

## FAMILY LAW'S CHALLENGE TO RELIGIOUS LIBERTY

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INTRODUCTION

Parameters that define the family have shifted for millennia. Originally, family was premised upon kinship, tribal connections, and household composition; or, as society progressed, a legal status acquired through adoption. The earliest families established a form structure, which entitled those within the form to defined rights over property distribution, the raising of children, and decision-making authority. Some of these early family forms were ratified through references in centuries-old religious texts. In geographical areas where the population assimilated these religious texts, form families became the norm in the fabric of society. Gradually, the norm warranted common law and statutory protection and preeminence. The religious and legal norm remained the standard of what constituted family as society progressed into the modern age. As Professor Harold Berman aptly summarized, “[s]ixty to seventy years ago, the connection between law and religion in the West was so intimate that it was usually taken for granted.”<sup>1</sup>

In addition to form families, parallel family structures have always existed. These families are based more upon function than form, deriving their status as a family from the subjective intent of adult members seeking to share property, a household, or intimacies. These function families, if they lacked the blood, marriage, or adoption elements of form families, were denied the same protected legal status as form families. Most often, they

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1. Harold J. Berman, *Religious Foundations of Law in the West: An Historical Perspective*, 1 J.L. & RELIGION 3 (1983).

suffered legal sanctions. Thus, unmarried, nonrelated adults sharing property, a common household, and intimacies were almost always deprived of inheritance, support, and often paternity rights. As a result, the economic and parenting consequences of these functioning relationships were extremely adverse. However, little thought was given to the disparity between the protections afforded form families and the lack of such protections for function families. Most commentators thought that disparity resulted from personal choice. The rationale was that adults formed function families through personal choice, and because establishing a form family was an available option, any disparity in legal protections arose from personal choices freely made. If adversity ensued, participants had no one to blame but themselves. Furthermore, if a particular choice was not available to adult parties, it was not due to discrimination, but rather to the nature of the choice itself. Thus, same-sex marriage, incestuous marriage, polygamy, and parental rights without a genetic or statutory basis were unavailable choices because of the definition of marriage or parenthood. The definition of the right sought precluded the choice—not society and not the law.

The laws pertaining to family structure existent in the colonial territories of America were always pluralistic. Colonists from countries like England, Holland, France, and Spain did not inexorably maintain the law of the country from which each emigrated. “Instead, . . . the early settlers crafted the law of each new colony in a distinctive fashion designed to give effect to the specific goals that had induced settlement . . . . What [the colonists] shared in common was a willingness to alter received legal doctrine to suit their needs and purposes . . . .”<sup>2</sup> Because many of the settlers came to America to escape religious persecution and to freely practice their own religious beliefs, their religious doctrines often formulated common law, statutes, and practice. Therefore, as Professor Berman observes, many of the laws and practices of early America were firmly rooted in biblical language. This language formed the basis of definitions, rights, and responsibilities applicable to divorce, marriage, adoption, and parentage. Professor Berman, referencing Blackstone’s Commentaries on the Laws of England, opines that for centuries, law was viewed as “a product of overlapping histories—the history of Christianity and Judaism, the history of Greece, the history of Rome, the history of the church, local history, national history, international history, and more.”<sup>3</sup> All of these parameters, he suggests, served to reveal “the providential character of law as part of a divine plan.”<sup>4</sup> Among many Amer-

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2. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 879 (2009) (quoting WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1780–1830, at ix–xii (1994)).

3. Berman, *supra* note 1, at 4–5.

4. *Id.* at 5.

icans today, there remains the notion that law represents a divine plan, a world view, and an immutable natural order to things.

Throughout the twentieth and into the twenty-first century, the concept of law as immutable and divinely ordered was explicitly challenged. The challenges occurred at two levels: first, at the public level, through both civil and criminal litigation; and second, on a private level, through the actions taken by individuals manifesting a newly discovered reality that people could private-order their choices, independent of form or structure. At the public level, beginning with divorce, then proceeding to marriage, adoption, and finally to non-coital parentage, litigants in functioning families used newly discovered federal and state constitutional guarantees to successfully override centuries of precedent. No-fault divorce proliferated; same-sex marriage evolved from nonmarital cohabitation and newly established status arrangements similar to marriage; assisted reproductive technology permitted parentage independent of marriage, sexual intercourse, and genetic connection; single persons, unmarried cohabitants, and same-sex couples could adopt children freely. Over a few decades, on both the public and private levels, the immutable and divinely ordered family law structure in America was challenged and as a consequence, underwent radical change.

Specifically, at the private level, increasing numbers of individual adults spurned form families. Instead, they demonstrated a preference to private-order their lives in order to maximize choices and expand opportunities. The possibility of private-order choices was born in *Griswold's* right to marital privacy,<sup>5</sup> then nurtured by *Eisenstadt's* individual's right to be let alone,<sup>6</sup> *Roe's* personal choice to end a pregnancy,<sup>7</sup> and *Lawrence's* liberty interest protecting intimacies among consenting adults.<sup>8</sup> These seminal decisions abound in family law litigation. Arguably, private-ordering among adults is the engine challenging family law structures today. Private-ordering is not a gay and lesbian movement or a product of increasing secularization. Rather, private-ordering is about private ordering. As Professor Paul Horwitz writes, "the liberal consensus, for both religious and secular reasons, is pervaded by a highly individualistic worldview."<sup>9</sup>

Successful challenges to family law structures at the public and private levels have precipitated a concerted reaction from persons and organizations with sincerely held religious beliefs. For these religious advocates, the debate is about a worldview based on religious beliefs and contexts that evidence a divine plan; individual creeds are not as significant as a shared

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5. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

6. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. *Lawrence v. Texas*, 539 U.S. 558 (2003).

9. PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 15 (2011).

worldview that must be maintained. Among adherents of this worldview, issues such as the definition of marriage, the purpose of human sexuality, the unique integrity of the human body, and the importance of human life are not decided at the individual level, but rather involve questions of fundamental religious truth. Private-ordering, no matter how well-grounded in civil rights and recent constitutional precedent, is not qualified to challenge a worldview based upon scripture, history, and practice. Adherents to this worldview can claim many successful interventions in secular life. “Religious faith has provided the impetus for so many of the movements for civic reform and renewal in the United States: the abolitionist movement, which worked for the eradication of slavery; the labor movement; the child-welfare movement; the civil-rights movement; the peace movement(s); the pro-life movement.”<sup>10</sup> It is because of these formidable accomplishments, plus the fervent evangelical religious beliefs of many Americans that many persons and organizations have resolved to preserve traditional forms of family structure generally, resisting the impetus of private-ordering and instead protecting religious liberty specifically. These adherents rally behind a worldview dependent on religious texts, history, and an immutable natural law.

This Article argues that challenges made to family law structures have provoked a significant reaction from persons and religious organizations advocating a distinctive worldview based on religious and historical values. Additionally, as family law changes from being a product of a religious-historical worldview to being a product of private-ordering, the religious liberty of worldview adherents has been challenged. The struggle is apparent in the debates during the 2012 presidential election and is evidenced in government mandates that include, among other requirements, that employers—including religious organizations—provide insurance coverage for employees that include contraception. Although many aspects of family law have been challenged by private-ordering, this Article will focus on four developments: divorce, marriage, adoption, and parentage. When addressing each of these, this Article will analyze the progression from what had been the standard for centuries, and then the challenges made by private-ordering. Then this Article will analyze the reaction to this challenge by worldview adherents.

Part I of this Article discusses the impact of private-ordering upon family law structures. Changes in family law, particularly as they affect what had heretofore been considered immutable characteristics of form families, occur at a unique cultural time. Citizens have become increasingly pluralistic. There are many religious traditions, and there are certainly many per-

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10. DONALD WUERL, *SEEK FIRST THE KINGDOM: CHALLENGING THE CULTURE BY LIVING OUR CATHOLIC FAITH* 62 (2012).

sons with no religious tradition at all. The Internet, with its multifaceted connections, provides family, affirmation, and faith. Indeed, as one commentator wrote: “[I]t is now possible to imagine life without religious belief at all.”<sup>11</sup> Stripped of its religious underpinnings, history becomes less relevant and natural law unobservable. The focus is now on private-ordering. America’s penchant for private-ordering suggests that it may be impossible to place the genie back into the bottle. It may be impossible to recreate or maintain a worldview without private-ordering, with hierarchy, without the preeminence of conscience.

Part II of this Article analyzes the changes that have occurred in divorce. The indissolubility of marriage, a bulwark of the religious worldview, has dissipated since the advent of no-fault divorce. States adopted the practice whereby either spouse could obtain a divorce regardless of fault with alacrity. From the start, worldview adherents were adamantly opposed to divorce because of the historical and religious uniqueness of marriage; however, divorce remains easy to obtain. Indeed, divorce is becoming inconsequential as the number of persons in nonmarital cohabitation increases. Yet, no-fault divorce forms the bedrock upon which subsequent challenges to family law rest.

Part III of this Article analyzes the changes that have occurred in marriage. An increasing number of couples choose to enter into nonmarital cohabitation rather than marry at all, and a significant number of persons remain single. But marriage and the commitment it entails epitomizes a worldview built upon religion and historical practice, operating as it does under defined terms and defined obligations. For those whose worldview encompasses a definition of marriage as being of one man and one woman, the changes making marriage available to persons of the same-sex have been catastrophic. In addition, many states provide the unique benefits of marriage to persons living in alternative status arrangements such as domestic partnerships, reciprocal beneficiaries, and civil unions. Worldview adherents reject marriage alternatives and same-sex marriage because they ignore the unique function of marriage: sexual intercourse in the context of natural law fecundity.

Part IV of this Article analyzes the changes that have occurred with adoption. Traditionally, adoption is solely a statutory creation. With the exception of equitable adoption—which really is not adoption at all, but rather a means by which equity might be done so as to allow a child to inherit an intestate estate from a caretaker adult—adoption remains a creation of statute. The modern challenge arises from the introduction of statutes that allow single persons, same-sex couples, and unmarried persons to adopt children. These statutes provide the appearance of procreation without the prerequi-

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11. Horwitz, *supra* note 9, at xiv.

site of marriage within the historical and religious parameters of worldview adherents. Today, there are multiple examples of adoption by same-sex couples, single persons and nonmarital cohabitants. Furthermore, once an adoption is finalized in one state, it is entitled to Full Faith and Credit in all other states. States with a public policy favoring a worldview that limits marriage and procreation to form families are powerless to deny recognition.

Part V of this Article analyzes the changes that have occurred in parentage. Through scientific developments in assisted reproductive technology, it is possible for individuals and couples to conceive children through multiple means. Parentage may occur without the necessity of genetic connection, after the death of the gamete providers, and through gestational agreements premised upon mutual consent and a written contract. Moral and ethical issues surrounding these increasing technological achievements include the destroying of human embryos, disposing of embryos upon dissolution of any relationship, and cloning. However, while persons and organizations commit to providing additional opportunities to persons and couples in pursuit of self-ordering, worldview adherents view the process of assisted reproductive technology as a grave distortion of sexual intercourse in the context of marriage. Sexual intercourse within marriage is essential to worldview adherents, and when challenges are made to its importance, both through mimicry and through state action that mandates contraceptive coverage, worldview adherents react strongly. Litigation, commentary, and statutory initiatives surrounding mandated contraceptive insurance coverage is an example. Yet, the real controversy exists over self-ordering persons challenging worldview adherents in the context of family law issues. Because the worldview relies upon religious texts and convictions, this precipitates a challenge to religious liberty.

#### I. PRIVATE-ORDERING VERSUS A WORLDVIEW

American culture has evolved into one that fosters private-ordering. “[T]he institutional and culture climates of America abundantly reinforce languages of an unencumbered self: choice, self-interest, personal happiness, and pleasure. Contexts that reinforce values of service, long-term commitment, and sharing are often submerged, relative to those emphasizing gratification.”<sup>12</sup> While sounding hedonistic, in application, private-ordering is tempered by self-imposed restraints and the legal and social restrictions of the culture itself. But even in this encumbered condition, private-ordering is the engine that guides increasing numbers of Americans

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12. John A. Coleman, *The Common Good and Catholic Social Thought*, in *AMERICAN CATHOLICS AND CIVIC ENGAGEMENT: A DISTINCTIVE VOICE* 10 (Margaret O’Brien Steinfels ed., 2004).

living their individual lives. In contrast, there are many Americans who are convinced that there is a worldview, often structured by scriptural references; sometimes by commonly shared ideals and history; and in a few instances, by political ideologies. Not surprisingly, there are often clashes between those persons expressing their private-ordered choices and persons seeking to maintain an immutable worldview.

Within American civil law there is a clash. On the one hand, there are those persons seeking to readily divorce, marry whom they please, adopt children without restraint, and procreate commensurate with the latest technological advancements. On the other hand, there are those persons who maintain a worldview that views marriage as indissoluble and between persons of the opposite sex, adoption as reserved to persons representative of their worldview, and procreation as restrained by the importance of the sexual intercourse within marriage. Beginning in the second half of the last century, an increasing number of laws were enacted, judicial opinions issued, and private decisions made that openly confronted the traditional worldview. This movement is perceived as a challenge to religious persons and organizations. Previously, these persons and organizations could be exempted from the application of these challenging laws through heightened judicial scrutiny or through statutory accommodation exemptions. But today, these protections have evaporated, been inadequate, or been otherwise denied. Faced with continuing challenges to the religious worldview, persons and organizations are forced to enter the political arena to avoid the consequences of these challenges. Yet, there are difficulties in motivating religious adherents because they too have been affected by the cultural phenomenon of private-ordering, preferring to vote and lobby individually.

If family law challenges are fueled by private-ordering, which this Article argues is the case, how did private-ordering come to be such a formidable force? Three principal factors have contributed to private-ordering's ability to challenge a worldview that had dominated American civil life from the time of the Colonies. First, the perspective of family law has shifted from local to international concerns. Second, the protective judicial scrutiny and statutory accommodation devices that shielded the religious worldview from the intrusion of civil law have been eliminated. Finally, the religious congregations have been affected by the private-ordering of their congregants, thus lessening the political clout that these organizations once wielded. Increasingly, a well-educated congregation of adherents relies upon individual conscience without hierarchical or dogma restraints. However, conscience is often the rationale behind self-ordering.



### A. Evolution of Family Law

In 1858, the United States Supreme Court disclaimed any jurisdiction to decide divorce cases or to address the attendant alimony issues.<sup>13</sup> In so doing, the Court established what is known as the domestic relations exception to federal jurisdiction, making family law an area that “has been left to the States from time immemorial and not without good reason.”<sup>14</sup> The reason that federal courts abstained from state family law disputes was simple: local communities were better able to decide cases based on community mores, and to apply “creative responses to vexing problems.”<sup>15</sup> However, the village has now become the global community, and the emphasis on local family law has waned precipitously.

The first significant challenge to local family law came with the 1878 decision of the United States Supreme Court permitting a state to outlaw polygamy, in spite of the sincerely held religious beliefs of the polygamist.<sup>16</sup> The decision promulgated the distinction often cited in support of the separation of church and state today: “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”<sup>17</sup> One hundred years later, a series of Supreme Court decisions would overturn many state statutes that sought to prohibit sodomy and abortion, restrict access to birth control devices, and prohibit nonmarital cohabitation.<sup>18</sup> These decisions signaled that family law was no longer a local matter; family law became increasingly subject to federal courts and to federal constitutional decisions—and, as time progressed, to state courts and state constitutional decisions.

Federal statutes quickly accompanied federal court rulings. For example, in 1978 Congress enacted the Indian Child Welfare Act,<sup>19</sup> thereby restricting all state court custody decisions concerning Native American children. In an effort to protect Native American culture and traditions, control over children was given to the Native American tribes. Congress en-

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13. *Barber v. Barber*, 62 U.S. 582, 584 (1858); *see also* *Ankenbrandt v. Richards*, 504 U.S. 689, 697–98 (1992) (holding that the exception to federal jurisdiction is grounded in the power of Congress to grant jurisdiction under Article III of the Constitution).

14. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting).

15. *Id.* at 791.

16. *Reynolds v. United States*, 98 U.S. 145 (1878).

17. *Id.* at 166.

18. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a federal right to privacy for married couples); *see also* *Lawrence v. Texas*, 539 U.S. 558 (2003) (banning state sodomy statutes as violating the liberty interest in the Fourteenth Amendment); *Roe v. Wade*, 410 U.S. 113 (1973) (banning state laws prohibiting abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the federal right to privacy to single persons).

19. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1934 (2006).

acted the Parental Kidnapping Prevention Act in 1980,<sup>20</sup> the International Child Abduction Remedies Act in 1988,<sup>21</sup> and the International Parental Kidnapping Crime Act in 1993.<sup>22</sup> These federal statutes affirmed the national character of child custody determinations. Federal statutes were also enacted to establish regulations for child support, such as the Child Support Recovery Act of 1992,<sup>23</sup> and various other federal statutes either complemented or replaced existing state laws—examples include the protection of the worldview definition of marriage through the Defense of Marriage Act of 1996<sup>24</sup> and the protection of battered and abused women with the Violence Against Women Act.<sup>25</sup> A ban on partial-birth abortion was codified through the Partial Birth Abortion Ban Act of 2003<sup>26</sup> and then subsequently held to be constitutional by the United States Supreme Court in 2007.<sup>27</sup>

While the federal judiciary and Congress were becoming more active in their pursuit of transforming family law into a national concern, non-governmental groups were proposing uniform laws for adoption by the states. The National Conference of Commissioners on Uniform State Laws and academic groups such as the American Law Institute drafted laws that, if adopted by the individual states, would make uniform many of the family laws proposed. Gradually, states enacted many of the laws in whole or in part. The Uniform Marriage and Divorce Act, first promulgated in the early 1970s, became the model for many states.<sup>28</sup> Additionally, the Uniform Parentage Act,<sup>29</sup> the Uniform Status of Children of Assisted Conception Act,<sup>30</sup> and the Uniform Premarital Agreement Act<sup>31</sup> became models for many state statutes. Two uniform acts were considered so essential to national enforcement that Congress mandated that they be adopted by the states prior to the state obtaining federal funding: the Uniform Child Custody Jurisdiction and

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20. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3566 (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

21. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006).

22. International Parental Kidnapping Act of 1993, 18 U.S.C. §§ 1201, 1204 (2006).

23. Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified as amended in scattered sections of 18 and 42 U.S.C.).

24. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in scattered sections of 1 and 28 U.S.C.).

25. Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

26. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

27. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

28. UNIF. MARRIAGE & DIVORCE ACT §§ 101–506 (amended 1973), 9A Part I U.L.A. 171 (1998) through 9A Part II U.L.A. 549 (1998).

29. UNIF. PARENTAGE ACT §§ 101–905 (amended 2002), 9B U.L.A. 295–372 (2001).

30. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 1–16, 9C U.L.A. 368–86 (2001).

31. UNIF. PREMARITAL AGREEMENT ACT §§ 1–13, 9C U.L.A. 39–58 (2001).

Enforcement Act<sup>32</sup> and the Uniform Interstate Family Support Act.<sup>33</sup> While the former pertains to child custody enforcement and the latter to child and spousal support, each state was required to adopt the uniform legislation as part of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>34</sup> Increasingly, family law has morphed into a national conglomeration.

It took decades for family law to transform itself from a patchwork of local laws into a more national and consistent assemblage. It took far less time for family law to become international. Today, family law is impacted by an ever-expanding list of international treaties that either provides for international enforcement of current federal laws, enforcement of state determinations of custody or support, or that mandates support for various international endeavors. For example, the Uniform Child Custody Jurisdiction and Enforcement Act specifically refers to enforcing an order for the return of a child made under an international treaty,<sup>35</sup> and the Hague Convention on the Civil Aspects of International Child Abduction prohibits child kidnapping.<sup>36</sup> International adoptions, now commonplace, are included in the Uniform Adoption Act<sup>37</sup> and are also referenced in the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.<sup>38</sup> These are but a few examples of family law's international application.<sup>39</sup>

Family law has evolved from a hodgepodge of local common laws, statutes, and practices into an international, pluralistic, and complex process governed more by shared goals than local and easily recognizable expecta-

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32. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT §§ 101–405, 9 pt. IA U.L.A. 657–706 (1999).

33. UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 101–905 (amended 2001), 9 pt. IB U.L.A. 175–270 (2005).

34. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 101–913, 110 Stat. 2105 (codified as amended in scattered sections of 2, 5, 7, 8, 10, 11, 15, 20, 21, 25, 26, 28, 29, 31, and 42 U.S.C.).

35. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 105, 9 pt. IA U.L.A. 662–63 (1999).

36. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89.

37. UNIF. ADOPTION ACT §§ 1-101 to 8-106, 9 pt. IA U.L.A. 20–132 (1999).

38. Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

39. For additional examples of international treaties and statutes, see WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW STATUTES: SELECTED UNIFORM LAWS, FEDERAL STATUTES, STATE STATUTES, AND INTERNATIONAL TREATIES 398–456 (Thompson Reuters/Foundation Press 4th ed. 2011). *See also* D. MARIANNE BLAIR & MERLE H. WEINER, INTERNATIONAL FAMILY LAW: CONVENTIONS, STATUTES, AND REGULATORY MATERIALS (2d ed. 2010). For cases and materials pertaining to family law, see D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW (2d ed. 2009).

tions. This evolution has fostered a culture of options and choices that fuels private-ordering because it lessens the sense of a local community with a shared vision of expectations and practices. For example, marriage, divorce, adoption, and procreation have become increasingly optional, multifarious, and variable. It is no wonder that individuals perceive so many options available for families and look to private-ordering as the only appropriate response.

#### B. Leveling of Family Law

The Constitution's First Amendment states, in part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>40</sup> When these words were written and adopted, "the idea of the state and the concept of religion were fairly well defined and quite narrowly limited, and where it was thought that the core ideal of religious autonomy could be secured by placing matters of religion beyond the competence of the national government."<sup>41</sup> But times have changed considerably since the Framers drafted the Constitution. Family law has evolved into an international amalgamation. The society in which family law operates has also expanded considerably, retaining little of its ethnic and religious coherence. Instead, family law has become increasingly pluralistic and electronically interconnected. Today's family law would be inconceivable to colonial America. Within this pluralistic milieu, legislatures have enacted choices that contradict the religious worldview of persons and organizations. Because the worldview results from history, natural law, and religious texts, there are few opportunities to change with the times, and words like "marriage" and "parents" have been defined and practiced for centuries. There is no compromising. Hence, religious liberty is challenged.

