGE AND ITS EFFECT UPON LEGAL RECOGNITION

By

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[1] Some of the most debated issues of morality in American history are inextricably woven with religious fabric and even lined with claims for the First Amendment right to exercise them.¹ Polygamy, deemed slavery's "twin relic of barbarism," was defended by 19th century Mormons as a religious freedom.² The legal right to an abortion is defended by some on the grounds of

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¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. This paper will only examine the Free Exercise Clause. It should be noted, however, that some have argued that the Establishment Clause offers a promising path for the legal recognition of same-sex marriage which this author desires to pursue in subsequent research. Sherryl Michaelson argued that the historical influence of conventional morality and institutional religion in the development of prohibition of same-sex marriages "confirms the supposition that the prohibition is meant to advance certain conceptions of traditional morality." Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 394 (1984). See, e.g., *Adams v. Howerton* 486 F. Supp. 1119, 1123 (1980) ("Thus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible."); *Baker v. Nelson*, 291 Minn. 310, 312 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."). This relationship in part is enough to demonstrate a violation of the Establishment Clause, namely the promotion of a single religious definition of marriage. Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 388-97 (1984). See generally Marc L. Rubinstein, *Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585 (1995).

² SARAH BECKER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 1-15 (2001).

religious liberty.³ It should come as no surprise then that same-sex marriage, interestingly labeled as a contemporary “relic of barbarism,”⁴ is defended as a religious act of worship worthy of First Amendment protection.⁵ Several religious groups either allow same-sex marriage

³ See Paul D. Simmons, *Religious Liberty and Abortion Policy: Casey as ‘Catch-22,’* 42 J. CHURCH & STATE 69 (2000); Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 467, 567-84 (1993); James E. Wood Jr., *Religious Liberty and Abortion Rights*, REPORT FROM THE CAPITAL 29 (January 1974). For a further discussion on this issue see BARRY HANKINS, *UNEASY IN BABYLON: SOUTHERN BAPTIST CONSERVATIVES AND AMERICAN CULTURE* 165-199 (2002).

⁴ Robert P. George and William L. Saunders, *Republicans and the Relics of Barbarism*, NATIONAL REVIEW ONLINE (August 30, 2004), available at http://www.nationalreviewonline.com/comment/george_sqaunders200408301423.95P. The authors draw an analogy between 19th century slavery and polygamy controversies and 21st century abortion and same-sex marriage debates.

⁵ Regardless of their respective differences over same-sex marriage, a broad group of religious groups sent a letter to Congress opposing any amendment to forbid same-sex marriage and couched the objection in terms of religious establishment and free exercise. Those who signed the document are as follows:

Alliance of Baptists; American Friends Service Committee (Quaker); American Jewish Committee, Anti-Defamation League; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christians for Justice Action; Disciples Justice Action Network (Disciples of Christ); Episcopal Church, USA; Friends Committee on National Legislation (Quaker); Guru Gobind Singh Foundation (Sikh); Jewish Reconstructionist Federation; Loretto Women's Network (LWN) (Catholic Order); Lutheran Office for Governmental Affairs of the Evangelical Lutheran Church in America; National Conference for Community and Justice; National Council of Jewish Women; National Sikh Center; Metropolitan Community Churches; Presbyterian Church (USA), Washington Office; Protestant Justice Action; Sikh Council on Religion and Education (SCORE); The Interfaith Alliance; Union for Reform Judaism; Unitarian Universalist Association of Congregations; United Church of Christ Justice and Witness Ministries; and Women of Reform Judaism.

Ron Stief, *Religious Groups Oppose Constitutional Amendment Banning*, WORLDWIDE FAITH NEWS, (July 13, 2004), available at <http://www.wfn.org/2004/07/msg00105.html>.

ceremonies or are currently debating issues such as homosexuality, civil unions, and marriage within their respective faith.⁶

[2] From its early legal battles in the 1970's until the recent decision in *Goodridge v. Department of Public Health*⁷ which ultimately legalized same-sex marriage in the state of Massachusetts, this "relic of barbarism," unlike its 19th century counterpart, appears to be making headway. However, the victories gained could be defeated with weapons of a different making. Instead of the judicial canons fired from the gay and lesbian activists, those opposed to same-sex marriage and civil unions have used legislative artillery such as state constitutional amendments and a proposed, yet defeated, federal marriage amendment.⁸

⁶ Groups that might acknowledge same-sex marriage include The Society of Friends (Quakers), Unitarians, Buddhists, Reform Jews, and Reconstructionist Jews. Other groups such as Episcopalians, the United Church of Christ, and the Union of American Hebrew Congregations have sought to "reinterpret" their faith to permit religious recognition of unions, but not necessarily marriages between same-sex couples. The Roman Catholic Church, the Episcopal Church, the United Methodist Church, the Evangelical Lutheran Church in America, the Presbyterian Church (USA), the Greek Orthodox Church, the Church of Jesus Christ of Latter-day Saints, the National Baptist Convention, and the Church of God in Christ are ordering or asking clergy not to officiate at same-sex marriages. Others have dissented within their respective religious affiliation and sought to reform their own tradition such as Dignity USA (Catholic); SDA Kinship International (Seventh-day Adventist Church); The Association of Welcoming and Affirming Baptists (Baptist); and Affirmation (Mormon). See <http://www.dignityusa.org/archives/2003marriage.html> (August 2003); <http://www.sdakinship.org/index.htm> (last visited Nov. 22, 2005); <http://www.wabaptists.org/whoweare.htm> (last visited Nov. 22, 2005); http://www.affirmation.org/about/gay_and_mormon.asp, (last visited Oct. 28, 2004). For a discussion of various denomination's attempts to interpret homosexuality in light of their faith, see Chris Glaser, *The Love that Dare Not Pray Its Name: The Gay and Lesbian Movement in America's Churches*, in *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE*, 156-60 (Jeffrey S. Siker ed., 1994).

⁷ The Supreme Court of Massachusetts ruled that same-sex couples could no longer be denied marriage licenses in the state of Massachusetts. The court's opinion stated that the denial of those licenses failed to pass the rational basis test for Due Process and Equal Protection. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 960 (Mass. 2003).

⁸ H.J. Res. 56, 108th Cong. (2003).

[3] Have the gay and lesbian activists used all their tactics? Have they run out of arguments? Larry Catá Backer, a professor of law at Pennsylvania State University, believes that even though the debate over same-sex marriage has reached a “point of exhaustion,”⁹ the place to find new life in this battle “may lie in that area of discourse that has been studiously avoided or reviled by advocates of non-conformist marriage -- in the bosom of religion.”¹⁰ Another scholar, agreeing that the religious nature of same-sex marriage ought to be considered in discussions of legal recognition, believes “[I]f religious denominations are willing to perform same-sex marriages they ought to have the right to confer the same societal benefits for those marriages as for those of heterosexuals.”¹¹ This inequality and discrimination in the law, according to Capital University professor of law, Mark Strasser, can hardly be justified particularly due to the fact that some religions recognize same-sex marriage. Strasser maintains that “[if] the appropriate level of scrutiny employed to determine whether the state could justify interfering with this religious practice, the state would *never* be able to establish that such a ban is justified.”¹²

⁹ Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221 (2002).

¹⁰ *Id.* at 245. Backer states that “what can be said has been said; what can be done has been or is being done, or at least considered.” *Id.* at 228. He then articulates the arguments offered by both sides of the debate in the areas of history, legal issues, political and economic issues, and psychiatry. He argues that within each area of discussion evidence is offered for both positions while no evidence appears to sway the other side. Due to his interpretation of the inability of the evidence to move the issue to closure, he posits moving the discussion to a more fundamental level, namely religion. *Id.* at 244-78.

¹¹ Rebecca T. Alpert, *Religious Liberty, Same-Sex Marriage, and the Case of Reconstructionist Judaism* 125, in *GOD FORBID: RELIGION AND Sex IN AMERICAN PUBLIC LIFE*, (Kathleen M. Sands ed., 2000).

¹² Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 629 (2002) (emphasis added). He appears to suggest that a high level of scrutiny should be used even post-*Smith*. This position of his argument will be addressed later. *Id.* at 625-629.

[4] Is religion, along with its First Amendment claim for free exercise, the guarantee to legal recognition? Is religious liberty the great battering ram which breaks down the walls of discrimination for this “relic of barbarism”? These questions will be answered by examining three areas – the claim for religious liberty itself, the legal precedence of this religious liberty argument for same-sex marriage, and the current state (post-*Smith*) of religious liberty.

A RELIGIOUS LIBERTY CLAIM

[5] Before examining the judicial precedence of religious liberty claims by homosexuals seeking marriage or the argument’s possible effect upon legal recognition, this paper seeks to answer a more fundamental question; namely, do same-sex couples have a religious liberty claim to make? This paper has already offered evidence and references to further research that indicate some religious groups approve of and sanction same-sex marriage. However, does a same-sex couple, who are married based on religious conviction, have a Free Exercise claim to make in a court of law?

[6] Same-sex couples are able to exercise their religious right to marry governed by their faith and by their clergy in the context of their faith community. Accordingly, Backer even appears to agree with this assessment, stating that “merely because the government has chosen to use . . . its legislative powers to deny secular recognition” of same-sex marriage “does not mean that such marriages have not occurred – in the eyes of God or those of the religious communities in which such unions take place.”¹³

¹³ Alpert, *supra* note 11, at 128. Apparently, contrary to Backer’s view, Alpert argues, “Same-sex couples know that the state does not at this time validate their marriages, but they want to be considered married in the eyes of God and the Jewish people.” *Id.* However, it does not appear necessary that the state must validate one’s marriage in order to be married in the eyes of God and the Jewish people. *See* Backer, *supra* note 9, at 273-274.

[7] Two recent events could be raised to question this thesis. The District Attorney of Ulster County, New York filed charges against two ministers, Rev. Kay Greenleaf and Rev. Dawn Sangrey, who conducted thirteen marriage ceremonies in the city of New Paltz.¹⁴ However, according to the District Attorney, their stated intention was “to perform civil marriages under the authority vested in them by New York State law, rather than performing purely religious ceremonies.”¹⁵ In other words, the clergy were charged because of their intention to act as an agent of the state validating certain marriages that were forbidden by law. This was the first such attempt to prosecute clergy for marrying gay couples in the United States. The court later dismissed all charges against the two ministers because the judge felt that the statute, forbidding a person from performing a ceremony without also being presented with a marriage license, as presented was unconstitutional.¹⁶

[8] In August 2004, the state of Missouri passed a constitutional amendment which explicitly defines marriage within the state as between one man and one woman.¹⁷ Unique to the Missouri Amendment is a provision that makes marrying two people of the same sex a misdemeanor.¹⁸

¹⁴ See Alan Cooperman, *Charges in Same-Sex Nuptials*, WASHINGTON POST, March 16, 2004, at A4; Thomas Crampton, *Two Ministers are Charged in Gay Nuptials*, N.Y. TIMES, March 16, 2004, at B1.

¹⁵ Cooperman, *supra* note 14. The different religious reactions to these charges are interesting. Rabbi David Saperstein, director of the Religious Action Center of Reform Judaism, said that even if they violated the law, “we respect the ministers' actions as a form of civil disobedience. These laws need to change. That day is coming. We hope, we pray, soon.” *Id.* Richard Land, the president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, said that the minister’s clearly violated the civil law, and “If these ministers feel this is an unjust law, then I’ll look forward to reading their letter from the Ulster County Jail.” *Id.*

¹⁶ *People v. Greenleaf*, 780 N.Y.S.2d 899, 905 (N.Y. Just. Ct. 2004).

¹⁷ MO. CONST. art. I, § 33. See also Cheryl Wetzstein, *Missouri Marriage Amendment Wins Handily*, THE WASHINGTON TIMES, August 4 2004, at A1.

Some, such as Missouri attorney Arlene Zarembka, see the provision as a potential infringement upon religious marriage ceremonies. “You’ve got some questions,” Zarembka said, “like is a Unitarian minister guilty of a crime if he holds a religious marriage under this constitutional amendment?”¹⁹ The provision apparently would not criminalize any religious marriage but only the act of a clergyman who performs a civil marriage acting as the state’s agent, which resembles the earlier New York case.²⁰ Therefore, it appears, without evidence to the contrary, that the religious faiths that desire to perform these ceremonies can do so without interference from the state.

[9] However, Rebecca Alpert maintains that even if same-sex couples have the ability to perform their religious acts, the refusal of legal recognition either by the denial of licensing or denial of benefits constitutes an infringement of religious free exercise.²¹ “If religious denominations are willing to perform same-sex marriages they ought to have the right to confer the same societal benefits for those marriages as for those of heterosexuals.”²² Is the denial of same-sex marriage rights an infringement of the Free Exercise Clause? Is such an argument valid? Has a religious group ever argued that a denial of government benefits hindered their religious freedoms, particularly with regards to marriage? During the late 18th to early 19th century, Baptists fought for greater equality under the law in terms of marriage mainly in the

¹⁸ See Emily Umbright, *Same-Sex Marriage Amendment Won’t Change Current Missouri Laws, Says Attorneys*, ST. LOUIS DAILY RECORD, July 30 2004.

¹⁹ *Id.* Umbright also raised an Establishment Clause claim by arguing that one religious viewpoint was being placed in the Missouri Constitution via the amendment. *Id.*

²⁰ *Id.*

²¹ Alpert, *supra* note 11.

²² Alpert, *supra* note 11, at 125.

form of legal recognition of Baptist ceremonies and the subsequent legal benefits.²³ According to one church-state scholar, Baptists “had no desire to deny themselves the advantages of civil laws that recognized their marriages.”²⁴

[10] Apart from historical evidence, the Supreme Court itself provides a basis upon which religious groups could argue. The Court has recognized the religious significance of marriage. Justice Burger, in *Stanley v. Illinois*,²⁵ wrote that marriage has “religious or quasi-religious connotations.”²⁶ The Court has also said, “many religions recognize marriage as having spiritual significance . . . therefore, the commitment of marriage may be an exercise of faith as well as an expression of personal dedication.”²⁷

[11] Since marriage is not simply a civil or secular association, a claim asking for legal recognition of religious marriages, which has historically been argued by other religious groups, appears to have constitutional import. “Because state supports religious marriage and because those communities have a place in defining public policy,” Alpert says, “it is imperative that religious liberty claims be considered.”²⁸

²³ Philip Hamburger points out that in May of 1784, they dropped their condemnation of laws connecting church and state and their demand for shared privileges. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE, 58-9, 177-8 (2002).

²⁴ *Id.* at 178.

²⁵ 405 U.S. 645 (1972)

²⁶ *Id.* at 663.

²⁷ *Turner v. Safley*, 482 U.S. 78, 96 (U.S. 1987).

²⁸ Alpert, *supra* note 10, at 125.

[12] Another Supreme Court decision could provide further insight into the validity of a religious liberty claim by same-sex couples. In *Sherbert v. Verner*,²⁹ a Seventh-day Adventist Church member who was fired for her refusal to work on Saturday (her Sabbath Day) was denied unemployment compensation for not accepting “suitable work.”³⁰ The Court held that the denial of unemployment benefits to the plaintiff stemmed directly from her religious practices, and they could find no compelling state interest that outweighed her religious exercise rights.³¹ In this employment case, the state did not prohibit her beliefs nor did they prohibit her from acting out those beliefs. Regardless, Justice Brennan still maintained that a burden was placed upon her religious freedom. The state policy “force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”³²

[13] A similar point was made in *Thomas v. Review Board*, “Where [the state] denies such benefits because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.”³³ The important similarity between this employment case and religious claims of same-sex marriage is that both are concerned with public benefits being denied on the basis of faith claims.³⁴ It would then appear that, given these historical examples and the philosophy of

²⁹ 374 U.S. 398 (1963).

³⁰ *Id.* at 401-02.

³¹ *Id.* at 406-407.

³² *Id.* at 404.

³³ 450 U.S. 707, 717-18 (1981).