Modern legislatures most often avoid any reference to religion or faith-based values, seeking to remain firmly neutral amidst a religiously diverse nation. "The current attitude of the state, political officials included, is often one of nominal piety and actual secularism. American politicians, by and large, *campaign* as Christians and *govern* as secularists."<sup>42</sup> But politicians are bereft of options. Disregarding reelection chances, both the modern secular *and* religious culture promote acceptance, equality of choice, and non-discrimination. This is, after all, the culture of private-ordering, where each individual must be free to make personal choices. This is the essential ingredient. Who am I to evaluate another's choice? There is little commonality that makes a difference anymore, with the possible exception of being a fan

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40. U.S. CONST. amend. I.

41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1154 (2d ed. 1988).

42. Horwitz, *supra* note 9, at 149.

of a particular sports team. Thus, politicians seek to be neutral as to religion, fearful that choosing one will infringe on the choices of others.

Strict adherence to the American penchant for private-ordering results in a church-state policy of strict neutrality when enacting legislation.<sup>43</sup> Such a policy has been espoused in prior Court decisions. “In the relationship between man and religion, the State is firmly committed to a position of neutrality.”<sup>44</sup> However, there is a dilemma with applying strict neutrality. Neutrality of application will always ratify the religious beliefs of some and concomitantly will reject the religious beliefs of others. In a nation of such diverse religious beliefs, no legislature can please all of the people all of the time. For example, while some religious persons adamantly believe that marriage is immutably defined as one man and one woman, others bless same-sex unions. And some religions teach that assisted reproductive technology trivializes the integrity of human intercourse, but others see it as a part of God’s plan to multiply life upon the earth. To satisfy the legitimate expectations of those who are challenged by a neutral application of the laws, legislatures could grant a religious accommodation exemption to those persons and organizations whose beliefs are adversely impacted. But of course, the exemptions would most likely be given to those organizations politically significant enough to demand them, thereby marginalizing most religious minorities. Also, whenever a religious accommodation is granted, it makes a patchwork of the laws, creating a bizarre world of applicability. “Leaving room for legislatures to craft religious accommodations recognizes that they may be in a better position than courts to decide when the advantages of strict neutrality are overstated. But unbounded tolerance of governmental accommodation in the name of free exercise neutrality could eviscerate the establishment clause.”<sup>45</sup>

Prior to 1990, another option existed that permitted legislatures to enact neutral laws, yet allow religious persons and organizations to assert First Amendment claims so as to avoid compliance.<sup>46</sup> Thus, it was possible to require the government of action to provide a compelling state reason for enacting a statute that adversely affected any religion.<sup>47</sup> This heightened judicial scrutiny originated in the 1963 Supreme Court decision *Sherbert v. Verner*.<sup>48</sup> The facts of the case involved an unemployment compensation claim made by a potential worker who refused to accept work on a Saturday because that would violate her religious beliefs.<sup>49</sup> In ruling that the state had

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43. *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 226 (1963).

44. *Id.*

45. TRIBE, *supra* note 41, at 1195 (footnote omitted).

46. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

47. *Id.*

48. *Id.*

49. *Id.* at 399.

to accept the potential worker's Free Exercise right not to work on Saturday, the Court held that the state law that infringed upon her religious liberty must be strictly scrutinized, mandating the state to demonstrate that the law was the least restrictive means of achieving a compelling state interest.<sup>50</sup> The holding in *Sherbert* was reaffirmed and extended in subsequent cases.<sup>51</sup> In a few decisions, however, the Court rejected Free Exercise claims.<sup>52</sup> The rationale and practical application became increasingly tenuous.

Then, in 1990, the Court abandoned the strict scrutiny standard for government infringement on a Free Exercise claim sufficiently established in *Employment Division v. Smith*.<sup>53</sup> There, two Native Americans were dismissed from their employment because they were using a hallucinogenic drug as part of their religious observance.<sup>54</sup> Upon their dismissal, the two men sought unemployment compensation from the state, but a state statute disqualified them because they had been dismissed from their employment due to their misconduct.<sup>55</sup> These men sought to excuse the conduct as protected under the Free Exercise Clause—that peyote, the hallucinogenic drug

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50. *Id.* at 399, 406 (“It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation . . . .”) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

51. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 710, 720 (1981) (holding that a Jehovah's Witness was entitled to unemployment compensation when he quit his job in a weapons plant because the employment violated his religious beliefs); *see also* *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138–39, 146 (1987) (holding that the Commission's refusal to award unemployment compensation benefits to an employee who was discharged when she refused to work on her Sabbath violated the Free Exercise Clause of the First Amendment).

52. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) (holding that the Amish had to pay Social Security tax); *see also* *Goldman v. Weinberger*, 475 U.S. 503, 504, 509–10 (1986) (holding that Orthodox Jews have no right to wear yarmulkes while serving in the military).

53. 494 U.S. 872, 888–89 (1990) (“[P]recisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”). For additional commentary on the decision, see James G. Dwyer, *The Good, The Bad, and the Ugly of Employment Division v. Smith for Family Law*, 32 *CARDOZO L. REV.* 1781 (2011); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 *CALIF. L. REV.* 91 (1991); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 *GEO. WASH. L. REV.* 841 (1992); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 *U. CHI. L. REV.* 1109 (1990); John T. Noonan, Jr., *The End of Free Exercise?*, 42 *DEPAUL L. REV.* 567 (1992); Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse*, 25 *LOY. L.A. L. REV.* 1 (1991); Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the “War on Terror,” and Religious Freedom*, 32 *CARDOZO L. REV.* 2009 (2011).

54. *Smith*, 494 U.S. at 874.

55. *Id.*

they used during the course of a religious ceremony, should be exempted from any misconduct allegation because of their free exercise of religion.<sup>56</sup> The Court, in a break from the precedent established by *Sherbert*, ruled that a burden on the Free Exercise rights of a claimant, no matter how severe, does not violate the First Amendment.<sup>57</sup> The state statute would be upheld as long as the infringement was “merely the incidental effect of a generally applicable and otherwise valid provision.”<sup>58</sup> Thus, as long as the statute does not impose any special sanctions against a particular religion, or seek to compel religious beliefs, the statute is valid.<sup>59</sup>

The *Smith* decision deprives both religious organizations and persons of judicial strict scrutiny that had once protected them from state statutes unless the state could provide a compelling interest. This protection extended to all religious denominations, regardless of the ability to muster the votes warranting a state statutory accommodation exemption. The author of the opinion, Justice Scalia, acknowledged that the *Smith* decision would place minority religions at a distinct disadvantage since the political process would not be as fruitful for them as it would be for larger, more politically powerful denominations.<sup>60</sup> Nonetheless, this “unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”<sup>61</sup>

Following the *Smith* decision, Congress enacted the Religious Freedom Restoration Act,<sup>62</sup> which sought to apply strict scrutiny to any law impacting religions, as was previously done in *Sherbert*. The Supreme Court invalidated the act as applied to the states but not for federal laws.<sup>63</sup> Subsequently, states adopted their own versions of the federal statutes,<sup>64</sup> and Congress passed another statute—the Religious Land Use and Institutionalized Per-

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56. *Id.* at 876.

57. *Id.* at 884–85.

58. *Id.* at 878.

59. *Id.* at 877–78.

60. *Smith*, 494 U.S. at 890.

61. *Id.*

62. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

63. *See Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

64. *See* ALA. CONST. art. 1, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.04 (2010); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01–761.04 (West 2010); IDAHO CODE ANN. §§ 73-401 to 73-404 (2006); 775 ILL. COMP. STAT. ANN. §§ 35/1–35/99 (West 2011); MO. ANN. STAT. §§ 1.302–1.307 (West Supp. 2012); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (West 2011); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2008); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West 2012); R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2006); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–110.012 (West 2011).

sons Act of 2000<sup>65</sup>—applying a form of strict scrutiny to any statute affecting land use and the religious rights of prisoners. This federal statute left the consequences of the *Smith* decision intact. In effect, the *Smith* decision returned the argument over claims of religious liberty infringement to the rule that the states are free to regulate actions but not beliefs. This is the same distinction made in the *Reynolds* decision a century earlier.<sup>66</sup> However, this test offers very little accommodation to persons and organizations advocating a worldview that incorporates religious values. Without the protection of *Sherbert*'s compelling state interest requirement, state laws could infringe on religious liberty of adherents as long as those laws did not single out any one religion.<sup>67</sup>

Religious organizations sought to safeguard their religious worldview against state legislation with little success. One success occurred in a case focusing on whether there is a ministerial exception to suits brought by employees alleging discrimination in employment.<sup>68</sup> The petitioner, a kindergarten teacher at a Lutheran school, was fired from her position as a “called teacher” because of her insubordination and disruptive behavior.<sup>69</sup> She then filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that her employment had been terminated because of a medical condition diagnosed as narcolepsy and that the termination violated the Americans with Disabilities Act (ADA).<sup>70</sup> Based on her complaint, the EEOC brought suit against the Lutheran school, alleging that the respondent fired the petitioner because she threatened to bring suit against the school.<sup>71</sup> At issue was whether the petitioner’s suit against the religious employer was barred because of a ministerial exception that precluded certain employment discrimination claims against religious institutions.<sup>72</sup> The Supreme Court

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65. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

66. See *Reynolds v. United States*, 98 U.S. 145 (1878).

67. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that it is appropriate to apply strict scrutiny when any statute is directed towards a specific religion and is, thus, not neutral); see also *State v. Green*, 99 P.3d 820 (Utah 2004) (holding that state bigamy statute was facially neutral and did not violate Free Exercise).

68. See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012).

69. *Id.* at 701.

70. *Id.* at 700–01.

71. *Id.* at 701.

72. See *id.* at 705–06. For circuit court cases that recognize the ministerial exception, see, for example, *Rweyemamu v. Cote*, 520 F.3d 198, 209–10 (2d Cir. 2008) (holding that the ministerial exception barred a Catholic priest’s race discrimination claim under Title VII); *Schleicher v. Salvation Army*, 518 F.3d 472, 477–78 (7th Cir. 2008) (holding that former ministers fell within the ministerial exception); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–227 (6th Cir. 2007), *abrogated by Hosanna-Tabor Evangelical Lutheran*



held that a ministerial exception to enforcement of employment claims did exist.<sup>73</sup>

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.<sup>74</sup>

The petitioner was considered a minister of the church because she had a formal title in the church school, which was given to her by the church, and because she performed important religious functions for the church.<sup>75</sup> Her suit was thus covered under the ministerial exception and dismissed accordingly.<sup>76</sup>

The Court distinguished the *Smith* decision, holding that “*Smith* involved government regulation of only outward physical acts.”<sup>77</sup> Here, on the other hand, the petitioner’s claim “concern[ed] government interference with an internal church decision that affect[ed] the faith and mission of the church itself.”<sup>78</sup> Because the petitioner was a minister in the church, her dismissal involved an internal church-related matter, and the petitioner’s dismissal was exempted from the normal protections offered to employees through the EEOC: “Because [petitioner] was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.”<sup>79</sup> And in announcing for the first time a ministerial exception when an employee seeks protection under the EEOC, the Court affirmed churches’ rights under the First Amendment to choose “who will preach their beliefs, teach their faith, and carry out their mission.”<sup>80</sup>

The fact that the Court, for the first time, provided for a ministerial exception to employment discrimination cases does not mean that it altered the landscape of laws adversely affecting religious persons and organizations. Today, the state of religious liberty cases can be summarized as this: “Laws aimed at religion are subjected to searching scrutiny, while neutral and gen-

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Church and Sch. v. EEOC, 132 S. Ct. 694 (2012) (holding that the religious hospital did not waive its First Amendment right to ministerial exception, which precluded the suit brought by a former employee).

73. *Hosanna-Tabor*, 132 S. Ct. at 706.

74. *Id.*

75. *Id.* at 707–08 (noting significantly that petitioner used her own title).

76. *Id.*

77. *Id.* at 707.

78. *Id.*

79. *Hosanna-Tabor*, 132 S. Ct. at 709.

80. *Id.* at 710.

erally applicable laws do not trigger the Free Exercise Clause at all, even if they impose significant incidental burdens on religious practice.”<sup>81</sup> What this means is that “the Church is understood as requiring not a favored, publicly authorized position in society but only the protected ability to be socially engaged.”<sup>82</sup> Within such a climate, religious persons and organizations must mobilize their resources and exert their influence within the political process.<sup>83</sup> However, religious denominations have been affected by the private-ordering prevalent within society as a whole. At one time, the political clout of a denomination such as the Roman Catholic Church (“Church”) in the United States was formidable. An illustration is the Church’s Legion of Decency (“Legion”), which was organized in 1935 and provided an official Catholic movie classification system out of an office in New York City.<sup>84</sup> If the Church condemned a movie because of such features as sex and violence, Catholics, and many others, would boycott the film. The movie studios worked with the Legion to arrive at an agreement that would permit any movie to receive a favorable rating and permit attendance by Catholics and those others influenced by the ratings. And there are many other examples, which include running for political office, expanding the parochial school system, and influencing the development of the labor movement. The central identity that was both so prevalent and so cohesive among religious adherents a century ago has been replaced by individuality and autonomy—a significant development in the pursuit of religious liberty.

### C. Private-Ordering Congregations

It is impossible to generalize about the coherence of any or all of the religious denominations in the United States. There are too many of them, and they are often organized in such a way that, at best, each denomination operates as an independent entity within a unified group. Thus, the political ability of any one of them is difficult to gauge. Nonetheless, the largest religious denomination in the United States—the Roman Catholic Church—is sufficiently organized and documented to provide an appraisal of this question: whether political activism is feasible. The Church has a documented

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81. Horwitz, *supra* note 9, at 183.

82. William A. Galston, *Contending with Liberalism, in* AMERICAN CATHOLICS AND CIVIC ENGAGEMENT: A DISTINCTIVE VOICE, *supra* note 12, at 49.

83. The Catholic Bishops of the United States published a document urging Catholics to contribute to civil and respectful public dialogue on issues such as same-sex marriage, abortion, and the economic crisis. See U.S. CONF. OF CATHOLIC BISHOPS, FORMING CONSCIENCES FOR FAITHFUL CITIZENSHIP (2011); see also AMERICAN CATHOLICS AND CIVIC ENGAGEMENT: A DISTINCTIVE VOICE, *supra* note 12.

84. See CHARLES R. MORRIS, AMERICAN CATHOLIC 205–09 (1997). There were many movies expressly including Catholic saints or clergy. “In just three years, from 1943 through 1945, Catholic movies were nominated for thirty-four Oscars.” *Id.* at 196.

record of resistance to modern developments in the four family law issues to be discussed in this Article. This resistance includes consistently opposing the liberalization of divorce laws; continually resisting the legalization of same-sex marriage; specifying, for adoption rules as utilized in Catholic institutions, that parents should be married and of the opposite sex; and condemning assisted reproductive technology and any specific state or federal health care initiatives that conflict with the its teachings. Through its national organization, the United States Conference of Catholic Bishops (USCCB), the Church has developed and maintains a consistent record pertaining to each of these family law issues: divorce, marriage, adoption, and assisted reproduction. Often, positions adopted by the USCCB result from documents issued from the Vatican or from statements made by individual bishops. The challenge to the religious liberty of the Roman Catholic Church is documented and precise. Because of its hierarchical structure and documented record, there is an opportunity to evaluate the Church's ability to mobilize its adherents to effectively operate within the political arena. This has become the answer to the challenge to religious liberty—political activism to initiate accommodation.

The Roman Catholic Church in the United States is large and extensive. Since 1965, “the number of Catholics in the United States has grown rapidly, from 46.9 million in 1967 to 68.1 million in 2009. On average, some 500,000 Catholics were added to parish rosters each year almost without fail.”<sup>85</sup> In addition, the parishes are very diverse: “Racial and ethnic mix, places of origin, educational levels, and rural, urban, or suburban location are among them.”<sup>86</sup> In addition to ethnic and racial diversity, the education level of Catholics has increased to the highest of nearly any religious group; congregational populations have shifted from rural to suburban parishes—and, to a lesser degree, urban parishes too.<sup>87</sup> This changing face of the Roman Catholic Church has contributed to a membership that is far different from the Catholics who arrived from Europe almost two centuries ago. At that time, each ethnic group built its own church, fostered its own priests, and buried its parishioners in the Catholic cemetery that it built next to the Catholic school its children attended. Today, in contrast to the ethnically created divisions of old, there are significant numbers of “very active core Catholics, whose commitment is *chosen* rather than merely inherited or im-

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85. Katarina Schuth, *Assessing the Education of Priests and Lay Ministers*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY* 320 (Michael J. Lacey & Francis Oakley eds., 2011). However, it is important to note that “between 1967 and 2007 almost a quarter of those Americans who were raised as Catholics have voted with their feet and quietly left the church.” Francis Oakley, *Epilogue: The Matter of Unity*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra*, at 350.

86. Schuth, *supra* note 85, at 320.

87. *Id.*

posed, [and they] have created an extraordinarily vibrant and participatory grassroots parish life, just as post-Vatican II liberals dreamed might happen.”<sup>88</sup>

The post-Vatican II generations have not grown up with the strong sense of Catholic cultural identity that characterized Irish, Italian, Polish, German (and so on) “ethnic” Catholics in their parents’ and grandparents’ formative years. Nor were they formed with a 1960s confidence in the transformative possibilities of participatory democracy in society and church. . . . Some embrace Catholic teaching about sex and marriage or the more antiestablishment aspects of Catholic social teaching as a way of standing up against individualism, consumerism, militarism, and other modern forms of . . . temptation . . . .<sup>89</sup>

Undoubtedly, younger Catholics have grown up in a time of Vatican II’s acceptance of pluralism, religious tolerance, self-fulfillment, and individual rights. Throughout the twentieth century, there was an emphasis on personal autonomy, and some would describe that as one of the century’s most important cultural developments.<sup>90</sup> Obviously, this places Roman Catholics in a similar cultural milieu as their non-Catholic neighbors.

Likewise, this sense of individualism and private-ordering suggests that the Church’s moral authority has been diminishing since Vatican II.<sup>91</sup>

In 1963, more than half of American Catholics accepted the church’s teaching that contraceptive birth control was wrong; in a 1987 poll, only 18 percent said it was wrong. A 1993 survey found only 13 percent of Catholics holding that conviction. In that survey, only 12 percent of Catholics under age fifty said they agreed with “all” church teaching on faith and morality; of those fifty and older, the figure was 28 percent. The act of disobeying or simply ignoring a church pronouncement, especially when a person knows that millions of others are also doing it, creates alienation from the pronouncement itself.<sup>92</sup>

The justification for departing from the official teachings of the Church’s bishops often arises in the context of freedom of conscience.

88. MORRIS, *supra* note 84, at 320 (emphasis added).

89. Lisa Sowle Cahill, *Moral Theology after Vatican II*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra* note 85, at 210–11 (endnotes omitted) (internal quotations omitted).

90. See, e.g., ANDREW M. GREELEY, *THE NEW AGENDA* (1973).

91. William V. D’Antonio et al., *American Catholics and Church Authority*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra* note 85, at 273. “As the acceptance of church leaders as the locus of moral authority declines, individual authority increases. . . .” *Id.* at 285. “Over time, Catholics moved away from looking to church leaders as the appropriate source of moral authority and toward the individual.” *Id.* at 290.

92. *Id.* at 279 (endnotes omitted).

In the final analysis, to recognize that freedom of conscience is a fundamental right, that it is an essential component of human agency, must require a recognition within the church itself that each Christian must be free to exercise his or her judgment in applying the gospel to contingent moral or political circumstances, in finding a language to articulate the faith, and to make whatever sense they can of the enigmas we live with and in.<sup>93</sup>

Such a view comports with the culture of private-ordering. One Catholic commentator writes that Catholic moral theology, in general, at the beginning of the new century, “is ‘personalistic,’ assuming the dignity and freedom of the person, along with the person’s indispensable connection to others through social relationships and institutions.”<sup>94</sup> Many Catholics asserting the indispensable role of conscience find support in the documents that form the legacy of the Council of Vatican II, all published in the mid-1960s.<sup>95</sup> Catholics find a respect for conscience in subsequent documents too. For example, Pope John Paul II wrote:

[T]he right to religious freedom and to respect for conscience on its journey towards the truth is increasingly perceived as the foundation of the cumulative rights of the person. This heightened sense of the dignity of the human person and of his or her uniqueness, and of the respect due to the journey of conscience, certainly represents one of the positive achievements of modern culture.<sup>96</sup>

But there is an argument for limitations on the freedom of individual conscience. The Church holds its faith in a hierarchical fashion, and the

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93. Charles Taylor, *Magisterial Authority*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra* note 85, at 265.

94. Cahill, *supra* note 89, at 216.

95. See SECOND VATICAN ECUMENICAL COUNCIL, *DIGNITATIS HUMANAE* [DECLARATION ON RELIGIOUS FREEDOM] (Dec. 7, 1965), *available at* [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html); SECOND VATICAN ECUMENICAL COUNCIL, *GAUDIUM ET SPES* (Dec. 7, 1965), *available at* [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html) [hereinafter *GAUDIUM ET SPES*]; SECOND VATICAN ECUMENICAL COUNCIL, *NOSTRA AETATE* [DECLARATION ON THE RELATION OF THE CHURCH TO NON-CHRISTIAN RELIGIONS] (Oct. 28, 1965), *available at* [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_nostra-aetate\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html); SECOND VATICAN ECUMENICAL COUNCIL, *UNITATIS REDINTEGRATIO* [DECREE ON ECUMENISM] (Nov. 21, 1964), *available at* [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decree\\_19641121\\_unitatis-redintegratio\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_unitatis-redintegratio_en.html).

96. POPE JOHN PAUL II, *ENCYCLICAL LETTER, VERITATIS SPENDOR* (Aug. 6, 1993), *available at* [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html) (endnote omitted).

bishops claim a scriptural preeminence in making decisions. Thus, conscience and free choice are crucial elements in the life of faith, but sacred texts and scripture provide a firm basis of authority. Donald Cardinal Wuerl, the Archbishop of Washington, explains the interaction between individual conscience and the authority of the bishops in the following manner:

Everyone, therefore, has a moral duty to see to it that his or her conscience is informed. While true in matters of moral decision-making, this is all the more crucial in matters of faith. The Catholic faith is founded upon divine revelation and contains truths that exceed human understanding and must be accepted on the basis of the divine authority. According to Catholic teaching, bishops as successors of the apostles are the authoritative teachers of the truths of faith. Individual judgment or opinion based on human reason, no matter how sincerely held, can never have the last word.<sup>97</sup>

The limitation on private-ordering motivated by conscience is the scriptural authority of the bishops.

Contemporary commentators suggest that modern Catholics increasingly doubt the primacy of the bishops' moral authority. "Over time, Catholics moved away from looking to church leaders as the appropriate source of moral authority and toward the individual."<sup>98</sup> Some authors point to 1968 when the Pope issued the encyclical *Humanae Vitae*,<sup>99</sup> which made artificial contraception gravely sinful for Catholics. The encyclical produced instant and significant opposition among many members of the clergy, theologians, and very literate and committed lay Catholics.<sup>100</sup> More recently, Catholics point to the child sex abuse scandal that implicated so many of the nation's bishops in the movement of abusive priests from parish to parish despite numerous credible indications that sexual abuse had, in fact, occurred.<sup>101</sup> These two events lead some commentators to conclude that "[w]hen it comes to sex, [they] very much fear, the Catholic Church has drifted into

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97. WUERL, *supra* note 10, at 138.

98. D'Antonio et al., *supra* note 91, at 290.

99. POPE PAUL VI, ENCYCLICAL LETTER, *HUMANAE VITAE* (Jul. 25, 1968), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

100. See, e.g., Leslie Woodcock Tentler, *Souls and Bodies: The Birth Control Controversy and the Collapse of Confession*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra* note 85, at 293; see also ANDREW M. GREELEY, *THE AMERICAN CATHOLIC: A SOCIAL PORTRAIT* (1977); THOMAS P. RAUSCH, *BEING CATHOLIC IN A CULTURE OF CHOICE* (2006); LESLIE WOODCOCK TENTLER, *CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY* (2004).

101. See Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 397-407 (2004).

irrelevance with near-disastrous consequences.”<sup>102</sup> For other commentators, there is a suspicion that the faithful now distinguish the bishops’ authority—recognizing their authority over matters pertaining to sacramental life but not over matters constituting moral life.<sup>103</sup> If correct, this dichotomy in Church authority will impede its efforts to motivate congregants to seek political accommodation from state statutes that challenge religious liberty.

At least within the Roman Catholic Church in the United States, efforts to mobilize congregants to support or to overturn legislation that challenges the worldview of the Church have been affected by the cultural phenomenon of private-ordering. Arguably, the task of mobilizing congregants has been further adversely affected by decisions or pronouncements made by the Church about which congregants, often arguing conscience, disagree. In spite of this concern, American Church leaders are increasingly calling upon congregants to become politically active. “Cardinal Timothy Dolan[, Archbishop of New York and President of the USCCB,] called on Roman Catholic worshippers Saturday to become more involved in politics as the church stands against the government in what he called a ‘freedom of religion battle.’”<sup>104</sup> Cardinal Donald Wuerl, Archbishop of Washington, asked that letters be read to congregants at Sunday services and contacted parishioners by email to oppose same-sex marriage in Maryland and the federal mandate to provide contraception for all employees. These efforts to enter the political arena will depend upon factors that will be explored further. We proceed now to each of the four areas of family law where it seems that the challenge to religious liberty has been, and continues to be, most radical: divorce, marriage, adoption, and parentage.

## II. DIVORCE

### A. Statutory Challenge

Divorce, like other family law matters in the United States, evolved from the laws and mores of the immigrants’ homeland. For the majority of the colonies, this meant that divorce law originated in England. Thus, since divorce was rarely permitted in England, it was practically unavailable in the American colonies.<sup>105</sup> “In many southern states, the only way to get a

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102. Tentler, *supra* note 100, at 311.

103. Taylor, *supra* note 93, at 268–69.

104. *Cardinal Calls on Catholics to Become More Politically Active*, WASH. POST, Mar. 4, 2012, at A9.

105. An early twentieth-century American court stated:

There has been divorce in some form since the dawn of history. Under Mosaic Law the husband could write the wife a bill of divorcement and send her away,

divorce was to petition the legislature. . . . [S]ome northern states had established a system of judicial divorce as early as the end of the eighteenth century: Courts, not legislatures, granted divorces. . . .<sup>106</sup> Where divorce was possible, the petitioner had to obtain residency in a state permitting divorce, then commence an adversarial process by which he or she had to prove that the other spouse was guilty of a fault that went to the essence of the marriage—a fault so grievous that the marriage could not continue.<sup>107</sup> In addition, the petitioner had to prove that he or she was not equally at fault (recrimination), had not condoned the fault of the other party (condonation), had not purposely brought about the fault (connivance), and was not acting in tandem with the other party to precipitate the end of the marriage (collusion). Finally, the petitioner had to commence the action within a reasonable period of time after the occasion of the offense upon which the divorce was premised (laches).<sup>108</sup>

The fault grounds available to a petitioner varied among the states. The most common were cruelty, desertion, and adultery.<sup>109</sup> The longer the marriage, the greater the amount of cruelty courts required to end it; the desertion had to be for at least one year, without provocation, and the petitioner had to want the deserting spouse to return.<sup>110</sup> Adultery only required a disposition for and an occasion to commit the offense. Absent from adultery was any requirement that the act of sexual intercourse be witnessed or recorded.<sup>111</sup> Most states had additional fault grounds, such as habitual drunkenness,

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and she could go and become another man's wife. Deuteronomy, c. 24. About the beginning of the Christian era there arose two famed schools of the law at Jerusalem. One, under Shammai, taught that divorce was unlawful except in adultery; the more popular one, under Hillel, authorized divorce for any cause. With the early Romans divorce was at the will of the husband, and later upon the agreement of the parties. In more modern times, in all civilized countries, divorce has been subject to the limitations or consent of the state or church in control. In England at the time of the secession of the colonies, and for a long time previously, divorce from bed and board had been allowed by the ecclesiastical courts, and absolute divorces to a favored few by special acts of Parliament. Otherwise divorces were not granted under the common law, and there was no general act of Parliament authorizing them, and no jurisdiction in the chancery or common-law courts to grant divorces until eighty-one years after the Declaration of Independence.

Worthington v. Dist. Court for Washoe Cnty., 142 P. 230, 237 (Nev. 1914).

106. LANGBEIN, *supra* note 2, at 920 (quoting Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1501–03 (2000)).

107. Raymond C. O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 352 (1999).

108. *Id.* at 353.

109. LANGBEIN, *supra* note 2, at 920.

110. O'Brien, *supra* note 107, at 353.

111. *Id.* at 352.



homosexuality, fraud, or a felony conviction and imprisonment. In Hawaii, it was possible to obtain a divorce from a spouse who had contracted leprosy.<sup>112</sup> A few states became “divorce mills” because they enacted multiple grounds for divorce, had short residency periods, and proof or corroboration of the fault was relatively easy. A petitioner with sufficient assets could go to one of these states, provide proof of residency, obtain a valid divorce, and return to his or her true residency with a decree of divorce.<sup>113</sup> The petitioner’s true state of residency, even if its own procedures were significantly more stringent, was forced to recognize the divorce judgment obtained in the other state due to the requirement of Full Faith and Credit.

Often couples would mutually agree on a need to end their moribund marriage, and stage the needed divorce ground.<sup>114</sup> A stranger, hired by the couple, would arrive at a hotel room where one spouse and a stranger were minimally dressed or there would be pictures taken from outside of a hotel room’s window, indicating an occasion of adultery. Courts routinely accepted these sham fault grounds and granted the divorce. If not, the couple could go to a foreign country and obtain a divorce there, often in a matter of days. But the defect in foreign divorces is that they are not entitled to Full Faith and Credit in the couple’s home state.<sup>115</sup> They are, however, entitled to comity, an equity device that looks to the fairness of the procedure. If the divorce is bilateral, with both parties to the marriage present in the foreign country, then the home state is very likely to award comity.

If a petitioner could not meet the requirements of a fault divorce, or simply did not want to completely end the marriage, it was possible to obtain a limited divorce, often referred to as a divorce *a mensa et thoro*.<sup>116</sup> States maintained a separate list of grounds for this limited divorce, which entitled the petitioner to live separate and apart from his or her spouse, with awards of child custody and support.<sup>117</sup> The disadvantage was that neither party could marry someone else; the spouses were merely separated from “bed and board.” If one of the spouses died during the time the divorce *a mensa et thoro* was in effect, the surviving spouse was entitled to inherit from the estate of the decedent plus partake in any other benefit available to a surviving spouse. Thus, the effect of this limited divorce was to keep the marriage intact while providing for an order of support. Likewise, the in-

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112. LANGBIEN, *supra* note 2, at 920.

113. O’Brien, *supra* note 107, at 353.

114. *Id.*

115. *Id.*

116. The Roman Catholic Church permits limited divorce. SECOND VATICAN ECUMENICAL COUNCIL, CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH 573 (1994). “The separation of spouses while maintaining the marriage bond can be legitimate in certain cases provided for by canon law.” *Id.* (citation omitted).

117. *See, e.g.*, MD. CODE ANN., FAM. LAW § 7-102(a), (e) (West 2006).

tense adversarial process involved in the previously described fault divorce was also designed to keep the marriage intact by making the process very litigious. Those spouses with adequate resources and attorneys could circumvent the process and exit from the marriage easily. But overall, the policy of the states was one of keeping the couple together, most often for the sake of any children, in hopes that the spouses would reconcile and be happier than before.<sup>118</sup> Admittedly, the process also ratified the importance of marriage as an institution.

During the 1960s, commensurate with the discovery of a right to marital privacy in the Constitution<sup>119</sup> and what may be argued as the start of a cultural awakening to private-ordering, a development occurred in England that would have a significant impact on divorce in America. “In 1964 the Anglican Archbishop of Canterbury appointed a committee to review divorce in England. In 1966 that committee submitted the Mortimer Report which recommended that divorce be granted in England upon a no-fault ground.”<sup>120</sup> Almost immediately, no-fault divorce was permitted in England and in 1969, California became the first American state to follow suit.<sup>121</sup> The new law was to eliminate the adversary process of fault divorce. Under the new system, either party could petition for a divorce, regardless of fault. No longer would one of the parties have to prove adultery, cruelty, desertion, or something equally catastrophic. Instead, either party need only prove that the marriage was irretrievably broken, irreconcilable, or that the spouses had remained separate and apart for a minimum period of time.<sup>122</sup> Any of these no-fault grounds would suffice if corroborated by friends, neighbors, or even by the other spouse.

By 1970, the National Conference of Commissioners on Uniform State Laws voted to make irretrievable breakdown the sole ground for divorce, eliminating all fault grounds from its statutory proposals.<sup>123</sup> When the Commissioners proposed the Uniform Marriage and Divorce Act in 1973, it

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118. *See, e.g.*, *Parks v. Parks*, 187 P.2d 145, 147 (Or. 1947) (en banc) (“Statistics demonstrate that a large percentage of our mounting juvenile delinquency comes from broken homes. Public policy demands that this trend should stop, that the courts cease putting their stamp of approval upon a course of conduct that may destroy the foundation of society itself, except in those cases coming unmistakably within the purview of the law.”).

119. *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965).

120. O’Brien, *supra* note 107, at 353 (footnote omitted).

121. *See* ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* 72–81 (2000). California’s no-fault statute defines irreconcilable differences as those grounds determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved. CAL. FAM. CODE § 2311 (West 2004 & Supp. 2009).

122. *See, e.g.*, *Bennington v. Bennington*, 381 N.E.2d 1355 (Ohio Ct. App. 1978) (holding that living in a van next to house was not living separate and apart).

123. *See* O’Brien, *supra* note 107, at 353.

specified that a marriage was irretrievably broken if the parties had lived separate and apart for more than 180 days because of a serious marital discord.<sup>124</sup> And in 1974, the American Bar Association ratified no-fault divorce, recognizing that no-fault was rapidly being adopted in every state. Indeed, the movement towards no-fault was swift, and while some states also retained the traditional fault grounds, others deleted them from their statutes, making no-fault divorce the sole means by which a marriage could be dissolved in some jurisdictions.<sup>125</sup>

From 1960 to 1990, after the adoption of no-fault divorce legislation by all of the states, the divorce rate doubled.<sup>126</sup> Critics of no-fault raised many objections to the new system. They argued that, under the new divorce statutes, an “innocent spouse” would be forced into an unwanted divorce solely to meet the needs of the other spouse, that couples would now be able to divorce easily without the time and incentive to work through their problems,<sup>127</sup> and, of course, that children of a divorcing couple would suffer economic and social harm.<sup>128</sup> For some commentators, no-fault divorce “not only rejects some of the old standards as meaningless, undesirable, or wrong; it also hesitates to set standards that cannot readily be enforced or that go beyond the minimal responsibility expressed in the cant phrase[:] ‘Do your own thing, as long as you don’t hurt anybody else.’”<sup>129</sup> Such comments identify the shift from the worldview of marriage as indissoluble and integral to the natural law towards private-ordering. Eventually, a few states initiated a backlash; Louisiana, Arkansas, and Arizona enacted “covenant marriage” statutes that allowed the couple to choose to voluntarily restrict the possibility of divorce in that state.<sup>130</sup> Thus, before entering into marriage, the couple will, in accordance with the state statute, enter into pre-marital counseling, work to preserve their marriage if discord occurs, and limit themselves to one divorce ground of living separate and apart for at least

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124. UNIF. MARRIAGE & DIVORCE ACT § 302(a)(2), 9A U.L.A. 23 (1973).

125. O’Brien, *supra* note 107, at 353.

126. NAT’L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 18 (2007).

127. See, e.g., Carl E. Schneider, *Moral Discourse and the Transformation of Family Law*, 83 MICH. L. REV. 1803, 1806–1810 (1985).

128. For discussion of this issue, see Elizabeth S. Scott, *Divorce, Children’s Welfare, and the Culture Wars*, 9 VA. J. SOC. POL’Y & L. 95 (2001). See also Paul R. Amato & Alan Booth, *A Perspective Study of Divorce and Parent-Child Relationships*, 58 J. MARRIAGE & FAM. 356 (1996); Jean M. Muransky & Darlene DeMarie-Dreblow, *Differences Between High School Students from Intact and Divorced Families*, 23 J. DIVORCE & REMARRIAGE 187 (1995).

129. Schneider, *supra* note 127, at 1820 (footnote omitted).

130. See ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (2007); ARK. CODE ANN. § 9-11-801 (2009); LA. REV. STAT. ANN. § 9:273 (2008).

two years.<sup>131</sup> Few couples enter into covenant marriages and even among those that do, the possibility remains that one of the spouses could always go to another state and obtain a divorce based on a ground in that state and return to the covenant marriage state with a divorce entitled to Full Faith and Credit.<sup>132</sup>

The enactment of no-fault divorce implied that marriage was not important; grounds such as irretrievably broken implied whim and fancy, as opposed to the essence of marriage. Those persons and organizations, most motivated by religious belief, viewed no-fault divorce legislation as permissive and, worse, dismissive of a worldview that viewed marriage in the context of Hebrew scripture: Adam and Eve, indissoluble, a covenant blessed by God.

For over a century, divorce law reflected and sought to enforce society's sense of the proper moral relations between husband and wife. Indeed, the law of divorce was virtually the only law that spoke directly or systematically to an ideal of marital relations. That ideal included a duty of life-long mutual responsibility and fidelity from which a spouse could be relieved, roughly speaking, only upon the serious breach of a moral duty by the other spouse.<sup>133</sup>

The no-fault divorce statutes, by making divorce easier, challenged this worldview and the response continues to evolve.

#### B. Worldview Response

The worldview approach often begins with recognition of historical precedent. As early as 1832, the Supreme Court of North Carolina approached annulment and divorce with the greatest reluctance.<sup>134</sup> In refusing to grant a divorce to a husband who had accused his wife of adultery, the Court affirmed the historical underpinnings of marriage:

[In] all Christian countries, although the [marriage] contract be regarded by the law merely as civil, it is usually executed with some religious ceremonial; so as in a degree to impress upon it, in the eyes of the individuals themselves, a character of holiness—that it may appear to be entered

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131. For a discussion of the effect of covenant marriage, see STEPHEN NOCK ET AL., *COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA* (2008); Katherine Shaw Spaht, *Covenant Marriage Seven Years Later*, 65 LA. L. REV. 605 (2005); Kimberly Diane White, Note, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869 (2010).

132. White, *supra* note 131, at 882.

133. Schneider, *supra* note 127, at 1809.

134. *Scroggins v. Scroggins*, 1832 WL 431 (N.C. 1832).

into before a witness who cannot be deceived or forget, and therefore, to be infrangible.<sup>135</sup>

The court acknowledged marriage as unique because of its character and its responsibilities. This decision affirms the worldview of marriage as indissoluble except in the most extreme circumstances.

Is it not wiser, better, kinder to the parties themselves and their issue, to declare the engagement to be unsusceptible of modification, much less abrogation—to make their union so intimate, so close, and so firm, that no discoveries of concealed defects, more than supervenient disease, depravity, dissoluteness or dissension could rend it asunder? Such being the case, the state would be the more discretely entered into, and the intercourse through life be the more harmonious.<sup>136</sup>

Furthermore, “that nothing could be more dangerous than to allow those who have agreed to take each other, in terms *for better, for worse*, to be permitted to say, that one of the parties is worse than was expected, and therefore, the contract ought to be no longer binding.”<sup>137</sup>

In many early decisions, courts made explicit reference to religious texts, scripture, and history. In a 1914 Supreme Court of Missouri decision, the court was tasked with establishing the ownership of the proceeds of an insurance policy.<sup>138</sup> A man and a woman had been married and, while married, the man took out a life insurance policy on his life, and the beneficiary was his wife. Subsequently, the couple divorced and then the man, still living, sought to change the beneficiary on the policy from his wife to his estate. The former wife claimed that he was barred from changing the beneficiary because the husband had instituted the divorce action; she had done nothing wrong and thus should not be barred from taking the benefit from the policy. The former husband argued that the divorce had revoked the beneficiary status of the wife and that he was free to change the beneficiary, regardless of whether he initiated the divorce.<sup>139</sup> The court, when addressing the effect of divorce upon a marriage, quoted from Demosthenes, Hammurabi, Moses, and the scriptural text of Deuteronomy.<sup>140</sup> The court then shifted to Jewish customs, the history of the early Roman Empire, and finally the oracle at Delphi.<sup>141</sup> All of these references to marriage and divorce in the

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135. *Id.* at \*4.

136. *Id.*

137. *Id.* at \*5.

138. *Orthwein v. Germana Life Ins. Co.*, 170 S.W. 885 (Mo. 1914).

139. *Id.*

140. *Id.* at 890–91.

141. *Id.* at 891.

context of history and religious texts reinforced the exceptional nature of divorce.

Subsequent decisions affirm the scriptural and historical precedence given to the unique status of marriage. A marriage creates a home,

welded and cemented together by the strong and weighty ties of solemn marital vows; a relationship sanctioned by God and man as the first step in stable organized society; an American home, the keystone to the arch which supports and sustains our whole social fabric; the hallmark of righteous living. Every intendment, implication and suggestion of public policy dictates, yes, demands, that this home be restored, stabilized and maintained.<sup>142</sup>

When the court writes approvingly of divorce, it is only when there has been an egregious act done to the marriage relationship, such as adultery. For example:

[A]dultery is the [most] heinous because it is abhorrent to religious beliefs, abhorrent in our literature (a history of the aeons of time and custom), and abhorrent in its very connotation-adulteration of the issue. Old Testament (King James Version), Exodus XX, 13 and 17; New Testament, Matthew V, 28; Shakespeare, King Lear, Act III, scene 6, line 18; Hawthorne, The Scarlet Letter.<sup>143</sup>

American religious denominations, as custodian of the religious texts that form a part of this worldview, vary in their approach towards divorce. While some teach that the conscience of the individual is paramount, others, such as the Roman Catholic Church, teach that divorce is objectively wrong. "Divorce is a grave offense against the natural law. It claims to break the contract, to which the spouses freely consented, to live with each other till death. Divorce does injury to the covenant of salvation, of which sacramental marriage is a sign."<sup>144</sup> The Church also makes specific reference to injury that may befall children as a result of divorce:

Divorce is immoral also because it introduces disorder into the family and into society. This disorder brings grave harm to the deserted spouse,

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142. Parks v. Parks, 187 P.2d 145, 147 (Or. 1947).

143. Chalmers v. Chalmers, 285 A.2d 77, 78 (N.J. Super. Ct. Ch. Div. 1971); *see also* S.B. v. S.J.B., 609 A.2d 124, 125 (N.J. Super. Ct. Ch. Div. 1992) (citations omitted). ("New Jersey, as well as other states, have [sic] taken the position that homosexuality is an act so offensive to the marital relationship that it entitles the other spouse to a divorce on the basis of extreme cruelty.").

144. SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 116, at 573. In condemning divorce and recommending a perpetual union of spouses, the Church relies upon scriptural references in *Matthew* 5:21–31, 19:3–12; *Mark* 10:2–12; *Luke* 16:18; *Romans* 7:2; and 1 *Corinthians* 7:10–11.

to children traumatized by the separation of their parents and often torn between them, and because of its contagious effect which makes it truly a plague on society.<sup>145</sup>

The challenge of no-fault divorce to a worldview based in part on religious values has waned over the years. Initially, in 1969, when no-fault divorce statutes spread rapidly throughout the country, widespread condemnation and alarm followed. Today, compared to same-sex marriage, changes in adoption laws, and technological developments in parentage, no-fault divorce seems a relatively miniscule issue. Arguably, however, by enacting no-fault divorce, allowing a marriage to be dissolved—especially when there are children—upon a ground of undefined irreconcilable differences or irretrievably broken, states were eliminating any trace of moral opprobrium from divorce. Harvard Law Professor Mary Ann Glendon makes this argument. She argues that laws in America are more than laws; they define who we are. “Almost everywhere else, abortions and divorce are treated as small tragedies, as civic failures, as tiny rents in the social fabric, unavoidable at times, to be sure, but no less to be regretted.”<sup>146</sup> But, according to Professor Glendon, “American laws bespeak a society that denies the existence of external standards, one where people are free to define ‘right and wrong’ pretty much as they please.”<sup>147</sup> While these comments are indicative of a society committed to private-ordering, associating them with divorce indicates the impact that no-fault divorce has had on family law. No-fault divorce, while miniscule in comparison to the other family law issues discussed in this Article, contributes to a culture of private-ordering. The ability of either party to end the marriage quickly and easily depreciates the value of marriage, a bulwark in the fabric of a worldview that advocates the importance of family within human society.