³⁴ Compare *Id.* and *Alpert*, *supra* note 11 and accompanying text.

religious freedom which undergirds them, same-sex couples have a legitimate claim to the First Amendment, particularly the Free Exercise Clause.

[14] Although the religious liberty claim of same-sex couples has constitutional import, it does not necessitate legal recognition or legal benefits, a point which even gay-rights scholars admit. For instance, Backer has stated, “Even the bona fide establishment of communities of faith embracing same-sex marriage as religious within the meaning of the federal constitution need not guarantee the invalidity of state interference.”³⁵ For example, in *Reynolds v. United States*, the court argued that a religious acceptance of a wife’s jumping on her deceased husband’s funeral pyre would not entail that the state would have to permit the practice.³⁶ The question now to be answered is this: how effective is the same-sex couples religious claim?

THE EFFECT OF THE CLAIM IN LEGAL PRECEDENCE

[15] The legal precedent concerning homosexual rights and same-sex marriage spans the course of more than three decades.³⁷ The first case ever to deal with the issue of same-sex

³⁵ Backer, *supra* note 9, at 276.

³⁶ *Reynolds*, 98 U.S. 145 (1878). This case was the first application of the free exercise clause by the Supreme Court. George Reynolds who had only been a polygamist for a short period by marrying his second wife, Amelia Jane Schofield, was apparently going to be freed from charges by the expedient forgetfulness of the witnesses and the clergy who performed the ceremony. *Id.* at 148-149. However, Amelia, who was visibly pregnant, testified to their marriage. *Id.* Once the marriage was proven, a religious liberty tactic was employed which ultimately failed. Chief Justice Morrison Waite, delivering the opinion, quotes Thomas Jefferson’s *Letter to the Danbury Baptists* (1802), “thus building a wall of separation between church and State.” He then states, “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.” *Reynolds*, 98 U.S. at 164. “[I]t is impossible to believe,” he says, “that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.” *Id.* at 165. He then states a concept that would return in a late 20th century Supreme Court decision which will be examined later, “To permit this [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Id.* at 167.

marriage was *Anonymous v. Anonymous*.³⁸ The court examined the definition of marriage and concluded that no definition, legal or otherwise, understands the term as anything other than the voluntary union of one man and one woman. Therefore, the definition itself, the court argued, necessarily excludes two people of the same sex.³⁹ However, there was no discussion of religion, religious liberty, or the First Amendment. Another case decided later that year, *Baker v. Nelson*, held, upon constitutional analysis, that the denial of a marriage license to homosexual

³⁷ For an exhaustive history of homosexual rights including same-sex marriage, see Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589-681 (2004) and Arthur Leonard, *Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 415-564 (2000)

³⁸ 67 Misc. 2d 982 (N.Y. 1971). The plaintiff requested that the Supreme Court of New York decide his marital status. *Id.* at 983. The court used the definition of “marriage” given in *Morris v. Morris*, 31 Misc. 2d 548, 549 (N.Y. Sup. Ct. 1961) and also appealed to *Black’s Law Dictionary* in order to make this determination. *Anonymous*, 67 Misc.2d at 984. The facts of the case are as follows. The plaintiff initially met his partner in November of 1968 in Augusta, Georgia. *Id.* at 983. After a period of around three months, the couple was married in Belton, Texas. *Id.* During this period of time, the couple never had sexual relations nor saw either party nude. *Id.* However, shortly after their wedding ceremony, the plaintiff discovered that his new wife was in fact a man. *Id.* Even though the man desired to have a sex-change operation, the court decided that at the time of the ceremony the person was indeed a male and that “the so-called marriage ceremony in which the plaintiff and defendant took part in Belton, Texas, on February 22, 1969 did not in fact or in law create a marriage contract and that the plaintiff and defendant are not and have not ever been ‘husband and wife’ or parties to a valid marriage.” *Anonymous*, 67 Misc. 2d at 984.

³⁹ See generally Mark Strasser, *The Future of Same-Sex Marriage*, 22 U. HAW. L. REV. 119, 120-23 (2000). Strasser examines this position taken by several courts that “did not even have to examine whether the implicated state interests justified outweighing the individual interests at issue, because the definition of marriage obviated the need . . .” *Id.* at 121. He offers two meanings behind this position, namely (1) the legislature has chosen to define the term in this way and this precludes same-sex couples or (2) the term itself has “intrinsic” meaning which precludes same-sex couples regardless of the legislature of the courts. *Id.* He argues for that the second position is the best option. *Id.* Strasser mentions, as an illustration, the Hawaii Supreme Court, in *Baehr v. Lewin*, 852 P. 2d 44, 61 (Haw. 1993) which rejected the argument that the definition of marriage itself precludes same-sex marriage. *Id.* at 121-122.

males did not violate the First, Eighth, Ninth, or Fourteenth Amendments.⁴⁰ The court chose not to elaborate on the violation of the First Amendment but simply dismissed the claim without further comment.⁴¹ The first case to deal explicitly with claims of religious liberty came only three years later.

Jones v. Hallahan (1973)⁴²

[16] In this case, two females were denied a marriage license at the Jefferson County Circuit Court in Louisville, Kentucky.⁴³ They then filed suit on the basis that the clerk's denial of the license deprived them of three constitutional rights, namely the right to marry, the right of association, and the right to free exercise of religion.⁴⁴ The court's argument appeared more in line with the *Anonymous* case than *Baker* because of the appeal to the definition of marriage itself as sufficient justification for the denial of legal recognition.⁴⁵ "*Baker v. Nelson* considered

⁴⁰ *Baker*, 191 N.W.2d 185 (Minn. 1971). This case regarded the denial of a marriage license to Richard John Baker and James Michael McConnell, both adult male persons, who made the application in a Minnesota District Court. The clerk, Gerald Nelson, declined to issue the license "on the sole ground that petitioners were of the same sex." *Id.* The court also appealed to the definition of marriage itself as justification of a denial of the license quoting *Webster's Dictionary* and *Black's Law Dictionary*. *Id.* at 186 n.1.

⁴¹ *Id.* at 186 n.2.

⁴² 501 S.W.2d 588 (Ky. 1973).

⁴³ *Id.* at 589.

⁴⁴ *Id.*

⁴⁵ *Id.* The Kentucky Court of Appeals in this case, appealed to the very definition of "marriage," as did the courts in both the *Anonymous* and *Baker* cases. *See supra* notes 38-41 and accompanying text. The court explains that, because the Kentucky statutes regulating marriage did not include a definition of "marriage," a common definition was required. *Jones*, 501 S.W.2d at 589. They appealed to Webster's Dictionary, The Century Dictionary and Encyclopedia, and Black's Law Dictionary. *Id.* The court concluded, "It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the

many of the constitutional issues raised by the appellants here . . . In our view, however, no constitutional issues are involved . . . We find no constitutional sanction or protection of the right to marriage between persons of the same sex.”⁴⁶ In an unusually short opinion, the court quickly denied the weight of the religious liberty claim, stating “The claim of religious freedom cannot be extended to make the professed doctrines superior to the law of the land and in effect to permit every citizen to become a law unto himself.”⁴⁷

[17] Appealing to *Reynolds* in the decision is all the more intriguing if the *Jones* case is placed within its historical context. Only two years prior to this decision, the Supreme Court had used one of the highest levels of scrutiny⁴⁸ in the history of religious liberty in *Wisconsin v. Yoder* (1972).⁴⁹ Instead of applying *Yoder*’s “compelling state interest” test to Jones’ Free Exercise

County Court Clerk . . . but rather by their own incapability of entering into marriage as that term is defined.” *Id.*

⁴⁶ *Id.* at 590.

⁴⁷ *Jones*, 501 S.W. 2d at 590 (citing *Reynolds*, 98 U.S. at 145).

⁴⁸ In applying a high-level scrutiny, sometimes called the “compelling state interest test,” a court will uphold the challenged law only if it is in pursuit of a *compelling* or overriding *governmental interest* and it is *narrowly tailored* to achieve that interest, not intruding on the claimant’s rights any more than is absolutely necessary. For examples of the application of this standard, *see* *Sherbert v. Verner*, 374 U.S. 398 (1963); *Gillette v. United States*, 401 U.S. 437 (1971); *McDaniel v. Paty*, 435 U.S. 618 (1978); and *Widmar v. Vincent*, 454 U.S. 263 (1981). *See also* JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 121-125 (2000).