Private-ordering—divorce and remarriage—within civil law has had an impact on the perceptions of Roman Catholics. Between 1987 and 2005, Catholics were surveyed to determine whether they look to Church bishops, individuals, or both for moral authority on decisions affecting divorce and remarriage.<sup>148</sup> During those eighteen years, the percentage of Catholics stating that they looked to individuals, rather than to bishops or both, rose eleven percent.<sup>149</sup> These statistics indicated that Roman Catholics were increasingly viewing divorce and remarriage as a matter of individual conscience rather than something that was of ecclesiastical importance. This fact is re-

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145. SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 116, at 573.

146. MORRIS, *supra* note 84, at 419; *see also* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 112 (1987).

147. MORRIS, *supra* note 84, at 419.

148. D’Antonio et al., *supra* note 91, at 282.

149. *Id.*

flected in petitions for annulments by Roman Catholics. Compared to foreign countries, there are more annulments issued by Church tribunals in the United States.<sup>150</sup> An annulment, when issued, states that a marriage never occurred, even if children were born to the union or when the marriage lasted for decades.

The contrast between the rigid Church teachings on divorce and the enthusiasm with which many dioceses hand out annulments reeks of hypocrisy—the American Church accounts for the vast majority of all the annulments issued in the world, on grounds as slender as “immaturity” at the time of contracting marriage.<sup>151</sup>

It has been nearly five decades since no-fault was introduced, propelled in part by a culture that developed a sense of private-ordering. Attempts to reintroduce stricter standards prior to obtaining a divorce, like statutory covenant marriage, have not been accepted by many state legislatures or by the population as a whole. Even among religious organizations like the Roman Catholic Church, there is a continuing acceptance of either the possibility of obtaining a Church annulment or conscience empowering individuals to divorce and remarry without Church sanction, depending upon the morality of private-ordering. But the challenge to marriage brought by no-fault divorce cannot be ignored because that challenge impacts other family law issues. Adherents to a worldview that rejects divorce have one option: to educate the public regarding the unique and immutable characteristics of marriage, thereby promoting in individuals the personal motivation of their convictions. This seems to be essential to other family law issues such as same-sex marriage and assisted reproduction. Adherents to a worldview that defines these issues in religious and historical terms must rediscover the means by which they can explain this to the public and to their own fellow-adherents.

### III. MARRIAGE

#### A. Statutory Challenge

In 2007, the United States Census Bureau reported that the median age for a first marriage in the United States was 25.6 years for women, and 27.5 years for men.<sup>152</sup> Almost fifty years earlier, in 1960, the average age for a

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150. Jeff Ziegler, *Annulment Nation*, THE CATHOLIC WORLD REPORT (Apr. 28, 2011), [http://www.catholicworldreport.com/Item/470/annulment\\_nation.aspx](http://www.catholicworldreport.com/Item/470/annulment_nation.aspx).

151. MORRIS, *supra* note 84, at 293.

152. U.S. DEP'T OF COMMERCE, *Profile America Facts for Features Valentine's Day 2012: Feb. 14*, U.S. CENSUS BUREAU NEWS (Jan. 4, 2012), *available at*



woman getting married was 20.3 years, and for a man it was 22.8 years. It appears today that not only are men and women choosing to delay marriage, but they are also choosing alternatives to marriage; alternatives that were not available in 1960. For example, nonmarital cohabitation increased by more than 1,000 percent between 1960 and 2006.<sup>153</sup> In addition, many people choose to remain single, and some of these persons are single parents.

The rules to enter into marriage have remained relatively unchanged. Many states retain both statutory and common law marriage, and state statutes prohibiting incest often mirror biblical restrictions from Hebrew scripture.<sup>154</sup> Age restrictions on who can enter into marriage vary among the states, but they are, as a whole, unchanged. Generally, parties to the marriage must be able to consent, obtain a license, sometimes obtain a blood test, and in the case of statutory marriage, participate in a solemnization ceremony. In spite of pronouncements by the United States Supreme Court that marriage is a fundamental right<sup>155</sup> or that consenting adults have a right to intimate contact,<sup>156</sup> states have continued to ban polygamy, and, in some cases, same-sex marriage.

The most significant statutory challenge to marriage resulted from the ability of same-sex couples to enter into marriage. Often, the change occurred because of constitutional challenges, overturning a state's restrictions on marriage that defined marriage as between a man and a woman. These challenges involved both state and federal constitutional grounds,<sup>157</sup> but sometimes states enacted same-sex marriage statutes without prompting by the courts.<sup>158</sup> No matter how same-sex marriage became possible in an in-

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[http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff02.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff02.html).

153. U.S. CENSUS BUREAU, *UC-1 Unmarried Partners of the Opposite Sex/1, by Presence of Children/2: 1960 to Present*, U.S. DEP'T OF COMMERCE (Oct. 2011), <http://www.census.gov/population/socdemo/hh-fam/uc1.xls>.

154. See *Leviticus* 18:6–18, 20:11, 12, 14, 17, 19, 20, 21.

155. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that interracial marriage could not be prohibited); see also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that economic classifications cannot prohibit marriage).

156. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

157. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that banning same-sex persons from entering into civil marriage violates equal protection under Iowa's constitution); see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that banning same-sex couples violates the Massachusetts constitution). But see *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (holding that the state statute banning same-sex marriage was rationally related to procreation and that it did not violate the ERA or Substantive Due Process).

158. See, e.g., N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."); see also N.H. REV. STAT. ANN. § 457:1-a (2006 & Supp. 2012) ("Marriage is the legally recognized union of 2 people.").

creasing number of states, the process allowing same-sex couples to marry began long before the first court decision or legislative session. Arguably, same-sex marriage began with the constitutional right to privacy announced in *Griswold v. Connecticut*,<sup>159</sup> which was then extended to individuals in *Eisenstadt v. Baird*<sup>160</sup> and bolstered by pronouncements that marriage was a fundamental right in both *Loving v. Virginia*<sup>161</sup> and *Zablocki v. Redhail*.<sup>162</sup> While the Supreme Court was deciding these cases, no-fault divorce was being legislatively adopted in all of the states, creating additional options for adults seeking independence. Contemporaneously, nonmarital cohabitation was increasing in popularity. When the Supreme Court of California decided *Marvin v. Marvin*,<sup>163</sup> it recognized the enforceability of both oral and written contracts between persons of the same or opposite sex who were engaging in intimate contact.<sup>164</sup> The decision provided both recognition of a trend and enforcement of agreements that provided greater protection to adults pursuing privately-ordered relationships. Indeed, this was the time when adult Americans were introduced to the possibilities of private, functional relationships, independent of the forms that dominated their parents' lives. Because these form relationships represented the worldview supported by many religious persons and organizations, any alternative represented a challenge to a religious and historical worldview. There are a number of alternative arrangements.

### 1. *Nonmarital Cohabitation*

Gradually, the functional associations being adopted by consenting adults throughout the 1970s took on more structure. From the year 1960 until 2006, the number of nonmarital, cohabitating adults increased by more than 1000 percent.<sup>165</sup> Increasingly throughout this period, courts enforced oral and written agreements between nonmarital cohabitants, whereby, for example, one party promised to take care of another for a term of years or for life.<sup>166</sup> Equitable remedies expanded as time passed too.<sup>167</sup> The process of acceptance expanded from state to federal courts. The United States Court of Appeals for the Ninth Circuit ruled on a case where a nonmarried woman

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159. 381 U.S. 479 (1965).

160. 405 U.S. 438 (1972).

161. 388 U.S. 1 (1967).

162. 434 U.S. 374 (1978).

163. 557 P.2d 106 (Cal. 1976).

164. *Id.* at 122.

165. NAT'L MARRIAGE PROJECT, *supra* note 126, at 19.

166. *See* *Watts v. Watts*, 405 N.W.2d 303, 316 (Wis. 1987).

167. Courts look to the duration of the relationship, purpose, and services contributed by either of the parties. *See* *Devaney v. L'Esperance*, 949 A.2d 743 (N.J. 2008); *In re Long*, 244 P.3d 26 (Wash. Ct. App. 2010).

had been cohabitating with a man for more than thirty years.<sup>168</sup> The court ruled that she was in a “quasi-marital” relationship with the man.<sup>169</sup> As such, the woman was entitled to half of the man’s pension when they separated, plus a division of the property they had accumulated.<sup>170</sup> The decision, in effect, treated the woman the same as if the man and woman had been married and were granted a decree of divorce.<sup>171</sup> Additional decisions permitted enforcement of the shared expectations of nonmarital cohabitants after the death of one of the parties, permitting the expectations to supersede methods of testamentary disposition.<sup>172</sup> Courts addressing the issue concluded that if the parties could recover during life, the claims should be just as effective at death. Finally, as will be discussed further in connection with adoption, nonmarital cohabitants are increasingly permitted to establish parenthood, resulting in custody and visitation rights over any child or children.<sup>173</sup>

Opposition to extending marriage-like benefits to nonmarital cohabitants came from persons and organizations seeking to maintain the singularity of marriage as the sole institution designated to engender support, mutual obligations, and commitment necessary to raise children. Their point was this: If nonmarital cohabitation precipitated support obligations similar to marriage, but without the concomitant obligations, then why would anyone marry? Without marriage, the stability so essential to creating a durable family structure would evaporate.<sup>174</sup> The critics contend that the uniqueness of the worldview of marriage is being whittled away by providing all of the characteristics of marriage but requiring none of the commitment of marriage. Likewise, nonmarital cohabitation had none of the attributes so important to worldview adherents: a religious and historical context. These attributes require permanence, established by state’s role as a third party in any marriage. When the state requires a license and solemnization prior to marriage, it signals that the status adopted by the parties is taken seriously. This seriousness is evidenced by the state’s unwillingness to release the couple from the commitment they made absent permission. Such an assurance is missing from nonmarital cohabitation. Plus, courts are often em-

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168. *Owens v. Auto. Mach. Pension Trust*, 551 F.3d 1138, 1147 (9th Cir. 2009).

169. *Id.*

170. *Id.* at 1140 n.2.

171. *Id.*; *see also Hofstad v. Christie*, 240 P.3d 816 (Wyo. 2010) (dividing nonmarital property in a manner similar to marital property).

172. *See, e.g., Byrne v. Laura*, 60 Cal. Rptr. 2d 908 (Cal. Ct. App. 1997); *In re Estate of Quarg*, 938 A.2d 193 (N.J. Super. Ct. App. Div. 2008).

173. *See, e.g., Ark. Dep’t of Human Services v. Cole*, 2011 Ark. 145, \_\_\_ S.W.3d \_\_\_ (holding that nonmarital cohabitants should not be forced to choose between being parents and being in an intimate relationship with another adult); *see also Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002).

174. *See, e.g., Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

broiled in determining the private expectations of the parties—a difficult task. Indeed, a few states restrict benefits by statute for nonmarital cohabitation, especially as they pertain to same-sex partners.<sup>175</sup>

## 2. *Domestic Partnerships & Reciprocal Beneficiaries*

As the percentage of couples living together in nonmarital cohabitation increased, so did the need for couples to provide for nonmarital partners in a manner similar to marriage. For all nonmarital couples, in a manner similar to married couples, there was a need to provide health insurance and additional employment benefits. For example, one of the parties might wish to stay home and provide full-time child care or maintain the joint household. In the case of all same-sex cohabitants prior to the ability to marry, their health care and benefit needs were of particular concern. In order to meet these concerns, certain employers initiated company registration policies that allowed employees to register as what they termed “domestic partners.”<sup>176</sup> This was a new term, one that originated in American businesses, but then spread to government localities and states. By registering as the domestic partner of an employee, the non-employed partner could share in the employee’s health care benefits and any additional benefits the company offered, such as discounts on purchases or companion seats on airlines. Almost all companies restricted the new status to same-sex employees, rationalizing that opposite-sex couples had the option to marry and thus to establish benefits.<sup>177</sup> Obviously, the concern of companies when domestic partnership programs were initiated was to keep good employees satisfied, retained, and to provide a workplace program that mirrored the same benefits packages enjoyed by married couples.

The process of entering into a domestic partnership was simple, the employee registered an adult that otherwise qualified. Neither licensure nor solemnization was required. Likewise, to terminate the non-employee partner’s status as a beneficiary, the employee simply deleted the partner from the registration at the personnel office—unilaterally. A new domestic partner could be registered at the same time. The domestic partnership benefits were not entitled to reciprocity at other companies unless the successive company stated otherwise and were also limited to what the company could offer. Nonetheless, domestic partnership status conferred a modicum of pub-

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175. See VA. CODE ANN. § 20-45.3 (2008); *Cummings v. Cummings*, 376 N.W.2d 726 (Minn. Ct. App. 1985) (permitting enforcement of written agreements between nonmarital cohabitants); see also MINN. STAT. § 513.075 (2002); TEX. BUS. & COM. CODE ANN. § 26.01 (West 2007).

176. See Raymond C. O’Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 178–81 (1995).

177. *Id.* at 178.

lic recognition—a progression from nonmarital cohabitation.<sup>178</sup> Eventually, cities and states would adopt the domestic partnership option for same-sex couples. Today, the State of California has the most extensive domestic partnership statute in the United States: the Domestic Partnership Rights and Responsibilities Act of 2003.<sup>179</sup> The Act provides same-sex couples domiciled in the state with the same rights as opposite-sex married couples, and if the relationship ends in separation or death, the domestic partner is entitled to all of the state rights and responsibilities of a spouse. In addition, the Act provides for reciprocity with any other state’s status arrangements, excluding same-sex marriage.<sup>180</sup>

Domestic partnerships formed the framework for the next development, a new status termed “reciprocal beneficiaries.” In the mid 1990s, when the State of Hawaii was on the verge of adopting same-sex marriage, the state’s legislature enacted what it called the status of reciprocal beneficiaries.<sup>181</sup> Only same-sex, unmarried couples could take advantage of this new status that permitted eligible couples to enter and exit the status in a manner similar to domestic partnerships. Even though the status provided a list of benefits similar to marriage, few other state legislatures followed suit. However, Vermont retains the status today, together with same-sex marriage, and Hawaii retains the status but adopted a new status—civil unions—in 2011.<sup>182</sup> Civil unions are yet another development towards same-sex marriage and another alternative for couples seeking to privately-order their lives.

### 3. *Civil Unions*

On July 1, 2000, Vermont became the first state to adopt civil unions, a new status for same-sex couples. The ruling of the Vermont Supreme Court precipitated the decision to adopt civil unions, holding that the common benefits clause of the state constitution guaranteed to each citizen the same economic benefits.<sup>183</sup> Thus, same-sex and opposite-sex couples had to be

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178. *Id.* at 218–20.

179. *See* CAL. FAM. CODE § 297.5(a) (West 2004). However, marriage was defined in the California state constitution as between one man and one woman with the passage of Proposition 8. On February 7, 2012, the United States Court of Appeals for the Ninth Circuit ruled that Proposition 8 was unconstitutional as a violation of the Fourteenth Amendment’s guarantee of Equal Protection. *See* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

180. *See* CAL. FAM. CODE § 299.2 (West 2004).

181. *See* A Bill for an Act Relating to Unmarried Couples, 1997 Haw. Sess. Laws 383 (codified at HAW. REV. STAT. §§ 572C-1 to 572C-7 (West 1997 & Supp. 2007)).

182. *See* A Bill for an Act Relating to Civil Unions, 2011 Haw. Sess. Laws 232 (codified at HAW. REV. STAT. §§ 572B-1 to 572B-11 (2011)).

183. *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999).

treated equally and be able enjoy the same benefits.<sup>184</sup> In order to meet this mandate, the state legislature enacted legislation that went far beyond domestic partnership and reciprocal beneficiaries. The new status of civil unions required eligible couples to perform all of the requirements of married opposite-sex couples. That is, prior to entering into a civil union, couples had to be of proper age, provide consent, and not be barred by incest.<sup>185</sup> In addition, they had to obtain a license from the state, and then submit to a solemnization ceremony.<sup>186</sup> Then, if they sought to dissolve the civil union, eligible couples had to apply to the state for permission in the same manner as opposite-sex couples seeking a divorce.<sup>187</sup> Civil unions entitle couples to all of the state benefits provided to opposite-sex married couples. A civil union sought to be as much like marriage as possible without using the term marriage.

In addition to Vermont, other states such as Delaware, Illinois, and New Jersey enacted legislation providing for civil unions.<sup>188</sup> Hawaii enacted civil unions in February 2011, which became effective in January 2012.<sup>189</sup> Vermont, the state that initiated civil unions, followed the lead of other states and enacted same-sex marriage legislation.<sup>190</sup> The current situation among the states is very fluid, with some states recognizing a status from another state through reciprocity, while other states bar any recognition of same-sex status because of statute or constitutional amendment. Because any status obtained in one state is not a judgment, the status is not entitled to Full Faith and Credit in another state. To further confuse matters among the states, the Defense of Marriage Act<sup>191</sup>—federal legislation prohibiting any federal benefits to same-sex couples—is being challenged by litigation.<sup>192</sup>

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184. *Id.*

185. VT. STAT. ANN. tit. 18, § 5142 (2000 & Supp. 2012); *see also* VT. STAT. ANN. tit. 15, § 1203 (2010).

186. VT. STAT. ANN. tit. 18, § 5145 (2000 & Supp. 2012).

187. VT. STAT. ANN. tit. 15, § 1202 (2010).

188. *See* DEL. CODE ANN. tit. 13, § 202 (2012); 750 ILL. COMP. STAT. 75/20 (2009 & Supp. 2012); N.J. STAT. ANN. §§ 37:1-28 to 37:1-36 (West 2002 & Supp. 2012); VT. STAT. ANN. tit. 15, § 1202 (2010).

189. A Bill for an Act Relating to Civil Unions, 2011 Haw. Sess. Laws 232 (codified at HAW. REV. STAT. §§ 572B-1 to 572B-11 (2011)).

190. VT. STAT. ANN. tit. 15, § 8 (2010).

191. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in scattered sections of 1 and 28 U.S.C.).

192. *See* Massachusetts v. U.S. Dep't of Health & Human Services, 682 F.3d 1, 17 (1st Cir. 2012) (holding that DOMA's denial of federal benefits to same-sex couples is a denial of equal protection); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012) (holding that under heightened scrutiny the Act's classification based on sexual orientation violated the guarantee of equal protection); *see also* ERIC H. HOLDER, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, DEP'T OF JUSTICE, (Feb. 23, 2012), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

On February 23, 2011, the Attorney General of the United States announced that the United States Department of Justice will no longer defend the constitutionality of the Act as applied to same-sex couples who are validly married under any state's laws.<sup>193</sup>

However, the importance of civil unions lies not in its individual status, but rather in its role in the evolution of private-ordering. Beginning with nonmarital cohabitation, couples were able to enforce promises in manners unthinkable as recently as the 1950s. These same couples, albeit same-sex couples, were able to obtain a modicum of status through employer-provided domestic partnership benefits and then through state-sponsored domestic partnerships. Eventually, through state constitutional litigation in Hawaii, same-sex couples were able to obtain marriage-like economic status titled reciprocal beneficiaries.<sup>194</sup> Through similar efforts, Vermont's legislature enacted civil unions, which mirrored marriage in all but the name itself.<sup>195</sup> Led by the multitude of opportunities available through private-ordering of their individual lives, same-sex couples began to assert a right to marry too. Heretofore, the definition of marriage—one man and one woman—sufficed to insulate marriage from constitutional challenge.<sup>196</sup> But in the early 1990s, the insulation weakened, giving rise to constitutional challenges. The worldview's definition of marriage—as only between one man and one woman—was at stake.

#### 4. *Same-Sex Marriage*

Same-sex marriage is a product of private-ordering. Initially the result of shifting cultural attitudes marked by the establishment of an individual right of privacy, same-sex marriage next evolved with the advent of marriage alternatives like nonmarital cohabitation, domestic partnerships, reciprocal beneficiaries, and finally civil unions. Because of technological advances in communications and media, cultural attitudes of the American population also evolved to consider same-sex marriage as a civil right, an option that should be available to homosexual persons. Persons and organizations committed to a worldview built upon history, religion, and form

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193. ERIC H. HOLDER, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, DEP'T OF JUSTICE, (Feb. 23, 2012), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

194. HAW. REV. STAT. §§ 572C-1 to 572C-7 (West 1997 & Supp. 2007).

195. VT. STAT. ANN. tit. 15, § 1204 (2010).

196. See N.C. CONST. art. XIV, § 6 ("Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State."); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

relationships were unprepared for the sudden challenge of same-sex marriage. There was no parallel to this in history or in scripture.

Structurally, same-sex marriage became a reality in 1993 when the Supreme Court of Hawaii changed the definition of who could marry.<sup>197</sup> Relying on *Loving v. Virginia*,<sup>198</sup> the Hawaii court presumed that the definition of marriage would continue to evolve along with social order and custom.<sup>199</sup> In *Loving*, the Supreme Court overruled state statutes that prohibited interracial marriage and effectively eliminated race as a barrier to marriage.<sup>200</sup> The Hawaii Supreme Court viewed the *Loving* ruling as a change in the definition of marriage. If marriage could evolve to include interracial couples, then it could evolve to include same-sex couples as well.<sup>201</sup> This argument eliminated the definition barrier to same-sex marriage, an obstacle that had prevented constitutional challenge of state statutes defining marriage as between one man and one woman. Once this definitional barrier to same-sex marriage was removed, state statutes restricting marriage to opposite-sex couples were open to challenges based on state and federal constitutional grounds. With challenges a possibility post-*Loving*, the Hawaiian court ruled that its state statute restricting marriage to opposite-sex couples was unconstitutional based on equal protection guaranteed in the state constitution.<sup>202</sup> Other states would follow suit.<sup>203</sup>

Following the court's decision, Hawaii, like many other states confronting an onslaught of constitutional litigation challenging state prohibitions against same-sex marriage, amended the state constitution that previously defined marriage as solely between one man and one woman.<sup>204</sup> Once the definition of marriage is contained in the state constitution, the definitional barrier is in place and is an effective tool against challenges based on the state constitution, but there is nothing in the Federal Constitution defin-

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197. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

198. 388 U.S. 1, 12 (1967); *see generally* Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255 (2002).

199. *Baehr*, 852 P.2d at 63.

200. *Loving*, 388 U.S. at 12.

201. *Baehr*, 852 P.2d at 67.

202. *Id.*

203. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (mandating same-sex marriage); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (declaring same-sex marriage valid).

204. Opponents of same-sex marriage argued: (1) it destroyed the traditional institution of marriage; (2) that every state would be forced to adopt same-sex marriage through Full Faith and Credit; and (3) that the action by the Hawaii court was a flagrant example of judicial activism. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1184-85 (2009).



ing marriage. Only a federal challenge will suffice to overturn state bans, and there has been no such challenge to date.<sup>205</sup>

The most significant challenge to state bans on same-sex marriage is the decision by the Ninth Circuit Court of Appeals, affirming the district court's decision.<sup>206</sup> The case concerned a 2008 amendment to the California Constitution, Proposition 8, by which voters in California amended the state's constitution to define marriage as between one man and one woman.<sup>207</sup> Prior to the passage of that amendment, same-sex couples were able to marry in California because the state had legalized same-sex marriage.<sup>208</sup> In a two-to-one vote, the federal appellate court ruled that the state constitutional amendment lessened the status and dignity of gays and lesbians in California, thus reclassifying their relationships and families as inferior to those of opposite-sex couples.<sup>209</sup> The court did not consider the broader question of whether same-sex persons have a right under the Constitution to marry; it did decide that when same-sex couples previously had the right to marry in California, but then the state's constitutional amendment took away that right, the effect was to deny same-sex couples Equal Protection guaranteed by the Fourteenth Amendment.<sup>210</sup>

A majority of states enacted constitutional amendments defining marriage as between one man and one woman.<sup>211</sup> These amendments were adopted prior to legalization of same-sex marriage, in contrast to the California litigation. But even in those states lacking a constitutional amendment, state courts sometimes mandated same-sex marriage through constitutional interpretations that found any denial was a denial of equal protection, privacy, or freedom of association. In some states, the legislatures specifically enacted legislation permitting same-sex marriage;<sup>212</sup> however, Maine and other states, enacted same-sex marriage only to see those enactments

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205. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006) (holding that Nebraska's prohibition of same-sex marriage was valid). *But see* *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012) (holding that California's Proposition 8 that restricted marriage to one man and one woman was a denial of Equal Protection).

206. *Brown*, 671 F.3d at 1095.

207. *Id.* at 1064.

208. *Id.*

209. *Id.* at 1063.

210. *Id.* at 1064 (relying upon a prior Supreme Court's rationale). *See Romer v. Evans*, 517 U.S. 620, 633 (1996).

211. "In all, forty-one states and the U.S. Congress have enacted measures restricting the protections afforded same-sex couples since 1995, and twenty-six states have passed constitutional bans just since . . . 2003." Schacter, *supra* note 204, at 1155 (footnote omitted).

212. Maryland adopted same-sex marriage in a manner similar to New York, at the behest of the governor of the state. *See* MD. CODE ANN., FAM. LAW § 2-201 (West 2006).

repealed via voter referendum.<sup>213</sup> In 2009, Vermont became the first state to enact same-sex marriage legislation without judicial prompting.<sup>214</sup> This is a unique development in the progress of private-ordering. Prior to Vermont's legislative enactment, adoption of same-sex marriage came about because of a state's judiciary. Since then, additional legislatures have imitated the Vermont initiative, including New Hampshire,<sup>215</sup> the District of Columbia,<sup>216</sup> New York,<sup>217</sup> and California.<sup>218</sup> It is safe to conclude that same-sex marriage has established itself as a successor to the private-ordering initiated in *Griswold's* right to privacy in 1965 and nurtured through decades of nonmarital cohabitation and various status arrangements similar to marriage.<sup>219</sup> The events surrounding the 2011 adoption of same-sex marriage by the legislature in New York State illustrates this fact.

On June 24, 2011, New York Governor Andrew M. Cuomo, the son of former governor Mario Cuomo, signed the bill that legalized same-sex marriage in the state.<sup>220</sup> The state judiciary did not prompt the legislation; rather, the bill was the product of the governor himself: a Catholic living in a nonmarital cohabitation arrangement with a woman. The governor "used the force of his personality and relentlessly strategic mind to persuade conflicted lawmakers" to vote for the measure.<sup>221</sup> When asked why they voted for same-sex marriage, legislators responded that "they were inclined to see the issue as one of personal freedom, consistent with their more libertarian

213. On November 6, 2012, Maine voters reinstated same-sex marriage. Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, N.Y. TIMES, Nov. 8, 2012, at P7.

214. VT. STAT. ANN. tit. 15 § 8 (2010).

215. N.H. REV. STAT. ANN. § 457:1-a (Supp. 2010).

216. D.C. CODE § 46-401 (Supp. 2012).

217. N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012).

218. CAL. FAM. CODE § 300 (West Supp. 2012), *invalidated by In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Same-sex marriage was only valid from June 16, 2008 through November 4, 2008. June 16, 2008 was the date the California Supreme Court declared section 300 unconstitutional. *In re Marriage Cases*, 183 P.3d at 452 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST., art. I, § 7.5. The opposing November 4, 2008 bookend is the date that Proposition 8 passed by voter referendum. *See id.* Since that referendum has been held to be unconstitutional by the Ninth Circuit Court of Appeals, the status of same-sex marriage in California depends upon the outcome of appellate process. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

219. *See Griswold v. Connecticut*, 381 U.S. 479, 497 (1965).

220. Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 26, 2011, at A1.

221. *Id.* Governor Cuomo's father, former Governor Mario Cuomo, had signed legislation in 1984 providing state funding for abortion in New York and by doing so, incurred the wrath of Catholic hierarchy. He later made a speech at Notre Dame University defending his actions and upholding the validity of the political process. *See MORRIS, supra* note 84, at 424-28.

views.”<sup>222</sup> As further evidence of the shift in attitudes regarding private-ordering, Georgetown University historian, Michael Kazin, in reference to the New York legislation, states that “in general, Americans are more [likely] to support movements from the left or from the right that talk in terms of rights and individual freedom than talk about collective rights or responsibilities.”<sup>223</sup>

Likewise, Maryland’s same-sex marriage legislation was initiated by a Catholic governor, Martin O’Malley, who likened the legislation to civil rights.<sup>224</sup> Overall, the same-sex debate illustrates the contrast between those persons who have adopted the opportunities provided by private-ordering and those whose worldview limits those possibilities through history, religion, and natural law.

## B. Worldview Response

Historically, the earliest state court opinions pertaining to marriage contained references to Hebrew or Christian scripture texts.<sup>225</sup> These religious references were often intermingled with quotes from literary or philosophical authors, all evidencing the worldview that marriage was more than a civil contract between two adults; it was a living symbol of the interconnectedness of humanity and the natural order of things. The following evidences this worldview: “[T]he demands of our common human nature have shaped (however imperfectly) all of our religious traditions to recognize this natural institution. As such, marriage is the type of social practice whose basic contours can be discerned by our common human reason, whatever our religious background.”<sup>226</sup>

Scripture, history, and natural law were interwoven into many of the early court decisions. When ruling on a petition to annul a marriage, an Arkansas judge referenced how a woman was made from the rib of Adam, and this made them one person in the law.<sup>227</sup> The unity of husband and wife is a common theme in court opinions; one taken from frequent biblical refer-

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222. Barbaro, *supra* note 220, at A1.

223. Alec MacGillis, *The Rise of Zombie Liberalism: Half-Dead, Half-Alive*, WASH. POST, July 3, 2011, at B1.

224. See *The Rachel Maddow Show* (MSNBC television broadcast Mar. 8, 2012) (transcript available at [http://www.msnbc.msn.com/id/46686242/ns/msnbc-rachel\\_maddow\\_show/t/rachel-maddow-show-thursday-march](http://www.msnbc.msn.com/id/46686242/ns/msnbc-rachel_maddow_show/t/rachel-maddow-show-thursday-march)).

225. See, e.g., *State v. Barefoot*, 31 S.C.L. (1 Rich.) 209, 212 (S.C. Ct. App. 1845) (quoting excerpts from the Old Testament Book of Leviticus throughout the opinion).

226. Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 247 (2011).

227. See *Kelly v. Neely*, 12 Ark. 657, 662–63 (1852).

ences in some of the oldest American decisions.<sup>228</sup> Some of the cases refer to marriage as part of “[t]he moral law as promulgated to man by the light of reason . . . rightly . . . called natural law.”<sup>229</sup> In so doing, the cases reaffirm the worldview premise that family law is immutable, the product of history, codified in scripture.

[There is] but “one and the same law, eternal and immutable, [and it] shall be prescribed for all nations and all times, and the God who shall prescribe, introduce and promulgate this law shall be the one common Lord and Supreme ruler of all, and whosoever will refuse obedience to Him shall be filled with confusion, as this very act will be a virtual denial of his human nature . . . .”<sup>230</sup>

Consistently, the cases affirm the traditional definition of marriage as between one man and one woman and conclusively linked to mutual satisfaction of the parties and to the procreation and care of children.

For both men and women, marriage was the major determinant of wealth and status. For men, marriage secured the legitimacy of their offspring, and with legitimacy and primogeniture, the right of succession and authority over the family’s holdings. For women, marriage provided the only available form of support and the only socially sanctioned role outside the convent. Women had few opportunities for an independent economic existence, and in societies that prized virginity, little opportunity for remarriage once the union was consummated.<sup>231</sup>

The definition of marriage as one man and one woman became changeable with the Hawaii Supreme Court’s 1993 decision in *Baehr v. Lewin*.<sup>232</sup> Not only was the decision surprising, but it was also impossible for proponents of the worldview of marriage. Nonetheless, as a result of the decision, state statutes restricting marriage to persons of the opposite-sex became vulnerable to federal and state constitutional challenge. Among these challenges were those impacting guarantees of free speech, privacy, due process, and equal protection. In addition to the challenges themselves, questions remained as to standard of review to be applied to those challenges—either rational basis or strict scrutiny.

228. See *Head v. Head*, 2 Ga. 191 (1847); *State v. Walker*, 36 Kan. 297 (1887); *Hemingway v. Scales*, 42 Miss. 1 (1868); *Poor v. Poor*, 8 N.H. 307, 312 (1836); *Lanier v. Lanier*, 52 Tenn. (1 Heisk.) 462 (1871); *Wright v. Wright*, 6 Tex. 3 (1851).

229. *Sodero v. Sodero*, 56 N.Y.S.2d 823, 827 (Sup. Ct. 1945). For a recent explanation of natural law that argues for restricting marriage to persons of the opposite sex, see Girgis et al., *supra* note 226, at 247.

230. *Id.* (quoting CICERO, *DE REPUBLICA*, bk. III, ch. 23).

231. Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 859–60 (1988) (footnotes omitted).

232. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

Following ten years of litigation, many states amended their constitutions to define marriage as between one man and one woman—effectively barring challenge at the state level. But then in 2003, the Supreme Court of Massachusetts overturned its state statute banning same-sex marriage,<sup>233</sup> and other state courts followed suit.<sup>234</sup> Some state courts, relying on the worldview previously explained, decided that the historical, scriptural, and natural law worldview was rationally related to the state’s interest in responsible procreation<sup>235</sup> or that there was historical grounding in such a ban. Both of these bases were sufficient to refute any challenge based on equal protection or due process, assuming rational basis was the correct standard.<sup>236</sup> And, the rational basis test, rather than compelling state interest, was justified because same-sex marriage is not “deeply rooted in this Nation’s history and tradition.”<sup>237</sup> This is evidenced in a decision rejecting a constitutional challenge to the state’s ban on same-sex marriage. A New York court wrote:

It is an undisputed biological fact that the vast majority of procreation still occurs as a result of sexual intercourse between a male and a female. In light of such fact, “[t]he State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children.”<sup>238</sup>

Then, as an addendum, the court noted that if change were to come to the status of marriage, it must occur within the legislature, who is better able to decide such issues.<sup>239</sup>

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

234. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that state cannot provide a compelling reason to deny same-sex couples the right to marry and that the ban violates state’s guarantee of equal protection).

235. *See Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *see also Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005).

236. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (App. Div. 2005); *Andersen v. King Cnty.*, 138 P.3d 963, 982 (Wash. 2006) (en banc).

237. *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977). *See also Samuels v. N.Y. State Dep’t of Health*, 29 A.D.3d 9, 18–20 (N.Y. App. Div. 2006) (holding that the statute is constitutional if there is any reasonably conceivable state of facts that could provide a rational basis for the law). *But see Varnum*, 763 N.W.2d at 862 (using a compelling state interest test).

238. *Samuels*, 811 N.Y.S.2d at 145 (quoting *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 462–63 (Ariz. 2003)).

239. *Id.* at 142 (“While such a change of a basic element of the institution may eventually find favor with the Legislature, we are not persuaded that the Due Process Clause requires a judicial redefinition of marriage.”). New York’s legislature approved same-sex marriage in 2011. N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012).

Worldview arguments emphasizing that marriage should be restricted to opposite-sex couples often, like the New York decision, identify the unique and historical procreative function operating in the context of opposite-sex couples. Of course, this referred to sexual intercourse. While same-sex couples may procreate through assisted reproductive technology, this possibility is rejected by worldview advocates as incidental to sexual intercourse and should not detract from the means of procreation existing from the start of creation.

In coitus, but not in other forms of sexual contact, a man and a woman's bodies coordinate by way of their sexual organs for the common biological purpose of reproduction. . . . By extension, bodily union involves mutual coordination toward a bodily good—which is realized only through coitus. . . . But two men or two women cannot achieve organic bodily union since there is no bodily good or function toward which their bodies can coordinate, reproduction being the only candidate. This is a clear sense in which their union cannot be marital, if marital means comprehensive and comprehensive means, among other things, bodily.<sup>240</sup>

Importantly, this quote, and similar views shared by others, not only identifies the main reason why same-sex marriage is impossible but also identifies the immorality of assisted reproductive technology.

Parentage options provided through assisted reproductive technology have adversely affected the rational relationship between state statutes restricting marriage to opposite-sex couples and the traditionally advanced governmental interests. Permitting same-sex couples, married or otherwise, and single persons to adopt children affects the rational relationship in a similar manner. Because parentage is now possible outside of sexual intercourse, restricting marriage to persons who can procreate through sexual intercourse is viewed as irrational. Courts have taken note of this development. When overturning Iowa's ban on same-sex marriage, the state's highest court wrote that "[g]ay and lesbian persons are capable of procreation."<sup>241</sup> The court ignored the uniqueness of sexual intercourse and the historical underpinning of marital procreation. Instead, what mattered to that court was procreation itself.<sup>242</sup> In similar fashion, other courts have rejected the argument that coitus is the sole means of procreation. Ruling that the ban on same-sex marriage was unconstitutional, the Massachusetts Supreme Court wrote that "[o]ur laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of

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240. Girgis et al., *supra* note 226, at 254–55 (footnotes omitted).

241. *Varnum*, 763 N.W.2d at 902.

242. *Id.* at 902–03.

adult intimacy and *every other means of creating a family*.<sup>243</sup> The court then added that the Commonwealth of Massachusetts

affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive [reproductive] technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around permissible bounds of nonmarital child bearing and the creation of families by noncoital means.<sup>244</sup>

Opponents of same-sex marriage have offered alternative reasons to restrict marriage to persons of the opposite sex. For example, in addition to the uniqueness of coitus, opponents have argued that children thrive better in families where both a man and a woman are present as parents.<sup>245</sup> But courts and legislatures, when asked to accept the rationality of this argument, have most often rejected it.<sup>246</sup> The decisions often note that state policy pertaining to foster care, adoption, and overall preferences of what is in the best interest of a child, suggests that “people in same-sex couples may be ‘excellent’ parents.”<sup>247</sup> Furthermore, the Iowa Supreme Court wrote:

If the statute [banning same-sex marriage] was truly about the best interest of children, some benefit to children derived from the ban on same-sex civil marriages would be observable. Yet, the germane analysis does not show how the best interests of children of gay and lesbian parents, who are denied an environment supported by the benefits of marriage under the statute, are served by the ban. Likewise, the exclusion of gays and lesbians from marriage does not benefit the interests of . . . children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples.<sup>248</sup>

The court continues its rationale for holding that children are not adversely affected by being raised in same-sex households, suggesting that any effort to restrict children to opposite-sex households may be a product of bias rather than fact. Rejecting same-sex couples as ideal parents “suggests stereotype and prejudice, or some other unarticulated reason, could be present to explain the real objectives of the statute[ banning same-sex marriage].”<sup>249</sup>

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243. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (emphasis added) (citation omitted).

244. *Id.* at 962 (footnote omitted).

245. *Varnum*, 763 N.W.2d at 899.

246. *See id.*

247. *Goodridge*, 798 N.E.2d at 965.

248. *Varnum*, 763 N.W.2d at 901.

249. *Id.*

Most often, the worldview objection to same-sex marriage initiatives depends heavily upon history, natural law, and religious underpinnings. Although not likely to be a part of civil court decisions as it was in the past, religious belief has been accepted as a rational reason to prohibit same-sex marriage.<sup>250</sup> Perhaps religion is synonymous with historical precedent. That is, because scripture, admittedly historical, defines marriage as between one man and one woman, the definition must be immutable. Furthermore, the definition is grounded in historical practice, suggesting that it encompasses the natural way of doing things. All courts recognize the historical and scriptural basis of the definition and practice of marriage as between a man and a woman. “Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation.”<sup>251</sup> But recently, courts observe that some religious persons and organizations support same-sex marriage, and to choose one set of beliefs over another is barred by the Constitution.<sup>252</sup> “Thus . . . we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system . . . .”<sup>253</sup> Understandably, the courts adopt the same approach as many of the previous decisions involving statutes that impact religious liberty. A distinction is to be made between religious beliefs and civil practices, the courts and the legislatures are responsible only for the latter.<sup>254</sup>

The Roman Catholic Church is at the forefront of opposition to same-sex marriage. The Catechism of the Catholic Church affirms the immutable definition of marriage. While doing so, it recounts the first book of scripture, Genesis, in which man and woman are created in the likeness of God, and then concludes by calling attention to the fact that scripture ends with the Book of Revelation, in which there is a vision of the wedding-feast of the Lamb.<sup>255</sup> Throughout its description of marriage, the Catechism affirms the one man and one woman aspect of marriage as well as the historical underpinnings of the institution.<sup>256</sup> “The vocation to marriage is written in the very nature of man and woman as they come from the hand of the Creator. Marriage is not a purely human institution despite the many variations it may

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250. “While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling.” *Id.* at 904 (footnote omitted).

251. *Id.* (citing Ben Schuman, *Gods & Gays: Analyzing the Same-Sex Marriage Debate From a Religious Perspective*, 96 GEO. L.J. 2103, 2109–12 (2008)).

252. *See id.*

253. *Id.* at 905.

254. *See Varnum*, 763 N.W.2d at 905.

255. SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 116, at 400 (citing *Genesis* 1:26–27; *Revelation* 19:7, 9).

256. *Id.*



have undergone through the centuries in different cultures, social structures, and spiritual attitudes.”<sup>257</sup> In the documents of the Second Vatican Council, a universal council that impacted every aspect of the Church, there are affirmations of marriage being ordained toward the begetting and educating of children and for the “equal personal dignity of wife and husband, a dignity acknowledged by mutual and total love.”<sup>258</sup> Consistently, the Church describes marriage as a permanent union of one man and one woman, the goals of which are to beget children, provide for the mutual love and support of the couple, and provide a functioning home in which to raise the children.<sup>259</sup>

While this ideal is lived by many Americans, the cultural phenomenon of private-ordering has affected practicing Catholics too. For example, as described earlier, prior to the introduction of no-fault divorce, nearly eighty percent of adult Americans were married.<sup>260</sup> But by 2009, forty years after no-fault divorce was introduced, the number of married Americans had dropped to fifty-two percent.<sup>261</sup> The shift in the practices of American Catholics was similar to the overall trend.

[F]rom 1972 to 2010 there was a nearly 60-percent decrease in the number of marriages celebrated in the church, even as the Catholic population grew by 17 million. The overall percentage of married Catholics also dropped from 79 percent in 1972 to 53 percent in 2010. At the same time, the number of divorced Catholics who remarry without a church annulment continues to climb.<sup>262</sup>

Commentators suggest that this shift can be traced, in part, to private-ordering. “[W]e [American Catholics] have increasingly come to see marriage as a personal matter in which children are optional, a category into which same-sex marriage fits quite ‘naturally.’”<sup>263</sup>

Increasingly, and as a result of increasing private-ordering:

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257. *Id.*

258. GAUDIUM ET SPES, *supra* note 95, at 253.

259. It is important to note that Church doctrine forbids assisted reproductive technology as a means of parentage. Likewise, adoption of children by same-sex couples is not permitted. See CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION DIGNITAS PERSONAE ON CERTAIN BIOETHICAL QUESTIONS (2008), *available at* [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_2008\\_1208\\_dignitas-personae\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_2008_1208_dignitas-personae_en.html).

260. NAT’L MARRIAGE PROJECT, *supra* note 126, at 19.

261. William L. Portier et al., *A Modus Vivendi? Sex, Marriage & the Church*, COMMONWEAL, Jan. 13, 2012, at 12.

262. *Id.*

263. *Id.* at 13.

Rule-followers and rule-breakers alike tend to see their “Catholic” affiliation as merely tribal—thus, getting married in church becomes an expression of “family.” In this understanding, there is no sense that a larger social ethic underlies the commitment, that a deeper kind of belonging grounds the project, that there is recourse to an ultimate reality (which [Catholics] call “God”) that lends this very human moment some much-needed courage and scale and resolve.<sup>264</sup>

Furthermore, as no-fault divorce lessened the significance of marriage, the increasing use of assisted reproductive technology lessens the significance of the sexual intercourse aspect of marriage.<sup>265</sup> Adherents of a worldview based in part on religion cannot help but be affected by the scope and impact of private-ordering opportunities. Examples abound:

And then there’s my niece Theresa and her partner Sue, both cradle Catholics married “outside the church” whatever that now means. And their newborn twins, the “gentlemen,” as we call Jack and Michael. They’re here. We’re all here with them. Conceived and born in the modern medical miracle way. Emphasis on miracle. I thought we were good with miracles. In my family we still are. We have the proof.<sup>266</sup>

Likewise, religious adherents, through media and through friendships, are exposed to an increasing number of same-sex couples who adopt children and experience all of the turmoil and opportunity that opposite-sex couples face when raising their children. These factual anomalies must be addressed by religious authorities prior to any successful effort to seek religious liberty accommodation or to successfully challenge statutes permitting same-sex marriage.