⁴⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). The Court here exempted the Amish from full compliance with compulsory school attendance for their children. The Court acknowledged that their religious claim was not a “subjective evaluation” or simply a rejection of “contemporary secular values” but was a part of a traditional, communitarian way of life. *Id.* Furthermore, the Amish, according to their decision, met the state’s interest in compulsory education within the context of their agrarian lifestyle. *Id.*

claim, the Kentucky Court of Appeals decided to base its decision on *Reynolds*, one of the lowest level-scrutiny⁵⁰ cases up to that point in history.⁵¹

[18] Although the religious liberty argument for same-sex marriage was among the very earliest attempts at legal recognition, it would take almost twenty-five years for the argument to resurface in court. The court in the following case would have a low opinion of the religious liberty claim as well.

Shahar v. Bowers (1997)⁵²

[19] Robin Joy Shahar clerked at the Georgia Department of Law during the summer of 1990 while attending Emory University Law School.⁵³ After completing her temporary work, the department offered her a permanent position upon completion of her degree in 1991.⁵⁴ Shahar, before taking the position that fall, began making her “wedding” plans.⁵⁵ She invited approximately 250 people to the ceremony including two employees from the Georgia

⁵⁰ In applying a low-level scrutiny, sometimes called the “rational basis test,” a court will uphold the challenged law only if it is in pursuit of a *legitimate* governmental interest and it is *reasonably related* to that interest. For examples of cases which could be interpreted as, if not close to, a low-level scrutiny, see *Employment Division v. Smith*, 494 U.S. 872 (1990); *Boerne v. Flores* 521 S.Ct. 507 (1997). See also WITTE, *supra* note 48, at 121.

⁵¹ *Jones*, 501 S.W. 2d at 588.

⁵² 114 F. 3d 1097 (11th Cir. 1997).

⁵³ *Shahar v. Bowers*, 70 F.3d 1218, 1220 (11th Cir. 1995). She appeared to be a quality student during law school. *Id.* She graduated sixth in her class, worked for the *Emory Law Journal*, and made the Dean’s List every semester. *Id.*

⁵⁴ *Shahar*, 114 F.3d at 1100.

⁵⁵ *Id.* at 1099 n.1. The term “wedding” is in quotation marks not out of moral judgment by the author but because the opinion of the court decided to put Shahar’s relationship in quotation marks to distinguish it from legally recognized heterosexual marriage.

Department of Law.⁵⁶ The wedding, which took place in the summer of 1991, was characterized in the invitation as a “Jewish, lesbian-feminist, out-door wedding.”⁵⁷ In normal lunch-room type office discussions, Shahar had told Robert Coleman, the Deputy Attorney General, her intentions of getting married, changing her name, and taking a trip overseas.⁵⁸ The proverbial office grapevine spread due to an earlier run-in with a coworker at an Atlanta restaurant who overheard her conversation with Coleman.⁵⁹ This ultimately led to the Attorney General of the State of Georgia, Michael Bowers, being made aware of Shahar’s wedding plans.⁶⁰ The Attorney General responded by writing a letter to her withdrawing the job offer stating:

I regret to inform you that I must withdraw the State Law Department’s offer of employment which was made to you in the fall of 1990, which was to commence on September 23, 1991, to serve at my pleasure. This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office.⁶¹

[20] She continued her plans to have the ceremony, and, shortly after the wedding, she filed suit against the Attorney General claiming that four constitutional rights were violated, namely freedom of intimate association, freedom of religion, equal protection, and due process.⁶²

⁵⁶ *Id.* at 1100.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1101.

⁵⁹ *Shahar*, 114 F.3d at 1101.

⁶⁰ *Id.*

⁶¹ Cornelia Russell, *Shahar v. Bowers: Intimate Association and the First Amendment*, 45 EMORY L.J. 1479, 1517 (1996).

⁶² *Shahar*, 114 F.3d at 1101. Several important avenues of legal jurisprudence arise in this case. However, the purpose of this paper is best served if the focus is purely on the court’s opinion

[21] The district court, granting in favor of Bowers, claimed that the marriage was in fact public in nature and could lead the citizenry to view the actions of the department, particularly Bowers, as inconsistent.⁶³ Dealing with Shahar’s religious liberty claim, the court noted that her decision to marry was motivated “in part by a sincerely-held religious belief, . . . and her rabbi and synagogue supported [Reconstructionist Judaism].”⁶⁴ Bowers argued that this claim outweighed the state’s interest and was unwarranted in light of the Supreme Court’s ruling in *Department of Human Resources v. Smith*.⁶⁵ However, the court decided that much of *Smith* was inapplicable, because this case involved an office policy and not a “religion-neutral, generally-applicable criminal statute,” which was the context of *Smith*.⁶⁶ The policy under question stated, “Department employees may not conduct themselves in ways that are inconsistent with state law, publicly take positions that are inconsistent with the stance taken by

concerning religious liberty. This case also discusses the right of intimate association which is defined by Kenneth Karst as “a close familiar personal relationship with another that is in some significant way comparable to a marriage or a family relationship. An intimate association, like any group, is more than the sum of its members; it is a new being, a collective individuality with a life of its own.” Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980). For an in-depth analysis and history of the right of intimate association see Russell, *supra* note 61, at 1479-1531.

⁶³ *Shahar v. Bowers*, 836 F.Supp. 859, 865 (N.D. Ga. 1993). The court demonstrated that Shahar’s ceremony was indeed public due to the fact that many people were invited to the ceremony, including department employees; she and her partner wear wedding rings; they both filed for their name change petition with the Fulton County Superior Court; they received the married rate on their insurance. *Id.*

⁶⁴ *Id.* at 866.

⁶⁵ 494 U.S. 872 (1990). *Smith* involved two Native American drug and alcohol counselors at a private corporation who were terminated from their jobs for ingesting peyote for a religious ceremony. *Id.* They applied to the Employment Division of Oregon’s Department of Human Resources for unemployment compensation but were denied. *Id.* The Supreme Court ruled that their claim to religious liberty did not require an exemption from a criminal law which was neutral and generally applicable. *Id.* at 890.

⁶⁶ *Shahar*, 836 F.Supp. at 866.

the Department of Law, or conduct themselves in ways that undermine the credibility of the Attorney General's Office.”⁶⁷ The court did, however, find *Smith* relevant in that it restricted the scrutiny offered in *Sherbert*.⁶⁸ Because the court believed that neither *Smith* nor *Sherbert* provided a test fitting the particulars of this case, the court opted to use the *Pickering* test,⁶⁹ a free speech test that seeks to balance the public employee’s rights with the public employer’s need for order.⁷⁰ It permits termination of a public employee based purely on speculation by the government employer that the employee’s speech will interfere with the agency’s function. The court concluded on the basis of this test that, “assuming without deciding that [the] defendant indirectly burdened [the] plaintiff’s right to freely exercise her religion, . . . *any burden suffered . . . was justified* in light of the above-discussed unique governmental concerns” for the department to carry out its function.⁷¹

[22] After losing in district court, Shahar appealed to the Eleventh Circuit. The appeals court did not disagree with the earlier court’s decision and even used similar argumentation to arrive at its conclusion. The *Pickering* case was again decided to be the best test used “for evaluating the constitutional implications of a government employer’s decision based on an employee’s

⁶⁷ *Id.* at 866 n.5.

⁶⁸ *Id.* at 866.

⁶⁹ *Pickering v. Board of Education*, 391 U.S. 563 (1968).

⁷⁰ For a in-depth discussion of the *Picerking* test and its use in this case and others see Steven Aden, *A Tale of Two Cities in the Gay Rights Kulturkampf: Are the Federal Courts Presiding Over the Cultural Balkanization of America?*, 35 WAKE FOREST L. REV. 295, 295-342 (2000).

⁷¹ *Shahar*, 836 F. Supp. at 866 (emphasis added).

exercise of her right to free speech.”⁷² Although this case is technically not the *Smith* low-scrutiny test used in current religious free exercise cases, the level of scrutiny proved similar:

We have previously pointed out that government employees who have access to their employer’s confidences or who act as spokespersons for their employers . . . are in a special class of employees and *might seldom prevail* under the First Amendment in keeping their jobs when they conflict with their employers.⁷³

[23] The appellate court then sought to balance the claims of the public employee applicant, Shahar, with the claims of the employer, the Attorney General of the State of Georgia.⁷⁴

Bowers, demonstrating the employer’s interest in denying the offer, stated, “There are no words in the law that say, ‘Thou shalt not engage in homosexual marriage,’ but I couldn’t hire someone who was holding herself out as engaged in a homosexual marriage in view of the laws of the state of Georgia.”⁷⁵ The “laws” mentioned by Bowers were an apparent reference to the sodomy laws which were deemed constitutional in *Bowers v. Hardwick*.⁷⁶ The significance here was that the department itself was greatly involved in the case.

⁷² *Shahar*, 114 F.3d at 1103.

⁷³ *Id* (emphasis added).

⁷⁴ *Id.* at 1106.

⁷⁵ McKay Jenkins, *Gay Rights Battle Focuses on Georgia; Fight for Legal Recognition Still Steeply Uphill in Georgia*, ATLANTA J. & CONST., Oct. 6, 1991, at D1, *quoted in* Aden, *supra* note 70, at 319.

⁷⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986). This case, which was recently overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003), upheld Georgia’s ban on sodomy. Justice White, delivering the opinion, said, “Against this background, [in which many States have criminalized sodomy and still do], to claim that a right to engage in such conduct [sodomy] is ‘deeply rooted in this Nation’s history and tradition’ . . . is, at best, facetious.” *Bowers*, 478 U.S. at 194. He further argued that sodomy laws should not be invalidated because “there is no [rational basis for the law] other than the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable.” *Id.* at 196.

[24] The appellate court believed that the public nature of the “wedding” was “enough to warrant the Attorney General’s concern.”⁷⁷ The appellate court declared that, within the context of the homosexual controversy in Georgia, a “public perception”⁷⁸ which might “give rise to a likelihood of confusion in the minds of members of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues,” outweighs any constitutional right she might claim.⁷⁹

[25] The manner in which this court specifically treated her claims to religious exercise should be discussed. Judge Edmondson, delivering the opinion of the court, questioned whether or not Shahar had a constitutionally protected right to be “married” to another woman, particularly the right of intimate association.⁸⁰ The opinion also expressed “considerable doubt” that she possessed a constitutional right to be “married” and thus to engage in her religion, especially since her “religion requires a woman neither to ‘marry’ another female . . . nor to marry at all.”⁸¹ In a concurring opinion, Circuit Judge Tjoflat disagreed with Edmondson and responded, “I have found no authority for the proposition that the Free Exercise Clause protects only those activities

⁷⁷ *Shahar*, 114 F.3d at 1106.

⁷⁸ *See id.* at 1105 n.17.

⁷⁹ *Id.* at 1107. For a discussion on the weight of public perception in *Shahar*, see Jeremy Lowe, *Homosexual Discrimination and Government Employment: Shahar v. Bowers – The Government Employers’ Shield of Public Animosity*, 55 WASH. U. J. URB. & CONTEMP. L. 191 (1999); Michele Booth, *Shahar v. Bowers: Is Public Opinion Transformed Into a Legitimate Government Interest When Government Acts As Employer?*, 78 B.U. L. REV. 1235 (1998); Bryan Wildenthal, *To Say ‘I Do.’ Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381 (1998).

⁸⁰ *Shahar*, 114 F.3d at 1099.

⁸¹ *Id.*

which a person's religion commands him or her to perform."⁸² The concurring judge pointed out that the *Smith* decision warned the courts from seeking to determine the place of a religious claim within its respective framework or the plausibility of the claim itself.⁸³

[26] Three major reasons were offered by the court as to why doubt existed that the religious exercise claim caused same-sex marriage to become constitutionally protected. First, courts must be cautious in creating new rights not set out in the Constitution's text even if they seem like a good idea or are popular.⁸⁴ Second, the historical precedent in the United States demonstrates no found constitutional right to same-sex marriage.⁸⁵ Third, traditional marriage, namely between one man and one woman, has been challenged in previous history on religious liberty grounds to no avail.⁸⁶ "The advocates of polygamy, we assume, were no less sincere than the advocates of same-sex marriage, and they too had some religious arguments for their views. Yet, the Supreme Court repeatedly held that the Constitution provides no protection"⁸⁷ The court, similar to *Jones*, alluded to the *Smith* case: "Free Exercise . . . does not require that 'those who make polygamy a part of their religion are excepted from the operation of the statute' criminalizing polygamy."⁸⁸

⁸² *Id.* at 1117 n.12 (Tjoflat, J., concurring).

⁸³ *Id.* (Tjoflat, J., concurring).

⁸⁴ *Id.* at 1099 n.2.

⁸⁵ *Id.*

⁸⁶ *Shahar*, 114 F.3d at 1099 n.2.

⁸⁷ *Id.*

⁸⁸ *Id.* (citation omitted).

[27] The appellate court, in the same vein as *Reynolds* and to some degree as *Smith*, argued a belief-action distinction: “That the Attorney General did not revoke Shahar’s offer because of her religious affiliation or her religious beliefs (as opposed to her conduct) is plain from the record.”⁸⁹ Furthermore, even if the appellate court were to establish that her religious exercise claim was a concern, the court would not have decided differently.⁹⁰ “Assuming *arguendo* that the Attorney General’s decision to revoke Shahar’s offer did implicate her Free Exercise rights, we believe that *Pickering* balancing applies . . . and that the Attorney General prevails in that balance.”⁹¹ Furthermore, applying the decision in *Lyng v. Northwest Indian Cemetery Protective Ass’n*,⁹² the appellate court stated, “[S]everal of us also doubt that a facially neutral executive act which adversely impacts on the exercise of one’s religion either constitutes a violation of the Free Exercise Clause or requires heightened scrutiny.”⁹³

⁸⁹ *Id.* at 1111 n. 27.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 485 U.S. 439 (1988). In this case,

[T]he United States Forest Service prepared a final environmental impact statement for constructing a paved road through federal land, including the Chimney Rock area of the Six Rivers National Forest. This area, as reported in a study commissioned by the Service, has historically been used by certain American Indians for religious rituals that depend upon privacy, silence and an undisturbed natural setting.

Id. The Service rejected the study’s recommendation that the road not be completed because it would irreparably damage the sacred areas. *Id.* The Court ruled that the Free Exercise Clause did not prohibit the logging. It opined, “[G]overnment simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” *Id.* at 452.

⁹³ *Shahar*, 114 F.3d at 1111 n. 27 (citation omitted).

[28] The precedence of religious liberty arguments offered by same-sex couples do not appear to hold out the promise that “were the appropriate level of scrutiny employed to determine whether the state could justify interfering with this religious practice,” as Strasser claims, “the state would *never* be able to establish that such a ban is justified.”⁹⁴

[29] The courts have not used the level of scrutiny that Strasser desires. In both cases the courts either used or argued on the basis of a low-level of scrutiny. The opinions in *Reynolds*, *Pickering*, *Lyng*, and *Smith* all represent a similar skepticism of a religious claim’s weight in exemption from generally applicable laws.⁹⁵ The *Jones* case, which is arguably the case most likely to have regarded the religious liberty claim with greatest validity, all but dismissed the argument, referring back to *Reynolds*.⁹⁶ The post-*Smith Shahar* case contained circumstances, such as the claimant’s status as a public employer, which perhaps necessitated a lower level of scrutiny than a case like *Jones*. However, it does not appear that the public nature of the employment would have altered the court’s intentions of using a very low-level of scrutiny according to its opinion.⁹⁷ Therefore, the legal precedent alone does not appear to guarantee the legal recognition of religious same-sex marriage. It could be argued, looking simply at precedent, that religious liberty has been the weakest argument used thus far for same-sex marriage as opposed to privacy and equal protection claims.⁹⁸

⁹⁴ Strasser, *supra* note 12, at 629 (emphasis added). He appears to suggest that a high level of scrutiny should be used even post-*Smith*. This position of his argument is addressed *infra* notes 99-114.