Almost all of the states permitting same-sex marriage provide an exemption for clergy who object to performing the solemnizations based on religious beliefs. Vermont, when it adopted same-sex marriage, provided: “This [law] does not require a member of the clergy authorized to solemnize a marriage . . . to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action.”<sup>267</sup> But most often the concern is not for the clergy, but for the religiously affiliated church or school hall, or a religiously motivated layman or laywoman. Few states provide comprehen-

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264. *Id.* at 14.

265. *Varnum v. Brien*, 763 N.W.2d 862, 902 (Iowa 2009) (discussing how same-sex couples are still able to procreate).

266. Portier et al., *supra* note 261, at 17.

267. VT. STAT. ANN. tit. 18, § 5144(b) (Supp. 2012); *see also* CONN. GEN. STAT. ANN. § 46b-22b(b) (West Supp. 2012); D.C. CODE § 46-406(c) (Supp. 2012); N.Y. DOM. REL. LAW § 10-b(2) (McKinney Supp. 2012).

sive religion-based accommodation.<sup>268</sup> Without accommodation, clergy and religious organizations may be subject to allegations of discrimination under state statutes. In addition, “[c]hurches and religious organizations that oppose same-sex marriage perceive a credible, palpable threat to their tax-exempt status, the benefits of which are substantial.”<sup>269</sup> Both state and federal tax exempt status may be adversely affected. If religious organizations seek to exert political pressure to bring about a change in the law regarding issues such as same-sex marriage, their tax status as Section 501(c)(3) organizations may be adversely affected because for promoting a particular party or political agenda.<sup>270</sup>

If religious adherents to a worldview that opposes same-sex marriage are to be effective, they must motivate their fellow adherents. Statistics suggest that the majority of the Roman Catholic Church’s congregants are as affected by private-ordering as the general population, at least in reference to social issues such as divorce, marriage, adoption, and parentage.<sup>271</sup> Any recourse to authority alone is not an effective option.<sup>272</sup> What is needed is “honest dialogue” and a “wise and nuanced response”<sup>273</sup> to congregants who are admittedly affected by media, friends, and an educational level unsurpassed in the history of the Catholic Church in America.<sup>274</sup> Catholic leadership and other worldview adherents must honestly address the following: What is distinctive about a marriage based on the worldview advocated? Why is it better to solemnize a marriage in the context of a religious organization? What strengths will I derive? What will I have to sacrifice? Is it possible for me to fit within the parameters of the worldview? The challenges of family law—divorce, same-sex marriage, adoption practices, and assisted

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268. *But see* WASH. REV. CODE § 26.04.010(5) (Supp. 2012) (“No religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage.”).

269. Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 86 (Douglas Laycock et al. eds., 2008).

270. *Id.* at 89 (referencing litigation brought by the IRS against All Saints Episcopal Church in Pasadena, California because of a 2004 sermon against the Iraq war); *see also* Jason Felch & Patricia Ward Biederman, *Conservatives also Irked by IRS Probe of Churches*, L.A. TIMES, Nov. 8, 2005, at A1.

271. D’Antonio et al., *supra* note 91, at 273.

272. Portier et al., *supra* note 261, at 17.

273. Leslie Woodcock Tentler, *Souls and Bodies: The Birth Control Controversy and the Collapse of Confession*, in THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY, *supra* note 100, at 311.

274. *Id.*

reproductive technology—will continue. Commentators suggest education and dialogue to address the challenge.<sup>275</sup>

[O]nly a church that *learns* from its own mistakes, past and present, from the voices of its own faithful, from its own theologians, from its various and disparate episcopal and ecclesial contexts, from those of other churches, of other faiths and of no faith, indeed from the wider human experiences in general, can truly teach with genuine authority.<sup>276</sup>

The goal, it seems, is not to address the elements of the challenge family law poses—divorce, marriage, adoption, and parentage—but rather to address the culture of private ordering. This is a difficult task for an advocate of a worldview. The task is to convey the following:

While the law is not indifferent to the welfare of individual members of society, its primary aim is to promote the common good of the ecclesial community as the nurturing environment in which alone individuals can achieve their true good. However, this good of individuals consists not in maximizing their temporal prosperity, happiness, or even autonomy, but in maximizing their virtue, both natural and supernatural.<sup>277</sup>

#### IV. ADOPTION

##### A. Statutory Challenge

Adoption of an adult or a child occurs solely through statute.<sup>278</sup> The first officially recognized adoption statutes originated in Hawaii in 1841, Mississippi in 1846, Texas in 1850, and Massachusetts in 1851.<sup>279</sup> The earliest uniform statutory model was the Field Code, proposed in New York in 1865.<sup>280</sup> The Code was never adopted in New York, but it became the model for many other state adoption statutes. Unlike adoption statutes from ancient regimes like the Roman Empire, modern adoption statutes promoted the best interest of the child as the primary consideration rather than the dynastic prerogatives of the adopter.<sup>281</sup> The best interest of the child remains the per-

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275. See Gerard Mannion, *A Teaching Church that Learns? Discerning "Authentic" Teaching in Our Times*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra* note 85, at 184.

276. *Id.*

277. John P. Beal, *Something There Is That Doesn't Love a Law: Canon Law and Its Discontents*, in *THE CRISIS OF AUTHORITY IN CATHOLIC MODERNITY*, *supra* note 85, at 141.

278. For an explanation of adoption procedures, see WADLINGTON & O'BRIEN, *supra* note 39, at 166–82.

279. *Id.* at 166.

280. *Id.* at 167.

281. *Id.*

spective of modern adoption statutes and practices.<sup>282</sup> This is evidenced in the Uniform Adoption Act, first promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.<sup>283</sup> Subsequent revisions occurred in 1969 and then in 1999.<sup>284</sup> The Act initiated many features subsequently adopted by the states, such as interstate adoption, agency adoption, evaluations, relinquishments, petitions, and stepparent adoptions.<sup>285</sup>

Early adoption statutes were, like marriage and divorce, based on a worldview formed by history and scripture.<sup>286</sup>

The authorities are unanimous to the effect that adoption was unknown to the old common law of England. It was known to the Roman law, was attended by ceremonial dignity, and was of deep meaning and far-reaching results. It was known to the Athenians and Spartans and was familiar to the writers of the New, if not the Old, Testament. It seems to have taken root in Egypt (Exodus II: 10). The doctrine was not unknown to the Babylonians—witness the Code of Hammurabi, compiled from 2285 to 2242 B.C.<sup>287</sup>

Even in states not influenced by the English common law, such as Hawaii, adoption was “a sacred relation, and having all the rights, duties and obligations of a child of the blood; and the opinion which the majority of the Court entertain is, that by ancient custom and usage an adopted child was an heir of his adopted parents.”<sup>288</sup> Because adoption brought that child into a specific family unit, those related by adoption were prohibited from marrying, even though they had no genetic connection at all.<sup>289</sup> Such a policy was meant to “maintain the Divine Law forbidding the marriage of close relatives.”<sup>290</sup> Any marriage involving a genetic or adopted relative was considered incestuous and a criminal offense.<sup>291</sup> State statutes prohibiting incest

282. *Id.*

283. UNIF. ADOPTION ACT §§ 1-101 to 8-106, 9 pt. IA U.L.A. 20–132 (1999); *see generally* FAMILIES BY LAW: AN ADOPTION READER (Naomi Cahn & Joan Heifetz Hollinger eds. 2004); CYNTHIA MABRY & LISA KELLY, ADOPTION LAW: THEORY, POLICY, AND PRACTICE (2d ed. 2006); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003); David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459 (1999).

284. UNIF. ADOPTION ACT §§ 1-101 to 8-106, 9 pt. IA U.L.A. 20–132 (1999).

285. Wadlington & O’Brien, *supra* note 39, at 167.

286. *See In re Kirby’s Estate*, 261 N.Y.S. 71, 72 (Sur. Ct. 1932); *see also* Dep’t of Soc. Servs. v. Superior Court, 68 Cal. Rptr. 2d 239, 245 (Ct. App. 1997) (referencing biblical references from Deuteronomy to support placement of minors awaiting adoption).

287. *In re Kirby’s Estate*, 261 N.Y.S. at 72 (citations omitted).

288. *O’Brien v. Walker*, 35 Haw. 104, 123 (1939).

289. *See In re Enderle Marriage License*, 1 Pa. D. & C.2d 114 (Orphans’ Ct. 1954) (allowing a marriage between first cousins).

290. *Id.* at 120.

291. *See, e.g., Commonwealth v. Rahim*, 805 N.E.2d 13 (Mass. 2004).

often were based on biblical injunctions.<sup>292</sup> “Early American jurisprudence . . . applied the [state] statute . . . , which declared ‘all persons to be lawful that be not prohibited by God’s law to marry’ with God’s law supplied by the 18th chapter of the Book of Leviticus.”<sup>293</sup>

The effect of adoption, whether the person adopted is a minor or an adult, is to create a legal parent-child relationship with all of the rights and duties pertinent to that relationship.<sup>294</sup> Except in rare instances, a decree of adoption terminates the relationship between the child and the child’s former parents—ending visitation, communications, inheritance, and support. Then, once adopted, the adopted child is a child of the adoptive parents for purposes of support, custody, inheritance, and any determination of best interest. Only in cases of stepparent adoption,<sup>295</sup> standby guardianship,<sup>296</sup> or open adoption<sup>297</sup> is the status arrangement modified. In each of the latter three statutory arrangements, the unique and very modern statutes provide for a continuation of the parent and child relationship with the former parent.

Historically, the public perception of the adoption process most commonly involved a young unwed woman voluntarily surrendering her child to an adoption agency. The agency, after a process of evaluation and discernment would permit the infant to be adopted by a married man and woman. But this perception pattern has diminished with the passage of time. By the mid-1990s, only one percent of unmarried women voluntarily surrendered their child for adoption. This rate of surrender declines despite the fact that in 2003, more than one-third of all births in the United States occurred

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292. *Lowe v. Swanson*, 639 F. Supp. 2d 857, 863 (N.D. Ohio 2009).

293. *Id.* (quoting *State v. Barefoot*, 31 S.C.L. (1 Rich.) 209, 212 (S.C. Ct. App. 1845)).

294. *In re Adoption of C.A.*, 137 P.3d 318, 326 (Colo. 2006) (holding adoptive parents are protected under the Due Process Clause in the raising of their adoptive child); UNIF. ADOPTION ACT § 1-104, 9 pt. IA U.L.A. 23 (1999).

295. For step-parent adoption, see UNIF. PROBATE CODE § 2-119(b) (amended 2008), 8 pt. I U.L.A. Supp. 68–69 (Supp. 2010): “A parent child relationship exists between an individual who is adopted by the spouse of either genetic parent and: (1) the genetic parent whose spouse adopted the individual; and (2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.” Nearly half of all adoptions in the United States are stepparent adoptions. See ROSE M. KREIDER, ADOPTED CHILDREN AND STEPCHILDREN: 2000 2 n.4 (2003).

296. See, e.g., MD. CODE ANN., EST. & TRUSTS §§ 13-901 to 13-908 (West 2002) (providing guardianship of a minor or a minor’s property upon the consent, death, or incapacity of a minor’s parent).

297. See, e.g., N.M. STAT. ANN. § 32A-5-35 (West Supp. 2012) (permitting the former parents and the adopted child to maintain contact after the adoption has been finalized). For commentary, see CHILD WELFARE INFORMATION GETAWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., OPENNESS IN ADOPTION (Feb. 2003), available at [http://www.childwelfare.gov/pubs/f\\_openadopt.pdf](http://www.childwelfare.gov/pubs/f_openadopt.pdf).

among unmarried women.<sup>298</sup> This pattern is not unique. Perhaps the discrepancy between single mother births and a decline in the surrender of infants for adoption may be explained by the fact that fewer teenage women are having babies. Between 1970 and 2003, the ratio of births to teenage women has decreased from sixty-eight to forty-two births per thousand.<sup>299</sup> It is likely that the availability of contraception and abortion accounts for the decrease. Nevertheless, many single mothers of all ages are keeping their babies, perhaps because of a combination of greater societal acceptance of single parents and an individual maternal desire to simply raise the child on their own.

While the number of children voluntarily surrendered into the adoption process decreased, the number of children involuntarily removed from their parents and placed in some form of dependency care increased. A child is classified as dependent whenever there is no parent able or willing to care for the child.<sup>300</sup> This necessitates the child being temporarily placed with relatives or in an institution, such as foster care or a home for children. Most often, a child lacks a capable parent because of abuse, neglect, or abandonment. When this happens, the state, in almost all situations, must provide services to the parent to correct the harm.<sup>301</sup> The state may remove the child if there is a preponderance of evidence of neglect or abuse.<sup>302</sup> Then, at a hearing, the state must provide clear and convincing evidence of the parent's conduct that adversely affects the child.<sup>303</sup> If the state is successful, the child remains in state care and the parent must be provided with services to correct the problem. But if the parent does not cooperate with services, or the harm is very severe, then the state may involuntarily terminate the parent's rights to the child.<sup>304</sup> Termination of the parental rights requires clear and convincing evidence and is often a tortuously lengthy process.

Nearly 500,000 children are in some type of dependency care in the United States.<sup>305</sup> The state will return some of these children to their parents,

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298. See CTRS. FOR DISEASE CONTROL & PREVENTION, ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18–44 YEARS OF AGE IN THE UNITED STATES, 2002, VITAL AND HEALTH STATISTICS, SERIES 23, NO. 27, at 34 (2008); Brady E. Hamilton et al., CTRS. FOR DISEASE CONTROL & PREVENTION, *Births: Preliminary Data for 2003*, 53 NAT'L VITAL STATS. REPORTS 9, Nov. 6, 2004, at 1.

299. Hamilton et al., *supra* note 298, at 2 fig.2.

300. WILLIAM G. JONES, U.S. DEP'T OF HEALTH & HUM. SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION 84 (2006), available at <http://www.childwelfare.gov/pubs/usermanuals/courts/appenda.cfm>.

301. *Id.* at 23–40.

302. *Id.*

303. *Id.*

304. *Id.*

305. U.S. DEP'T OF HEALTH & HUM. SERVS., TRENDS IN FOSTER CARE AND ADOPTION—FY 2002–FY 2011 (Jul. 12, 2012), [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption.pdf).

but nearly 180,000 will eventually become eligible for adoption because of termination of parental rights.<sup>306</sup> When Congress adopted the Adoption and Safe Families Act of 1997,<sup>307</sup> all states had to petition the courts for termination of parental rights if the child spent fifteen out of twenty-two consecutive months in dependency care. The goal of the Act was to decrease the amount of time a child spends in dependency care, which is temporary and offers little stability. However, the Act increased the number of termination proceedings, resulting in the unintended consequence of more children becoming available for adoption.

In addition to the children whose parents have lost their parental rights, other children are placed for adoption because they are special-needs children having various illnesses, psychological or physical disabilities, or manifesting severe behavioral problems. In 2002, about sixty percent of unrelated adoptions were of special needs children.<sup>308</sup> Some states provide subsidized adoptions of children with special needs.<sup>309</sup> Virginia's statute defines a special-needs child as one with the following conditions: (1) "[p]hysical, mental, or emotional condition[s] existing prior to adoption;" (2) a predisposition to develop health issues leading to "substantial risk of future disability;" and (3) "individual circumstances . . . related to age, racial or ethnic background or a close relationship with one or more siblings."<sup>310</sup> The state provides various incentives to adopt.<sup>311</sup> In addition to a subsidy, the adopters will receive reimbursement for any fees or other expenses related to the adoption, legal expenses included.<sup>312</sup> State assistance ceases when the child with special-needs reaches eighteen years-of-age, but if the child has handicaps that necessitate continuation of payments, then the payments may continue until the child reaches the age of twenty-one.<sup>313</sup> Additionally, the federal government provides incentives for those willing to adopt children who are hard to place.<sup>314</sup> The hope is that financial incentives will enable a family

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306. *Id.*

307. Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 2 & 42 U.S.C.); *see generally* Richard Wexler, *Take the Child and Run: How ASFA and the Mentality Behind It Harm Children*, 13 UDC/DCSL L. REV. 435 (2010).

308. Paul Placek, *National Adoption Data*, in ADOPTION FACTBOOK IV, at 8 (Thomas C. Atwood et al. eds., 2007), *available at* <http://www.adoptioncouncil.org/images/stones/documents/adoptionfactbookiv1.pdf>.

309. *See, e.g.*, VA. CODE ANN. §§ 63.2-1300 to 63.2-1304 (2007) (stating that financial assistance to the adoptive parent continues until the child reaches eighteen, or twenty-one under special circumstances).

310. *Id.* § 63.2-1300.

311. *Id.* § 63.2-1301.

312. *Id.*

313. *Id.*

314. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. §§ 620-628(b), 670-679(b) (2006 & Supp. V



to adopt a child and thus provide the child with a permanent placement. As an added incentive to promote adoptions, the federal government provides an income tax credit for adoptive parents.<sup>315</sup> Despite state and federal efforts, only about 50,000 children are adopted out of the foster care system each year, leaving a significant number without permanent placements until they age-out of the system entirely.<sup>316</sup>

State and federal efforts to promote adoption of children placed in state foster homes and related institutions illustrate the dramatic need to place children in permanent homes and out of institutional care settings. The need to place children has provided an incentive for states and private agencies to become more lenient in permitting foster parents to adopt their foster children.<sup>317</sup> Recall that foster parents are paid by the state to provide children with temporary homes; traditionally, foster parents were prevented from bonding with the children through frequent moves from one foster home to another. Nonetheless today, statistics indicate that of all the children who were adopted in 2006, fifty-nine percent of children in foster care were adopted by their foster parents in 2006. Additionally, some children are being adopted by temporary foster parents of sorts. Typically, the state has been placing children with relatives of the parent waiting for a determination of parental rights.<sup>318</sup> A few courts even allow a presumption, or a priority status, to relatives when they seek to adopt a child.<sup>319</sup> This too is a radical departure from what occurred in the not too distant past.<sup>320</sup>

Generally, most adoption agencies prefer heterosexual, married couples with a stable economic history that seem suitable for promoting the best

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2011)); Protecting Incentives for the Adoption of Children with Special Needs Act of 2009, Pub. L. No. 111-20, 123 Stat. 1616 (2009).

315. 26 U.S.C. §§ 23, 137 (2006); *see generally* James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409 (2010).

316. However, some states provide for long-term foster care assistance. *See* VA. CODE ANN. § 63.2-908 (2007).

317. *See* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERVS., AFCARS REPORT 14 (2008),

*available at* [http://www.acf.hhs.gov/sites/default/files/cb/afcars\\_report14.pdf](http://www.acf.hhs.gov/sites/default/files/cb/afcars_report14.pdf). A number of courts have permitted foster parent adoption when it was in the best interest of the child. *See* Knight v. Deavers, 259 Ark. 45, 531 S.W.2d 252 (1976); C.S. v. S.H., 671 So.2d 260 (Fla. Dist. Ct. App. 1996).

318. *See generally* CHILD WELFARE INFORMATION GETAWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., OPENNESS IN ADOPTION (Feb. 2003), *available at* [http://www.childwelfare.gov/pubs/f\\_openadopt.pdf](http://www.childwelfare.gov/pubs/f_openadopt.pdf).

319. *See* Clark Cnty. Dist. Attorney v. Eighth Judicial Dist. Court, 167 P.3d 922 (Nev. 2007); *see also*, FLA. STAT. § 63.0425 (2005 & Supp. 2008) (creating a preference for a relative when the child has resided with the relative for six months or more).

320. *See, e.g.*, Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977) (holding that foster parents lack a due process right to custody of a child when the state removes the child from foster care).

interest of the child. Suitability may include matching the child's religious beliefs with the adoptive parents.<sup>321</sup> Adoption agencies can consider religious beliefs of the adopters as long as the belief is perceived as being in the best interest of the child.<sup>322</sup> States routinely prohibit agencies from denying any person the right to adopt a child based on race, color, or national origin.<sup>323</sup> Presumptively, the preferential couple being married and heterosexual would conform to the worldview advocated by religious persons and organizations. And religious agencies will restrict their adoptive couples to this model when state statutes allow it. There are fewer of these couples today, which presumably corresponds to the expanding number of children needing permanent homes. Thus, the need to place children has necessitated looking beyond preferred form families. Persons heretofore denied the opportunity to adopt—due to prohibitive state or institution profile guidelines—have challenged any agency limitations by asserting constitutional guarantees. As a result of these factors, today single persons,<sup>324</sup> gay and lesbian persons and couples,<sup>325</sup> older persons, and disabled persons are able to adopt children.<sup>326</sup> One study reported that sixty percent of public and private adoption agencies permit adoption by same-sex couples; approximately four percent of adopted children in the United States are being raised in same-sex households.<sup>327</sup>

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321. See, e.g., CAL. FAM. CODE § 8709(a) (West 2011) (amended 2012) (“The department or licensed adoption agency to which a child has been freed for adoption by either relinquishment or termination of parental rights may consider the child’s religious background in determining an appropriate placement.”); see also Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J. L. REFORM 879 (1992).

322. See, e.g., *In re Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1972) (providing an example of religious beliefs being considered for adoption determinations). Note that other factors like race may not be considered for adoption purposes.

323. See CAL. FAM. CODE § 8708 (a)(1) (2004); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415 (2006). But see 25 U.S.C. § 1915 (2006) (specifying an exemption for Native Americans).

324. See generally W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883 (2006).

325. Jason C. Beekman, Note, *Same-Sex Second Parent Adoption and Intestacy Law: Applying the Sharon S. Model of “Simultaneous” Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139 (2010); see, e.g., Adoption of M.A., 930 A.2d 1088 (Me. 2007) (permitting two unmarried same-sex persons to petition to adopt children because it was in the best interest of the children to be adopted).

326. See, e.g., WIS. STAT. § 48.82(5) (2011) (specifying that any person otherwise qualified, may not be prevented from adopting a child because the person is deaf, blind, or has other physical handicaps).