⁹⁵ See *supra* notes 58-85 and accompanying text.

⁹⁶ See *supra* text accompanying note 47.

⁹⁷ See *supra* notes 52-93 and accompanying text for a discussion of the *Shahar* opinions.

THE EFFECT OF THE CLAIM POST-SMITH

[30] Given that the legal precedent should curb the enthusiasm for the religious liberty claim's effectiveness among gay-rights scholars, the *Shahar* case was one of unique circumstances perhaps necessitating a lower level of scrutiny. For this reason, *Shahar* may not be definitive for post-*Smith* analysis. What effect, then, might the Free Exercise claim have upon legal recognition in a post-*Smith* court when the issue of public employment would not hinder same-sex couples' religious claims? In 1990, the Supreme Court's ruling in *Employment Division, Department of Human Resources v. Smith*,⁹⁹ one of the most controversial cases in the Court's history,¹⁰⁰ drastically altered the face of religious liberty in American jurisprudence. Strasser, to the contrary, has great confidence in the ability of the Free Exercise Clause to grant same-sex couples religious freedom.¹⁰¹ "It is quite clear that the Court would not currently dismiss religious practices so cavalierly."¹⁰² He is alluding to the Mormon polygamy cases in which the court's low-scrutiny found little room for religious exemption.¹⁰³ He suggests that the *Reynolds* Court, in its opinion written over a century ago, was not as sensitive to certain issues that are

⁹⁸ See *Romer v. Evans*, 517 U.S. 620 (1996); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

⁹⁹ 494 U.S. 872 (1990).

¹⁰⁰ Most First Amendment scholars have been critical of the decision. See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990). However, some have favored the opinion. See William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

¹⁰¹ Strasser, *supra* note 12, at 621.

¹⁰² *Id.*

¹⁰³ *Id.* at 621-22.

currently thought of as important, and that the Court itself possessed certain prejudices against Mormons.¹⁰⁴

[31] Strasser's confidence, however, in the neutrality of our current courts and in the effectiveness of the Free Exercise Clause appears ill-founded. The passage of time, even a century, does not dictate that the Supreme Court has shifted its line of reasoning. As the judicial precedent demonstrates, the previously examined courts still deemed it necessary to view their religious liberty claims through the lens of low-scrutiny used in *Reynolds*.¹⁰⁵ The Free Exercise losses, post-*Smith*, far outweigh the victories won by religionists. Even pre-*Smith* religious liberty claims were not as effective as one might think.¹⁰⁶

[32] In *Smith*, the Supreme Court opined that religious exemptions are not constitutionally required, as long as the law under question is "generally applicable" and "neutral."¹⁰⁷ However, the terms "generally applicable" and "neutral" are not as easy to interpret as one would initially imagine.¹⁰⁸ Steven Smith, professor of law at the University of San Diego, argues, "*every law is generally applicable in one sense, while in another sense no law is generally applicable.*"¹⁰⁹ For example, is the Missouri's denial of marriage licenses to same-sex couples generally applicable

¹⁰⁴ *Id.* at 621, 621 nn. 152, 157-58.

¹⁰⁵ *See, e.g.,* *Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

¹⁰⁶ *See generally* Carl H. Esbeck, *Table of United States Supreme Court Decisions Relating to Religious Liberty, 1789-1994*, 10 J. L. & RELIGION 573 (1993-1994).

¹⁰⁷ *Id.* at 879-80. *See supra* note 65 for a general overview of the *Smith* case.

¹⁰⁸ *See* STEPHEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 106-13 (2001).

¹⁰⁹ *Id.* at 107.

and neutral?¹¹⁰ In one sense, the denial is generally applicable to everyone who would attempt to be legally recognized as married with a person of the same sex. Furthermore, the denial is neutral in that it does not discriminate between geographic locations, between levels of economic status, or, for this paper's purpose, between religious or non-religious couples. In *Dean v. District of Columbia*,¹¹¹ a concurring judge argued this position:

My initial difficulty with a postulate of appellants' analysis . . . is its treatment of the marriage statute as the equivalent of a statute expressly addressed to an assertedly suspect class. The marriage statute is simply not the same as, say, a statute prohibiting the employment of homosexuals . . . Rather, it is a statute of inclusion of opposite-sex couples who may wish to enter a particular legal status recognized by the state. To the extent it is exclusive, it is exclusive evenly of all same-sex couples, who may . . . wish to enter that legal status.¹¹²

[33] On the other hand, one could argue that the denial necessarily discriminates against same-sex couples by singling them out from heterosexual couples who are granted all the privileges and benefits of legal recognition. This line of argument appears to be evident in the recent *Goodridge* decision.¹¹³ “[A] person who enters into . . . [a] union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and *equality under the law*.”¹¹⁴

[34] If, after *Smith*, the denial of same-sex marriage on religious freedom grounds is seen in light of *Dean*, then the religious liberty argument would most likely prove ineffective because

¹¹⁰ See *supra* notes 17-19 and accompanying text.

¹¹¹ 653 A.2d 307 (D.C. 1995).

¹¹² *Id.* at 362-63 (Steadman, J., concurring).

¹¹³ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹¹⁴ *Id.* at 949 (emphasis added).

religiously motivated action would not, under this neutral denial, require exemption. However, if we grant, as Strasser does, that such a ban is not generally applicable or neutral,¹¹⁵ would the religious liberty argument become more convincing?

[35] Justice Scalia, delivering the opinion of the *Smith* court, maintains that exemptions based on the compelling state interest test, as seen in earlier cases, were not granted on religious liberty claims alone, but were combined with other constitutional protections such as freedom of speech, freedom of the press, or the right of parents to educate their children.¹¹⁶ Therefore, under *Smith*, these “hybrid” claims require a compelling state interest to override the religious liberty claim as seen in earlier cases such as *Yoder and Sherbert*, instead of the lower scrutiny with a religious liberty claim alone.¹¹⁷ Given the legal precedent, a “hybrid” case could easily be constructed in a same-sex marriage case. In *Shahar*, constitutional issues such as religious liberty, expressive association, and intimate association were part of her charge,¹¹⁸ although the court did not evaluate the case in this manner.¹¹⁹ Even if a victory was gained by this approach, the religious liberty claim itself would not be solely responsible for the victory.¹²⁰ The necessity of coupling religious free exercise with other constitutional matters demonstrates the very low place that the Free Exercise Clause has in the contemporary Court.

¹¹⁵ Strasser, *supra* note 12, at 624-25.

¹¹⁶ *Smith*, 494 U.S. at 881-82.

¹¹⁷ *Id.*

¹¹⁸ *Shahar*, 114 F.3d at 1101.

¹¹⁹ The court examined the claim as a Free Speech claim. *Id.* at 1103.

¹²⁰ *See supra* note 116 and accompanying text.

[36] One of the more well-known cases dealing with “hybrid” rights is *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹²¹ This case, which involved a challenge to various ordinances which criminalized animal sacrifices, was a “hybrid” case, because the plaintiffs presented a free exercise claim coupled with free speech and freedom of association claims as well.¹²² The religious group called Santerias, which is an eclectic group with elements of Catholicism and Yoruba, sacrifices animals as a form of worship.¹²³ The priests, after performing the ritual, often leave the carcasses in public places, including near four-way stop signs or even yards and doorways.¹²⁴ The city of Hialeah then adopted various ordinances in part for sanitary measures.¹²⁵ The Supreme Court decided that the ordinances failed the test of neutrality because, even though not explicitly targeting the Santerias, the statutes nevertheless implied only their acts of worship.¹²⁶ The court then held, “[a] law burdening religious practices that is not neutral or not of general application must undergo the most rigorous of scrutiny.”¹²⁷

[37] Therefore, when applying the denial of legal recognition for same-sex marriage, it could be argued that there is a “hybrid” claim and that the ban is not “generally applicable” or “neutral.” The court must acknowledge a compelling state interest in denying the legal

¹²¹ 508 U.S. 520 (1993).

¹²² *Id.* at 527-28.

¹²³ *Id.* at 524.

¹²⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F.Supp 1467, 1474 n.27 (S.D. Fla. 1989).

¹²⁵ *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 526-28.

¹²⁶ *Id.* at 545-46.

¹²⁷ *Id.* at 546.

recognition of a same-sex couple. Backer believes that the state, having to find a compelling state interest, would fail to establish such importance.¹²⁸ “Disagreements over the nature of marriage . . . involve fundamental religious disagreements. State interference in this context ought to be as restrained as it has been with respect to . . . animal slaughter. . . .”¹²⁹ He then argues, “It is difficult to believe that a Court that protects the right of a religious community to the freedom to practice animal sacrifice would deny the same level of protection to a religious community seeking to join in marriage members of its [own faith] community.”¹³⁰

[38] One recent case would seem to support Backer’s claim. In *Baehr v. Miike*,¹³¹ five major reasons were offered as compelling state interests against denying legal recognition for same-sex couples.¹³² First, the state has a compelling state interest in “protecting the health and welfare of children and other persons.”¹³³ Second, the state “has a compelling interest in fostering procreation within a marital setting.”¹³⁴ Third, “securing or assuring recognition of [the state’s] marriages in other jurisdictions” is also of importance to the state.¹³⁵ The state also has an interest in protecting the public “from the reasonably foreseeable effects of State approval of

¹²⁸ Backer, *supra* note 9, at 262.

¹²⁹ *Id.*

¹³⁰ *Id.* at 264.

¹³¹ No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996).

¹³² *Id.* at *3.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

same-sex marriage” in the laws of the state.¹³⁶ Finally, the state has a compelling state interest in “protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.”¹³⁷ The court, however, concluded that the previous reasons failed to prove a compelling state interest.¹³⁸

[39] The force of the religious liberty claim, when seen in the light of compelling state interest, as Strasser desires, appears much more effective.¹³⁹ When the courts have asked for such interest, the states have failed even as late as *Goodridge*.¹⁴⁰ *Locke v. Davey*, a more recent case, possibly demonstrates a better evaluation of the effectiveness of religious liberty claims for same-sex couples.¹⁴¹ The state of Washington established a Promise Scholarship Program that assisted academically qualified students with college expenses.¹⁴² Joshua Davey, who was awarded the scholarship, sought to apply the money toward his expenses at Northwest College, incurred while earning a double major, which included business administration and pastoral

¹³⁶ *Id.*

¹³⁷ *Baehr*, 1996 WL 6942335, at *3.

¹³⁸ *Id.* at *20-22. An evaluation of the compelling state interest in banning same-sex couples from legal recognition is beyond the scope of this paper. For a negative evaluation, see Strasser, *supra* note 35, at 119-47. For a positive evaluation, see William Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153 (2004).

¹³⁹ Strasser, *supra* note 12.

¹⁴⁰ See *supra* notes 113-114 and accompanying text.

¹⁴¹ 540 U.S. 712 (2004). *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), could possibly be seen as a counter to *Locke*. However, as the *Locke* court itself claimed, *Rosenberger* was specifically dealing with a Free Speech issue and not with the Free Exercise Clause. *Locke*, 540 U.S. at 721 n.3.

¹⁴² *Locke*, 540 U.S. at 715.

ministries.¹⁴³ According to the state regulation, the scholarship could not apply to a pursuance of “a degree in theology.”¹⁴⁴ Davey urged the court to consider *Church of Lukumi Babalu Aye* as precedent to determine the program’s unconstitutionality based on its explicit discrimination against his religion.¹⁴⁵ However, the court rejected this line of reasoning partly because the circumstances of the previous case were very different.¹⁴⁶ Chief Justice Rehnquist, delivering the majority opinion, wrote, “In the present case, the State’s disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite.”¹⁴⁷ He further adds, “[I]t does not require students to choose between their religious beliefs and receiving a government benefit.”¹⁴⁸

[40] When applied to the religious liberty claims of same-sex couples, the similarities between these cases demonstrate their dissimilarities with *Church of Lukumi Babalu Aye*. First, both Davey and same-sex couples are able to exercise their religious faith. The law did not prohibit Davey from getting a pastoral degree, from becoming a minister, or from exercising his respective faith.¹⁴⁹ As previously discussed, same-sex couples have been and are able to marry in a religious ceremony without state interference or intervention.¹⁵⁰ This contrasts with the

¹⁴³ *Id.* at 717.

¹⁴⁴ *Id.* at 715-16.

¹⁴⁵ *Id.* at 720.

¹⁴⁶ *Id.* at 720-21.

¹⁴⁷ *Id.* at 717.

¹⁴⁸ *Locke* 540 U.S. at 720-21.

¹⁴⁹ *Id.*

¹⁵⁰ *See supra* note 13 and accompanying text.

Santerias, who were criminally forbidden from exercising their faith.¹⁵¹ Second, both Davey and same-sex couples sought public, monetary benefits based on Free Exercise grounds. Davey sought the scholarship money to curb the costs of his college degree.¹⁵² Same-sex couples generally seek the various monetary benefits that come with legal marriage, along with other benefits such as hospital visitation.¹⁵³ This is also in contrast to the Santerias, who were not seeking public benefits, monetary or otherwise.¹⁵⁴

[41] Based on Rehnquist's line of reasoning and on the similarities between *Locke* and the same-sex marriage claim, a religious liberty argument which solely amounts to receiving public benefit would not carry much weight.¹⁵⁵ On the other hand, if one could demonstrate, contra *Locke*, that one's religious beliefs actually require those government benefits, the claim might be more effective.

[42] Although several religious communities could be used as test cases, the Reconstructionist Judaism traditions, as evidenced in the *Shahar* cases will suffice.¹⁵⁶ The justification for using this faith tradition is two fold: (1) this is the only explicitly mentioned faith in the court cases thus far, and (2) this religious community has published an extensive report concerning Jewish homosexuality and same-sex marriage.

[43] Alpert suggests that there are at least three values which Reconstructionist Jews embrace as religious. This group validates these same-sex couples as a religious association based on (1)

¹⁵¹ See *supra* notes 121-127 and accompanying text.

¹⁵² See *supra* note 143 and accompanying text.

¹⁵³ Example of a same-sex couple seeking this in case law, as a basis for this assertion.

¹⁵⁴ See *supra* text accompanying note 122.

¹⁵⁵ See *supra* text accompanying notes 147-148.

¹⁵⁶ See *supra* notes 52-93 and accompanying text for an analysis of these cases.

economic justice, (2) stable and committed relationships, and (3) support for childrearing.¹⁵⁷

Two of these three, namely stable and committed relationships and childrearing, are also mentioned in the Reconstructionist Commission on Homosexuality's report.¹⁵⁸

[44] Jewish marriage, according to Alpert, has an "economic basis."¹⁵⁹ According to the marriage contract within Jewish tradition, marriage is an exchange of property whereby the woman, who has an economic value determined by her sexual status, receives economic stability from the husband's material provisions.¹⁶⁰ Since their religious claim entails monetary benefits, Alpert then argues that "[f]or many gay men and lesbians, the reason to fight for same-sex marriage is indeed economic," and that "[t]he absence of these benefits has caused severe financial hardship to gay and lesbian couples."¹⁶¹

[45] Marriage also provides stable and committed relationships within the Reconstructionist faith. The Commission on Homosexuality recognizes the religious nature of marriage because it

¹⁵⁷ Alpert, *supra* note 11, at 127-29.

¹⁵⁸ HOMOSEXUALITY AND JUDAISM: THE RECONSTRUCTIONIST POSITION 13-14 (Reconstructionist Rabbinical Association, 1993). The Commission acknowledges a total of fifteen religious values directly related to the discussion of both homosexuality and same-sex marriage: (1) human dignity and integrity, (2) holiness, (3) equality, (4) community and communal responsibility, (5) loving, caring relationships, (6) stable family and community life, (7) childrearing within the context of family, (8) physical pleasure and responsible sexuality, (9) physical, emotional, and spiritual health, (10) personal freedom, (11) Jewish continuity and adaptability, (12) inclusive community, (13) democracy, (14) learning from contemporary sources of knowledge, and (15) justice. *Id.* at 9-18.