327. Jeanne Howard, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?*, ADOPTION INSTITUTE 11 (2006), available at

Agencies affiliated with religious organizations may not, because of religious objections, permit same-sex couples to adopt children.<sup>328</sup> The same-sex couples may be presumed to be having an intimate sexual relationship. The religious agency, considering any sexual relationship outside of marriage as a sinful act and not in the best interest of a child, will deny the couple the right to adopt. If challenged by the prospective adopters, the agency will assert a Free Exercise right to refuse, arguing that gay and lesbian adoptive parents would not be in the best interest of the child since that child would be raised in an immoral household. The fact that same-sex couples may be married in a state permitting such marriages, or may be in a civil union or domestic partnership is irrelevant. The religious agency refusing them the right to adopt would not recognize any same-sex relationship involving intimacy as valid.

When a religious agency refuses to place a child for adoption with same-sex couples, it risks violating various constitutional guarantees or state statutes affording protection to such persons. As discussed previously in reference to same-sex marriage, arguments may be made in reference to Equal Protection, Due Process, the right to privacy, and freedom of association. In rare instances, rather than protecting the right of all persons to adopt, states prohibited same-sex couples from adopting children within their borders. Until late in 2008, Florida prohibited gay and lesbian couples from adopting children.<sup>329</sup> The state statute was ruled unconstitutional on the basis of Equal Protection due to the state's inability to provide a rational basis for denying gay and lesbian persons and couples adoption rights.<sup>330</sup>

In *Doe*, the state presented familiar arguments as to why homosexuals should not be able to adopt children—principally arguing that prohibition was rational because heterosexuals are better equipped to be parents.<sup>331</sup> That is, homosexual parents are more prone to various disorders resulting in more violence and earlier death.<sup>332</sup> The state's expert witness, Dr. George Rekers, asked to testify in support of this position, relied heavily on a worldview based on a moral law:

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[http://www.adoptioninstitute.org/publications/2006\\_Expanding\\_Resources\\_for\\_Children%20\\_March\\_.pdf](http://www.adoptioninstitute.org/publications/2006_Expanding_Resources_for_Children%20_March_.pdf).

328. Adoption in this section refers to any adoption by same-sex couples, when they are seeking to adopt together as a couple. Omitted is any discussion of an adoption of a child by one partner in a same-sex relationship. For an example of the issues involved in an adoption by one person in a same-sex relationship, see *Chatterjee v. King*, 253 P.3d 915 (N.M. Ct. App. 2010), *rev'd*, 280 P.3d 283 (N.M. 2012); *see also* *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

329. *See* FLA. STAT. § 63.042(3) (2008) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”).

330. *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).

331. *Id.* at \*6–12.

332. *Id.*

God has given us explicit instruction as to what his moral laws are. The psychologist who recommends that a person simply define his own sexual values ends up not being an advocate of human freedom, instead he becomes a revolutionary, attempting to overthrow the moral laws of God. Instead of being helped, the client is therefore led down a fanciful path of alleged morality called, quote, liberation.<sup>333</sup>

The court rejected this as a sufficient rational basis, holding that “it is clear that sexual orientation is not a predictor of a person’s ability to parent. Sexual orientation no more leads to psychiatric disorders, alcohol and substance abuse, relationship instability, a lower life expectancy or sexual disorders than race, gender, socioeconomic class or any other demographic characteristic.”<sup>334</sup> This holding effectively eliminated the ban on homosexuals adopting children in Florida.

In a second case, the Arkansas Supreme Court ruled that a state statute forbidding adoption by unmarried persons violated the privacy rights of a same-sex couple.<sup>335</sup> Relying upon the Arkansas Constitution, the court demanded that the state provide a compelling state interest, rather than a rational basis, because of the statute’s substantial and direct burden on the couple’s privacy rights.<sup>336</sup> Because the statute involved a fundamental right to engage in intimate consensual activity, it had to be justified by a heightened level of scrutiny.<sup>337</sup> The court ruled that the statute forced the couple to choose between engaging in intimate sexual activity and adopting a child<sup>338</sup>—an impermissible choice.<sup>339</sup> To force a couple to choose between adopting and engaging in intimate contact is impermissible without demonstrating a compelling state interest.<sup>340</sup> In a manner similar to the Florida decision, the state argued that its statute was justified because unmarried couples were more likely to suffer domestic abuse, and furthermore, the

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333. *Id.* at \*12 n.25 (quoting MICHAEL BRAWN & GEORGE REKERS, *THE CHRISTIAN IN AN AGE OF SEXUAL ECLIPSE* 14 (1981)).

334. *Id.* at \*20–21; see generally Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL’Y. & L. 291, 319–29 (2001); AM. PSYCHOANALYTIC ASS’N, POSITION STATEMENT ON PARENTING (2012), available at [http://www.apsa.org/About\\_APsaA/Position\\_Statements/Parenting.aspx](http://www.apsa.org/About_APsaA/Position_Statements/Parenting.aspx); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCI. 241 (2006). But see Lynn D. Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, 23 QUINNIPIAC L. REV. 541 (2004); Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1031 (2007).

335. Ark. Dep’t of Human Servs. v. Cole, 2011 Ark. 145, at 14–15, \_\_\_ S.W.3d \_\_\_, \_\_\_.

336. *Id.*, \_\_\_ S.W.3d at \_\_\_.

337. *Id.* at 19–20, \_\_\_ S.W.3d at \_\_\_.

338. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_.

339. *Id.* at 14, \_\_\_ S.W.3d at \_\_\_.

340. See *id.* at 19, \_\_\_ S.W.3d at \_\_\_.

nonmarital relationship lacked the social support necessary to raising a child.<sup>341</sup> Rejecting those arguments, the court held that these factors may be addressed in the screening of applicants and do not provide a compelling state interest.<sup>342</sup>

The constitutional arguments provided by the Florida and Arkansas courts are illustrative of the arguments likely to arise in the future when states seek to impose barriers to adoption by gay and lesbian persons or couples. Equal Protection and the constitutional guarantee of liberty announced in *Lawrence* are formidable hurdles to overcome, especially when increasing numbers of couples are seeking to adopt children coupled with a corresponding increase in the number of children seeking permanent homes.<sup>343</sup> Anticipating a challenge similar to what occurred in Florida and Arkansas, some states repealed statutes that prohibited gay and lesbian persons from adopting children.<sup>344</sup> The challenge to religious liberty is to be able to restrict the adoption of children to couples who fit within the worldview they espouse without violating Constitutional and statutory protections.

#### B. Worldview Response

Religious persons and organizations often provide emergency and more permanent care to children abandoned, neglected, abused, or surrendered by parents. It is logical then that many of these same persons and organizations would seek to facilitate finding the children a permanent home with loving parents. Nonetheless, same-sex parents involved in homosexual activity are classified by some religious organizations as “intrinsically disordered” and “contrary to the natural law.”<sup>345</sup> And thus, persons who engage in homosexual acts should not be permitted to adopt a child, even though homosexuals “must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.”<sup>346</sup> While the two statements may seem contradictory, they must be viewed in the context of a worldview that defines marriage as between a man and a woman, a union

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341. *Cole*, 2011 Ark. 145, at 21–22, \_\_\_ S.W.3d at \_\_\_.

342. *Id.*, \_\_\_ S.W.3d at \_\_\_.

343. See GARY J. GATES, ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5 (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf>.

344. See *Holden v. N.J. Dep’t of Human Servs.*, No. C-203-97 (Bergen Cnty. Ct. 1997); see also N.J. ADMIN. CODE §§ 10:121C-2.6, -4.1 (2012) (providing that New Jersey may not discriminate in a child’s adoptive placement based on marital status or sexual orientation, among other factors).

345. SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 116, at 566.

346. *Id.*

that is the primary mode of procreation and the rearing of children. Sexual activity outside of the context of this worldview is a sin and the best interest of the child precludes purposely placing the child in such a home. If the state, through statute or by the constitution, forces the religious agency to place a child in such a home, it is a coercive act and one that should be prohibited by a right to Free Exercise.

The issue of Free Exercise and adoption rights of same-sex couples arose in San Francisco.<sup>347</sup> A group of Roman Catholics and a Roman Catholic advocacy group sought to bring a 42 U.S.C. § 1983 action against the city, county, and individual members of the Board of Supervisors of San Francisco (“Board”).<sup>348</sup> The petitioners argued that the Board’s non-binding resolution opposing a Vatican-issued Church directive infringed upon their religious liberty.<sup>349</sup> The Vatican ordered the Archdiocese to stop placing children in need of adoption with homosexual households.<sup>350</sup> The Board issued a reactive city resolution urging the Vatican to withdraw the “discriminatory and defamatory directive.”<sup>351</sup> Specifically, this resolution described the Vatican directive as “an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City’s existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need.”<sup>352</sup> The Catholic petitioners responded by asserting that the Establishment Clause was infringed by the Board’s action.<sup>353</sup> That is, the resolution interfered in a religious matter, violating the separation of church and state.

The United States Court of Appeals for the Ninth Circuit ruled against the Catholic petitioners, holding that the Board’s action did not violate the Establishment Clause.<sup>354</sup> A violation would only occur when government departs from strict neutrality,<sup>355</sup> the Board’s action was based on secular principles, not theological. Whether same-sex couples may adopt a child in San Francisco is a matter with secular political ramifications important to the Board’s constituents.<sup>356</sup> Therefore, when the Board issued the resolution, the criticism of the Vatican directive was a purely secular matter not involving religious traditions or ceremonies.<sup>357</sup>

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347. Catholic League for Religious & Civil Rights v. San Francisco, 624 F.3d 1043 (9th Cir. 2010) (en banc).

348. *Id.* at 1062.

349. *Id.* at 1047–48.

350. *Id.* at 1043.

351. *Id.* at 1047.

352. *Id.*

353. *Catholic*, 624 F.3d at 1047–48.

354. *Id.* at 1059.

355. *Id.* at 1058.

356. *Id.*

357. *Id.* at 1060 (Silverman, J., concurring).

Left with no alternatives but to allow same-sex couples the right to adopt a child, religious agencies may cease to provide adoption services. Catholic Charities of the Archdiocese of Boston, for example, ceased to provide adoption services when the state prohibited any discrimination against gay and lesbian adopters.<sup>358</sup> Even though subject to constitutional attack, another option would be to seek an accommodation in the state's adoption statute, excusing the religious provider from complying with the state's non-discrimination policy. North Dakota has an extensive accommodation statute that provides the following:

A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies. A state or local government entity may not deny a child-placing agency any grant, contract, or participation in a government program because of the child-placing agency's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a placement that violates the child-placing agency's written religious or moral convictions or policies. Refusal by a child-placing agency to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the child-placing agency's written religious or moral convictions or policies does not constitute a determination that the proposed adoption is not in the best interest of the child.<sup>359</sup>

A third option for religious agencies refusing to place children with same-sex couples involves litigation. This is an expensive option. As discussed in connection with the Florida and Arkansas decisions, justifying any refusal to allow same-sex couples to adopt would be difficult. It is unlikely that courts would permit the agency to refuse same-sex couples based solely on religious liberty or Free Exercise grounds. The Florida decision permitting same-sex couples to adopt was based on Equal Protection, a formidable hurdle even when the court only requires a rational reason for the prohibition. The inability of the state to justify refusal at the lowest level of scrutiny is a good predictor of how a court would rule on a religious agency's right to refuse adoption to same-sex couples. The Arkansas decision went beyond Equal Protection, holding that couples should have to choose between adopting children and having an intimate physical relationship. The court's

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358. See Jerry Filteau, *Catholic Charities in Boston Archdiocese to End Adoption Services*, CATHOLIC NEWS SERVICE (Mar. 13, 2006), <http://www.catholicnews.com/data/stories/cns/0601456.htm>.

359. N.D. CENT. CODE § 50-12-07.1 (2011). Virginia is considering enacting a similar policy. See Anita Kuman, *Adoption Overall Seen as Anti-Gay*, WASH. POST, Feb. 8, 2012, at B1.

reliance upon *Lawrence v. Texas*<sup>360</sup> is illustrative of the extent of private-ordering. In *Lawrence*, the Court overturned a state anti-sodomy statute, holding that the state may not criminalize intimate contact between consenting adults, whether married or single, heterosexual or homosexual.<sup>361</sup> Such a right to intimate contact is grounded in the liberty interest guaranteed by the Due Process Clause:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.<sup>362</sup>

This approach requires the state to provide a compelling interest justifying restrictions on same-sex couples.<sup>363</sup> The Arkansas court held that the state, even under its own constitution, had not met this burden. While many articles have been written about *Lawrence*, applying its rationale to same-sex adoption provides further constitutional protection to same-sex couples seeking to privately order their own lives.

Permitting same-sex couples to adopt children is part of the private-ordering prevalent in society. It is also a reaction to the need to provide permanent homes for many children removed from abusive families. The process is a familiar one: first there is a need and then there is a response. This was first illustrated during the discussion of no-fault divorce then later, during the discussion of the evolution of nonmarital cohabitation to same-sex marriage. All three are products of the culture of private-ordering. And each of these three, divorce, marriage, and adoption, are posing challenges to the religious liberty of persons advocating a specific worldview. Allowing same-sex couples to adopt has an impact on same-sex marriage because it deprives worldview advocates of the parentage argument. That is, marriage is the means by which children are procreated. And of course, marriage is defined as one man and one woman able to engage in sexual intercourse, but same-sex adoption allows for procreation to occur other than in marriage. With the technological advances in assisted reproductive technology, par-

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360. 539 U.S. 558 (2003); *see also* *Romer v. Evans*, 517 U.S. 620 (1996) (holding that the state may not single out homosexuals from the Equal Protection of the law); *see generally* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010); Marsh B. Freeman, *Their Love Is Here to Stay: Why the Supreme Court Cannot Turn Back the Hands of Time*, 17 CARDOZO J. L. & GENDER 1 (2010).

361. *Lawrence*, 539 U.S. at 578.

362. *Id.*

363. *Id.* at 593 (Scalia, J., dissenting).



entage may be established far beyond the parameters of opposite-sex marriage.

## V. PARENTAGE

### A. Statutory Challenge

Fifty years ago, the sole means by which a child could be conceived was through sexual intercourse.<sup>364</sup> Most often, the man and woman engaging in intercourse were married and the birth of the child brought about parentage and all of its accompanying duties and benefits. But in 1978, Louise Brown became the first baby conceived in a test tube.<sup>365</sup> An egg was surgically removed from the mother and fertilized with the father's sperm in a test tube. For the first time, human conception occurred in a laboratory. Once the embryo was formed, it was implanted in the mother's uterus, and the mother carried the baby to term and delivery. This process of conception and birth became known as in-vitro fertilization and precipitated a dramatic change in the manner in which parentage is established. Today, there are additional means by which conception may occur. And whenever conception occurs through means other than intercourse, birth occurs through assisted reproduction.

The Uniform Parentage Act includes five ways by which pregnancy can occur outside of sexual intercourse: (1) intrauterine insemination; (2) donation of eggs; (3) donation of embryos; (4) in-vitro fertilization and transfer of embryos; and (5) intracytoplasmic sperm injection.<sup>366</sup> These technological possibilities exist for nearly everyone—including every possible combination of heterosexual and homosexual persons, single, married, or merely cohabitating. Any of these persons may use his or her own genetic material as part of the process. Alternatively, the person or couple may use donor sperm and eggs from qualified donors. As a result of assisted reproduction, adults may become parents without recourse to sexual intercourse,

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364. Artificial insemination has been used on animals for centuries, but human use in the United States did not gain acceptance until the middle of the twentieth century. *See generally*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 284–85 (Ct. App. 1993).

365. *See generally* Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 509–10 (2005) (providing information on in-vitro fertilization and Louise Brown).

366. UNIF. PARENTAGE ACT § 102(4) (amended 2002), 9B U.L.A. 303 (2001); *see generally* Deborah L. Forman, *When “Bad” Mothers Make Worse Law: A Critique of Legislative Limits on Embryo Transfer*, 14 U. PA. J. L. & SOC. CHANGE 273 (2011); Kerry Lynn Macintosh, *Brave New Eugenics: Regulating Assisted Reproductive Technologies in the Name of Better Babies*, 2010 U. ILL. J. L. TECH. & POL'Y 257; Moses, *supra* note 365, at 505; Brad J. Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL'Y 241 (2011).

which is of great significance to same-sex couples. Couples and persons may conceive a child inside or outside of marriage, even after the death of either or both of the genetic donors through posthumous conception.<sup>367</sup> States are slowly responding to advances in technology and adopting statutes that seek to establish parentage within the increasing opportunities provided by assisted reproductive technology.<sup>368</sup>

The number of users of assisted reproductive technology, for couples and individuals, has increased dramatically in the United States. According to the Centers for Disease Control, assisted reproductive technology was responsible for slightly more than one percent of all births occurring in 2009.<sup>369</sup> That year, there were a total of 60,190 infants born from assisted reproductive technology, more than double the number born in 1996.<sup>370</sup> And the largest group using the procedures available was women younger than thirty-five.<sup>371</sup> Increases in the number of persons and couples utilizing assisted reproductive technology prompt concerns about establishing paternity and maternity;<sup>372</sup> ownership of sperm, eggs, and preembryos entrusted to fertility clinics; and how best to regulate these clinics and address the myriad of ethical and moral questions they engender.<sup>373</sup> Because of the involvement of human conception, persons and organizations have expressed grave concerns over all aspects of assisted reproduction.<sup>374</sup>

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367. See generally Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332 (2009).

368. *Id.* at 339 (suggesting a possible statute to establish paternity and maternity in the context of posthumous conception).

369. *2004 Assisted Reproductive Technology Success Rates*, CENTERS FOR DISEASE CONTROL (Dec. 2006), 15, available at <http://www.cdc.gov/ART/ART2009>.

370. *Id.* at 57.

371. *Id.* at 40.

372. Because assisted reproductive technology allows for egg donations and surrogacy, establishing maternity is an issue now, whereas previously only the issue of paternity was in doubt.

373. See, e.g., *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (enforcing a private agreement between a sperm donor and the donee eliminating donor's responsibility to provide child support for resulting child); AM. MED. ASS'N COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS: CURRENT OPINIONS E-2.04 (Issued June 1993; updated Dec. 2004), available at <https://catalog.ama-assn.org/MEDIA/ProductCatalog/m1100080/AMA%20Code%20of%20Ethics.pdf>; Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283 (2007).

374. See HELEN ALVARÉ, U.S. CONF. OF CATHOLIC BISHOPS, ASSISTED REPRODUCTIVE TECHNOLOGY AND THE FAMILY (2007), available at <http://old.usccb.org/prolife/programs/rlp/Alvare.pdf>; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *supra* note 259; Charles P. Kinregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203 (2008); Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 (1983).

There are a number of state and federal decisions addressing concerns about the process. Despite criticism, assisted reproduction is protected under constitutional guarantees of privacy, liberty, and due process. In one of the first cases to address the issue of constitutional protection, a California court held that the decisional authority of the adult donor and the adult donee of the gametes must be protected, regardless of any form of marital status.<sup>375</sup> It would seem that more recent interpretations of constitutional guarantees would establish a right to assisted reproductive technologies under the rationale of *Lawrence v. Texas*, which specifically guarantees that adults have a liberty interest under the Due Process Clause of the Fourteenth Amendment to engage in conduct free from unwarranted state interference.<sup>376</sup> As technology continues to advance and states become more adept at legislating parentage, clinic safeguards, and custody arrangements, there will be fewer judicial controversies. At the same time, undoubtedly, the number of persons utilizing assisted reproduction will continue to increase.

Amidst the boom in reproductive technology, there arises the challenge to persons and organizations sharing the belief that human conception should be reserved to sexual intercourse between a married man and woman. The significant desire of persons and couples to parent a child makes the challenge a formidable one. Through assisted reproductive technology and adoption, single persons, nonmarital cohabitants of the same or opposite-sex, and married same-sex couples may now become parents. Thus, a worldview arguing that same-sex marriage should be prohibited because of the inability to procreate falters due to statutory adoption or assisted reproduction. Increasingly, proponents of a worldview arguing against same-sex marriage must rely upon the unique and historical importance of sexual intercourse as the only means by which parentage may occur. Such arguments, however, offend those seeking to become parents by utilizing their capacity to private-order their lives.

Advances in statutory adoption and assisted reproductive technology now make available four means to bring about parentage: (1) sexual intercourse conception; (2) statutory adoption; (3) compliance with statutes governing artificial insemination; and (4) valid gestational agreements. Obvi-

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375. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 289 (Ct. App. 1993) (sustaining the rights of an unmarried donor and a donee to transfer sperm during life and at death); *see also* Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R.4TH 295 (1991 & Supp. 2009) (reviewing the pertinent cases).

376. 539 U.S. 558 (2003); *see also* Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, \_\_\_ S.W.3d \_\_\_ (holding that state law banning adoption or foster care by persons who cohabit with a sexual partner of either gender is a denial of a right to engage in private intimate sexual relationship and therefore unconstitutional); *In re Adoption of Doe*, 2008 WL 5006172, at \*25 (Fla. Cir. Ct. Nov. 25, 2008) (holding that the statute that prohibited homosexuals from adopting discriminates against homosexuals without a rational basis); Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609 (2011).

ously, sexual intercourse conception, especially when the parents are married, presents no challenge to advocates of a worldview based partly on religion. Challenges posed by same-sex couples adopting have been discussed above. Thus, the challenge of valid gestational agreements will be discussed next, followed by compliance with artificial insemination statutes. These two developments in family law now permit same-sex couples to become parents.

### 1. *Gestational Agreements*

The Uniform Probate Code defines a gestational agreement as “an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (e).”<sup>377</sup> From biblical times until the present, single persons and couples have contracted with women to carry a child to term for them. Among same-sex couples, especially males, the practice is common; the men often provide the sperm and the surrogate contracts to bear their child. Not every state permits surrogacy contracts. Usually, refusal is based on public policy reasons—principally that the payment of money to a surrogate in return for a child is degrading to women and often violates laws prohibiting the use of money in connection with adoptions.<sup>378</sup> In 1988, the New Jersey Supreme Court invalidated a surrogacy contract between a married man and woman that provided the surrogate would become pregnant using the man’s sperm.<sup>379</sup> The contract specified that the surrogate would carry the child to term, and then upon birth, she would deliver the child to the married couple and cooperate with them in both the termination of her rights in the child and the married couple’s subsequent adoption.<sup>380</sup> In return for her services, the couple agreed to pay her \$10,000.<sup>381</sup>

When the child was born, the surrogate refused to comply with the terms of the contract, concluding that she could not surrender the child be-

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377. UNIF. PROBATE CODE, § 2-121(a)(1) (amended 2011), 8 pt. 1 U.L.A. Supp. 76–79 (Supp. 2010). Subsection (e), referenced in the definition, refers to posthumous conception—when a woman or a man deposits sperm or eggs with a fertility clinic with the intent that the sperm or eggs be used *after his or her death* to conceive a child under a gestational agreement. For a discussion of this, see O’Brien, *supra* note 367.