¹⁵⁹ Alpert, *supra* note 11, at 127.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 127-28. The economic benefits included by Alpert are shared property, inheritance, ability for medical decision making, adoption of children, pension and health benefits, joint tax returns, citizenship for immigrant spouses. *Id.*

is not only between the two people betrothed but also includes the divine.¹⁶² In other words, the Reconstructionist tradition claims that, due to the equality and worth of people, the Jewish community has an obligation to sanction same-sex marriage.

[46] Procreation is the third religious value offered as one of the main purposes of marriage within this tradition.¹⁶³ Both studies admit that same-sex couples are able to have children, either through adoption, divorces, or reproductive technologies.¹⁶⁴ This has subsequently caused a gay and lesbian “baby boom.”¹⁶⁵ Alpert specifically states that this desire for childrearing has been linked with a desire to be legally wed in order to receive legal protection for their children.¹⁶⁶

[47] Having examined certain religious values of Reconstructionist marriage, a question remains: does the denial of legal recognition require couples “to choose between their religious beliefs and receiving a government benefit”?¹⁶⁷ First, the economic benefits of legal marriage are questionable. In June 2004, the Congressional Budget Office (“CBO”) released a report on the potential budgetary effects of legal recognition of same-sex marriage.¹⁶⁸ The report includes

¹⁶² HOMOSEXUALITY AND JUDAISM: THE RECONSTRUCTIONIST POSITION, *supra* note 158, at 12.

¹⁶³ Alpert, *supra* note 11, at 128.

¹⁶⁴ *Id.* at 128-29; HOMOSEXUALITY AND JUDAISM: THE RECONSTRUCTIONIST POSITION, *supra* note 158, at 13-14.

¹⁶⁵ Alpert, *supra* note 11, at 129.

¹⁶⁶ *Id.*

¹⁶⁷ *Locke*, 540 U.S. at 720.

¹⁶⁸ CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES, *available at* <http://www.cbo.gov/showdoc.cfm?index=5559&sequence=0> (June 21, 2004).

discussion of income tax, estate tax, social security, and other programs such as Medicare and food stamps.¹⁶⁹ The CBO found over 1,100 statutory provisions granted to legally married couples.¹⁷⁰ The study assumed that 0.6 percent of the population would enter into same-sex marriage, so legalization would have only a small impact on the federal tax revenues.¹⁷¹ Interestingly, the net effect would benefit the federal government and not same-sex couples. The report concludes that federal tax revenues would actually increase by nearly \$400 million dollars each year.¹⁷² This evidence demonstrates that legal recognition would not actually relieve the supposed economic hardship of same-sex marriage partners, but would rather hurt their situation slightly.

[48] The second value of stability and commitment would not be furthered by state recognition, particularly if the couple believed that their marriage was in fact recognized by the divine. This latter recognition appears to be the goal of the Reconstructionist Jews' religious claim anyway. "Same-sex couples know that the state does not at this time validate their marriages, but they want to be considered married in the eyes of God and the Jewish people."¹⁷³ Therefore, the lack of state recognition does not appear to validate their religious claim or burden the claim's *telos*.

[49] The final value, procreation, is probably the most serious claim to be asserted. The actual religious value and exercise of procreation and childrearing is not essentially conditioned upon

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Alpert, *supra* note 11, at 128.

legal recognition, as noted in the previous discussion of the gay and lesbian “baby boom.”¹⁷⁴ Although a full discussion of this issue is beyond the scope of this paper, two important points need to be made. First, legal protection of parental religious rights to raise children is not absolute. A parent, whether religious or not, does not have an unqualified right to keep and raise a child. The most obvious example is if a child is found to be abused or neglected, which is criminal.¹⁷⁵ Thus, a claim to custody could be denied if the state could prove that the child is being criminally abused or neglected.¹⁷⁶ Second, various states already have laws that explicitly protect adoption rights for homosexual couples,¹⁷⁷ and it appears that only Florida,¹⁷⁸ Mississippi,¹⁷⁹ and Utah¹⁸⁰ prohibit homosexual couples from adopting. Thus, it appears that homosexuals already have some legal protection in childrearing and adoption. Regardless of this protection, the religious value of procreation, appears to have little bearing upon the legal recognition of same-sex marriage.

¹⁷⁴ *Id.* at 129.

¹⁷⁵ The Child Abuse Prevention and Treatment Act (“CAPTA”), 42 U.S.C. §§ 5101-5116 (1996), is an initiative to foster child protection and parental prosecution of abuse or neglect – that is, “at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.” *Id.*

¹⁷⁶ *See, e.g.*, TEX. FAM. CODE ANN. § 161.001 (2005).

¹⁷⁷ *See, e.g.*, CONN. GEN. STAT. §§ 46a-81i(a)-(b) (2004); 750 ILL. COMP. STAT. 50/2 (2004); N.J. ADMIN. CODE tit. 10, § 121C-4.1(c) (2004); VT. STAT. ANN. tit. 15A § 1-102 (2004).

¹⁷⁸ Florida law explicitly states that “homosexuals” are not eligible. FLA. STAT. ch 63.042(3) (2004). This law was upheld by the Eleventh Circuit Court of Appeals in *Lofton v. Sect. of the Dept. of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004).

¹⁷⁹ MISS. CODE ANN. § 93-17-3(2) (2004).

¹⁸⁰ Utah prohibits any unmarried cohabiting couple from adopting, thus prohibiting homosexual couples. UTAH CODE ANN. § 78-30-1(3)(b) (2004).

[50] In examining Reconstructionist Judaism, couples do not appear to choose between their religious faith and reception of government benefits, as Rehnquist suggested. In this particular example, all three religious values are achieved without the aid of legal recognition. As a consequence, it appears that *Locke* would seem to limit the effectiveness of the religious liberty claim of same-sex couples.

CONCLUSION

[51] Does this religious “barbarism” provide the battering ram that will lead to legal recognition of same-sex marriage? Ideally, religious, same-sex marriage would have greater strength than its secular counterpart. However, due to the legal precedent and the current state of religious liberty in a post-*Smith* court, the realistic conclusion is that the religious liberty argument provides little aid in recognition of same-sex marriage and may actually hinder its success. It appears that Strasser’s and others’ confidence in religious liberty claims of same-sex couples is ill-founded. The problem does not involve their confidence in same-sex couples getting recognition through the courts as seen in *Goodridge*; rather, the problem is overconfidence in the Court’s view of religion and its respective constitutional protection.

[52] Furthermore, even if a religious liberty claim were to be effective in recognizing same-sex marriage, it would only carve out an exemption for that specific couple for their specific religious liberty claim. For example, a same-sex couple might go to a county clerk’s office to receive a marriage license and might be denied. The couple then might sue based upon Free Exercise and win its case. Only that particular couple would then receive an exemption from the law or be granted a license as an exception.

[53] Given these conclusions, it appears that the religious liberty argument possesses little promise for legal recognition of same-sex marriage. Rather than utilizing judicial tactics for

legal recognition, perhaps Backer's observation would be most effective in permanently changing society:

Only by overcoming the current sociocultural basis of understanding marriage can there be created the sort of basis necessary for the reshaping of law, or the reinterpretation of current legal interpretation. Current law can be useful as a tool to the end, but it does not provide the ultimate solution for same-sex couples seeking social acceptance of that union their communities of faith have solemnized¹⁸¹

Apart from the question concerning the morality of homosexuality and same-sex couples, Backer's model for social change would serve as a helpful insight for social conservatives and progressives alike.

¹⁸¹ Backer, *supra* note 9, at 278. He offers eight strategies which faith communities could undertake to transform culture: (1) embrace your faith, (2) witness your faith, (3) teach your faith within your community, (4) protect your faith, (5) act on your faith in the secular community, (6) appeal to others, (7) call it marriage, and (8) take advantage of the law. *Id.* at 265-78.