378. See *In re Baby M*, 537 A.2d 1227, 1246–48 (N.J. 1988). Subsequent New Jersey courts would not extend a presumption of maternity to the wife of a man who impregnated a surrogate with the wife’s consent. See *In re T.J.S.*, 16 A.3d 386 (N.J. App. Ct. 2011), *cert. granted*, 23 A.3d 935 (N.J. 2011).

379. *Baby M*, 537 A.2d at 1234.

380. *Id.* at 1235.

381. *Id.*

cause it was her own.<sup>382</sup> The couple filed suit for enforcement of the contract and a very public struggle ensued during which the baby was taken from the surrogate and given to the couple, only to be returned to the surrogate upon a final appeal made to the New Jersey Supreme Court.<sup>383</sup> The New Jersey Supreme Court concluded that the contract violated the state's public policy and was therefore unenforceable.<sup>384</sup> The surrogate was entitled to keep the baby.<sup>385</sup> But because the husband's sperm was used in the conception of the child, he was also a parent to the child. This status allowed him to file for custody.<sup>386</sup> In making a determination of custody, the court used the test of what would be in the best interest of the child, awarding the husband physical custody and the surrogate eight hours of unsupervised visitation per week.<sup>387</sup> As a result of this arrangement, the couple who had hired the surrogate was able to raise the child. This did not occur because of the gestational contract but rather because of the custody determination.

Not all states consider gestational contracts as violative of public policy. Ohio, for example, looked to the fact that adult parties all signed a contract and there was no stated policy announced by the legislature that would prevent the enforcement of the contract.<sup>388</sup> Based on this, the state's highest court ruled that when a woman signed a gestational contract agreeing to be artificially inseminated with another woman's fertilized egg, she should be found in breach of contract if she violates its terms.<sup>389</sup>

Today, gestational agreements often involve persons of the same-sex seeking to become parents. For example, in 2007, two married men entered into a written gestational contract with a woman who agreed to act as their surrogate, a gestational carrier under the terms of the contract.<sup>390</sup> She was implanted with embryos formed from donor eggs and the sperm of one of the two men.<sup>391</sup> Much like the New Jersey case, the surrogate here agreed to surrender the child or children upon birth, proceed with termination of her parental rights, and cooperate with the men in replacing the original birth

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382. *Id.* at 1236.

383. *Id.* at 1237–38.

384. *Id.* at 1241. For a more recent ruling holding that gestational agreements are void as a matter of law, see *A.G.R. v. D.R.H.*, No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (permitting the surrogate to void the surrogacy agreement she had signed and to keep the resulting children even though the eggs used to conceive the children were not her own), *available at* [http://graphics8.nytimes.com/packages/pdf/national/20091231\\_SURROGATE.pdf](http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf).

385. *Baby M*, 537 A.2d at 1247.

386. *Id.*

387. *Id.* at 1258.

388. *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007).

389. *Id.* at 741–42.

390. *Raftopol v. Ramey*, 12 A.3d 783, 787 (Conn. 2011).

391. *Id.*

certificates.<sup>392</sup> The surrogate had served as a gestational carrier for the men previously, and all of the parties felt confident in the arrangement.<sup>393</sup>

In April 2008, the surrogate gave birth to twins, and the two men, with her cooperation, requested the court to find the gestational agreement valid and to order the Department of Public Health to issue the replacement birth certificate.<sup>394</sup> Because one of the men had contributed sperm for the conception, he was a genetic parent.<sup>395</sup> The issue, however, concerned the other man's parental rights and terminating the parental rights of the gestational carrier.<sup>396</sup> The court quickly concluded that the gestational carrier had no parental right but spent more time discussing the parental rights of the man who did not donate sperm.<sup>397</sup> In other words, the question became whether the second man, the one who had no genetic connection with the twins, could acquire parental rights through a valid gestational agreement.<sup>398</sup> The court concluded that the state's statute permitting the enforceability of a gestational agreement also permits a person who has no genetic or adoptive relationship with the child to become a parent to that child.<sup>399</sup> Thus, the court held that parentage may result without a genetic connection because the party to the agreement is an intended parent. The gestational agreement made the non-genetic man a parent of the child.<sup>400</sup> The significance of the court's decision is that a gestational agreement can confer parentage status, placing it on a par with sexual intercourse conception, artificial insemination, and adoption.

Not all states permit gestational contracts.<sup>401</sup> Those that do require all of the parties involved meet defined minimum standards.<sup>402</sup> For example, the Uniform Parentage Act requires the following prior to establishing the validity of the agreement: (1) the prospective gestational carrier, her husband if she is married, a donor or the donors, and the intended parents must execute a written agreement; (2) the agreement specifies that only artificial insemination may bring about conception, not intercourse; (3) reasonable compensation may be paid to the surrogate for her services; (4) the agreement may

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392. *Id.*

393. *Id.* at 787 n.12.

394. *Id.* at 788.

395. *Id.*

396. *Raftopol*, 12 A.3d at 788.

397. *Id.* at 789.

398. *Id.* at 793.

399. *Id.*

400. *Id.*

401. The Uniform Status of Children of Assisted Conception Act provides two alternatives for states, one permitting surrogacy agreements and the other forbidding them. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 1–13, 9C U.L.A. 368–86 (2001).

402. See FLA. STAT. ANN. §§ 742.11–742.15 (West 2010); VA. CODE ANN. § 20-156 (2008).

provide for payment of added consideration, but some states specify that the consideration be limited to reasonable living, legal, medical, psychological, and psychiatric expenses of the surrogate that are directly related to the pregnancy;<sup>403</sup> (5) the agreement may not limit the gestational carrier's decision related to her health or that of the embryos or fetus; and (6) a court may declare the intended parents as the parents of the surrogate's child or children if residency was properly established, only reasonable compensation was paid, and all of the parties have voluntarily entered into the agreement.<sup>404</sup>

Increasingly, same-sex couples utilize gestational carriers to bring about parentage. Most often, the facts are identical to the ones recited in the *Raftopol* decision.

## 2. *Artificial Insemination Statutes*

Assisted reproductive technology has provided same-sex couples with the ability to become parents; this development occurred long before the introduction of same-sex marriage. Once two adults became partners or spouses, their thoughts then turned to becoming parents, and they often failed to establish a legal basis for parentage. Their focus was always on becoming parents together, regardless of who contributed the genetic material that brought about the resulting child. But state parentage statutes equated parenthood with a genetic link to the child, which was sometimes lacking. In addition, adoption by the nonmarital partner proved to be inadequate. That is, some states required the genetic parent to relinquish his or her biological child in order to have the child adopted by someone else.<sup>405</sup> Because the couple could not marry, it was impossible to establish a step-parent adoption. There were some exceptions. Some states permitted the same-sex partner to have his or her name listed on the child's birth certificate as a parent without requiring the genetic parent to relinquish the child. What follows is a summary of when this has traditionally occurred.

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403. See FLA. STAT. ANN. § 742.15(4) (West 2010).

404. UNIF. PARENTAGE ACT §§ 801–809 (amended 2002), 9B U.L.A. 362–78 (2001); see also UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 1–16, 9C U.L.A. 368–86 (2001) (providing two alternatives for states to follow, either rejecting gestational contracts or permitting them).

405. See e.g., *In re Adoption of Luke*, 640 N.W.2d 374, 376 (Neb. 2002) (refusing to allow genetic mother's partner to adopt child unless mother relinquished her parental rights). But see *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003) (permitting adoption by partner without requiring relinquishment by genetic parent unless statutes mandate otherwise); *Wheeler v. Wheeler*, 642 S.E.2d 103 (Ga. 2007) (allowing genetic mother to retain rights in child while mother's partner adopted the child).

a. Marriage

As same-sex marriage became available, so have the parentage presumptions that occur because of marriage. For example, the Uniform Parentage Act provides that a man is presumed to be the father of a child if he and the mother of the child are married to each other, and the child is born during the marriage.<sup>406</sup> Likewise, if a man and a woman are married to one another and a child is born within 300 days of the dissolution of the marriage; or before or after the birth of the child, the mother and the man were married, then the man is presumed to be the father of the child even if the marriage is subsequently declared invalid for any reason.<sup>407</sup> The fact that the statute refers to opposite-sex persons does not detract from the point that marriage of spouses, regardless of gender, provides a presumption of parenthood.

An illustration of the parentage presumption applying to same-sex marriage occurred in Iowa. In 2006, two women participated in a state sanctioned commitment ceremony, and the following year, one of the women gave birth to a son who was conceived through in vitro fertilization brought about with anonymous donor sperm.<sup>408</sup> The non-genetically connected woman adopted her partner's son, and her name was registered on the child's birth certificate as the child's parent together with the genetic mother-parent.<sup>409</sup> The women had one more child and followed the same procedure.<sup>410</sup> But by then, Iowa had enacted same-sex marriage and the two women had in fact married under the new statutory procedure.<sup>411</sup> Subsequent to their marriage, one of the women gave birth to a third child and had her name listed as the mother.<sup>412</sup> The issue arose as to whether the non-genetically related spouse had to now adopt the child, as she had done prior to the enactment of same-sex marriage, in order to have her name listed on the birth certificate as well.<sup>413</sup> The women argued that the spouse with no genetic connection should not be required to adopt the child since she was the spouse of the genetic parent.<sup>414</sup> The court agreed, holding that even though the state's parentage statute referred to male and female spouses, the statute should be read in a gender neutral fashion.<sup>415</sup> Thus, when the two

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406. UNIF. PARENTAGE ACT § 204(a) (amended 2002), 9B U.L.A. 311–12 (2001).

407. *Id.*

408. *Gartner v. Iowa Dep't of Pub. Health*, No. CE 67807, 2012 WL 28078 (Iowa Dist. Ct. Jan. 4, 2012).

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Gartner*, 2012 WL 28078.

415. *Id.*



women married, the birth of a child to one of them created a presumption of parenthood in the other.<sup>416</sup> This presumption entitled both women to have their names on the child's birth certificate without the necessity of adoption by the spouse who had no genetic connection with the child.<sup>417</sup>

b. Presumed Parent

In addition to marriage, the Uniform Parentage Act provides another presumption of parentage applicable to same-sex couples.<sup>418</sup> The Act permits the presumption to be applied if “for the first two years of the child's life, [the man] resided in the same household with the child and openly held out the child as his own.”<sup>419</sup> Marriage is not a prerequisite to establishing a presumption of parentage under this section.<sup>420</sup> Furthermore, the provision should be read in a gender-neutral fashion so as to be applicable to same-sex couples. As an illustration, in one case, a woman became pregnant while dating a man.<sup>421</sup> She ended the relationship with the man and began a subsequent sexual relationship with another woman.<sup>422</sup> The other woman was there when the child was born, and they remained in a relationship until the child was five years-of-age.<sup>423</sup> At that time, the genetic mother ended the relationship with the woman and sought to prevent her from visiting with the child.<sup>424</sup> In response, the other woman commenced an action under the state provision based on the Uniform Parentage Act.<sup>425</sup> She argued that even though she had no genetic connection with the child, she should be considered a presumed parent, which entitled her to custody and visitation rights.<sup>426</sup> The court discussed the qualifications of a presumed parent under the Act and concluded that the essential ingredient is the alleged parent's abiding commitment to the child.<sup>427</sup> It is not necessary that the two adults share a common household or a commitment to each other, but it is necessary that the alleged presumed parent demonstrate a continuing commitment to the child's well-being.<sup>428</sup> Based on this test, the state appellate court remanded

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416. *See id.*

417. *Id.*

418. UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002), 9B U.L.A. 311–12 (2001).

419. *Id.*

420. *See id.*

421. *See E.C. v. J.V.*, 136 Cal. Rptr. 3d 339, 346–50, 351 n.3 (Ct. App. 2012).

422. *Id.* at 343.

423. *Id.*

424. *Id.*

425. *Id.* at 343–44.

426. *Id.* at 344.

427. *E.C.*, 136 Cal. Rptr. 3d at 346–47.

428. *Id.*

the case to the trial court to make a determination of whether the non-genetic person may be a presumed parent.<sup>429</sup>

Another uniform act widely adopted is the Uniform Probate Code. In its most recent amendments, it has incorporated a provision that establishes parentage between a child of assisted reproduction and another individual who has “functioned as a parent of the child.”<sup>430</sup> The code defines “function as a parent” as:

[b]ehaving toward the child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, [such as] fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as regular members of that household.<sup>431</sup>

The person seeking parentage status must have functioned as a parent no later than two years after the child’s birth, or it must be shown that the two years were impossible to complete because of death, incapacity, or other circumstances.<sup>432</sup> However, the better option under the Uniform Probate Code is for an individual seeking to function as a parent to have signed a written record evidencing a sufficient intent to do so.<sup>433</sup>

Finally, the Uniform Probate Code provides for parentage to occur whenever a non-genetically related person is an “intended parent” to a child.<sup>434</sup> This is defined as an “individual who entered into a gestational agreement that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction.”<sup>435</sup> The provisions are operable when an individual consents to the assisted reproductive procedure with the understanding that the resulting child will be the child of either or both of them.<sup>436</sup> Obviously, the intended parent has no genetic connection with the resulting child but nonetheless intends to serve as a parent of that child.<sup>437</sup> This procedure may be contemplated by same-sex partners seeking to become parents through assisted reproduction. Again, it broadens the possibility of parentage.

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429. *Id.* at 351.

430. UNIF. PROBATE CODE § 2-120(f)(2), 8 pt. 1 U.L.A. Supp. 76–79 (Supp. 2012).

431. *Id.* § 2-115(4).

432. *Id.* § 2-120(f)(2)(B).

433. *Id.* § 2-120(f)(1). For an example of a sufficient signed agreement, see *In re Martin B.*, 841 N.Y.S.2d 207, 207–08, 211–12 (Fam. Ct. 2007).

434. UNIF. PROBATE CODE § 2-121(d), 8 pt. 1 U.L.A. Supp. 76–79 (Supp. 2012).

435. *Id.* § 2-121(a)(4).

436. *Id.* § 2-121(a)(4), (d).

437. *Id.*

## B. Worldview Response

Persons and organizations advocating the worldview rely upon historical precedent, religious texts, and a moral law that is transcendent and immutable. For these advocates, parentage that arises in contexts other than through sexual intercourse is considered an aberration. Conception through any means other than sexual intercourse would be viewed as a challenge to natural law. The Catechism of the Catholic Church illustrates the importance of the bond of sexual intercourse between married persons when it states: “The marriage covenant, by which a man and a woman form with each other an intimate communion of life and love, has been founded and endowed with its own special laws by the Creator.”<sup>438</sup> Likewise:

The origin of human life has its authentic context in marriage and in the family, where it is generated through an act which expresses the reciprocal love between a man and a woman. Procreation which is truly responsible vis-à-vis the child to be born, must be the fruit of marriage.<sup>439</sup>

In addition, if assisted reproductive technology resulted in the destruction of human embryos it would likely be considered abortion.<sup>440</sup> Therefore, opposition to assisted reproduction will be on more than one level.

Those persons discussing assisted reproductive parentage on an ethical level have concerns over fairness, equality, due process, and consistency in application. Specifically, commentators and cases have identified illustrations involving genetic harvesting, marketing, cloning, and pursuit of designer babies.<sup>441</sup> Undoubtedly, developing technologies provide opportunities for unethical conduct. Opponents of assisted reproduction provide as an example the case of a California married couple who entered into a gestation contract with a surrogate that agreed to carry an embryo to term.<sup>442</sup> The embryo was the product of donor sperm and a donor egg.<sup>443</sup> In the midst of the

438. SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 116, at 414.

439. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *supra* note 259, at 4 (quoting CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION *DONUM VITAE* (1988)).

440. *See id.* at 12. “From the ethical point of view, embryo reduction is an intentional selective abortion. It is in fact the deliberate and direct elimination of one or more innocent human beings in the initial phase of their existence and as such it always constitutes a grave moral disorder.” *Id.*

441. *See, e.g.*, FLA. STAT. ANN. § 873.05(1) (West 2000) (“No person shall knowingly advertise or offer to purchase or sell, or purchase, sell, or otherwise transfer, any human embryo for valuable consideration.”); MASS. GEN. LAWS ANN. ch. 111L, § 8(c) (West 2009) (“No person shall knowingly and for valuable consideration purchase, sell, transfer or otherwise obtain human embryos . . . for research purposes”). For commentary on cloning, see Steven Goldberg, *MRIs and the Perception of Risk*, 33 AM. J. L. & MED. 229, 233–34 (2007).

442. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282–83 (Ct. App. 1998).

443. *Id.*

surrogate's pregnancy, the married couple divorced and informed the surrogate that they no longer wanted the baby she was carrying.<sup>444</sup> When the baby was born the surrogate sought to relinquish the child, stating that she was not the parent, that the donors of the sperm and egg were not the parents, and that because the married couple—now divorced—had no genetic connection with the child, they were not the child's parents.<sup>445</sup> The California trial court ruled that the baby had no parents.<sup>446</sup> But on appeal, the appellate court reversed and held that the parents of the baby were in fact the two adult parties who initiated the process, and but for their conduct intending to bring about a birth, there would have been no birth.<sup>447</sup> The appellate court reasoned that the case was analogous to when a husband consents to his wife being impregnated with the sperm of another man.<sup>448</sup> The husband, although not genetically connected to the child, is the child's parent because of his consent to the procedure. Intentionality was the element that established parenthood, not genetics.<sup>449</sup> The case illustrates the ethical conundrums created when adults have at their disposal technology, opportunity, and the financial resources to implement their desires.

Ethical and religious worldview objectors can point to the fact that there are few regulations of fertility clinics or the people who use them.<sup>450</sup> One case provides an illustration.<sup>451</sup> The issue concerned the disposition of seven frozen embryos stored in a Knoxville, Tennessee, fertility clinic.<sup>452</sup> While married, a man and a woman created seven cryogenically preserved embryos with the intention of one day using them to start a family.<sup>453</sup> Sadly,

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444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.* at 293–94.

448. *Buzanca*, 72 Cal. Rptr. 2d at 285–86.

449. *Id.*

450. See generally ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 101–1202 (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf>; DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006); Deborah L. Forman, *When “Bad” Mothers Make Worse Law: A Critique of Legislative Limits on Embryo Transfer*, 14 U. PA. J. L. & SOC. CHANGE 273 (2011); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000); Charles P. Kindregan, Jr., *Genetically Related Children: Harvesting Gametes From Deceased or Incompetent Children*, 7 J. HEALTH & BIOMED. L. 147 (2011); Lisa M. Luetkemeyer, Comment, *Who's Guarding the Henhouse and What Are They Doing With the Eggs (And Sperm)? A Call for Increased Regulation of Gamete Donation and Long-Term Tracking of Donor Gametes*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 397 (2010); Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283 (2007).

451. See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

452. *Id.* at 589.

453. *Id.* at 591–92.

the couple filed for divorce, and the two former spouses were able to agree on all aspects of the dissolution with the exception of who would have “custody” of the seven embryos.<sup>454</sup> The trial court determined that the embryos were human beings and awarded custody of them to the woman, with the right to use them to become pregnant.<sup>455</sup> But the appellate court reversed, awarding the man and woman joint control so that a pregnancy cannot occur without the consent of both parties.<sup>456</sup> The Tennessee Supreme Court then heard the case in an effort to establish parameters regarding reproductive technologies.<sup>457</sup>

First, the court observed that the two parties never executed a written agreement for disposition of the embryos and that there was no state statute addressing the issue.<sup>458</sup> In addition, there was, at the time, no established common law.<sup>459</sup> Second, the court disagreed with the trial court, which ruled that the embryos were human persons.<sup>460</sup> Instead, the court held that “they are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>461</sup> Third, the court focused on the privacy rights of the two adult parties, stating that this privacy right is grounded in the Fourteenth Amendment, protecting them from “unwarranted governmental intrusion into matters such as . . . intimate questions of personal and family concern.”<sup>462</sup> Fourth, utilizing the authority provided by the decisions conferring on the adult the right to obtain an abortion at the start of any pregnancy, the court concluded that the privacy interests of the adult parties determines the outcome: “[T]he state’s interest in potential human life is insufficient to justify an infringement on the gamete-providers’ procreational autonomy.”<sup>463</sup> Based on these observations, the court affirmed the appellate court, holding that the relative interests of both adult parties must be balanced.

Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood [by other means]. If no other reasonable alternatives exist, then the argument in favor of using the [embryos] to achieve pregnancy

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454. *Id.* at 592.

455. *Id.* at 593–94.

456. *Id.* at 594–96.

457. *Davis*, 842 S.W.2d at 594.

458. Courts will enforce a written agreement with a cryopreservation laboratory regarding the disposition of embryos stored there. *See, e.g.*, *Karmasu v. Karmasu*, No. 2008 CA 00231, 2009 WL 3155062, at \*2–3 (Ohio Ct. App. Sept. 30, 2009).

459. *Davis*, 842 S.W.2d at 594.

460. *Id.* at 595.

461. *Id.* at 597.

462. *Id.* at 600.

463. *Id.* at 602.

should be considered. However, if the party seeking control of the [embryos] intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.<sup>464</sup>

For advocates of a worldview that places strict limits on procreation and abortion, such cases offer a significant challenge. Some medical personnel working in a health care industry associated with assisted reproduction have refused to participate in some procedures, arguing that they have a First Amendment Free Exercise right to refuse involvement.<sup>465</sup> For example, a 2008 California decision involved physician who refused to perform an intrauterine insemination (IUI) on a lesbian woman living with her female partner.<sup>466</sup> The physician, employed at the North Coast Women's Care Medical Group, claimed that her sincerely held religious beliefs prevented her from personally performing the procedure.<sup>467</sup> She suggested that there were other persons on the staff who would assist the patient.<sup>468</sup> As the case developed it became apparent that this was not correct—there were no staff members capable of performing the procedure.<sup>469</sup> This lack of service prompted the lesbian patient to sue the physician under the state's Civil Rights Act, which prohibited discrimination based on sexual orientation.<sup>470</sup> In spite of the physician's Free Exercise argument, the court ruled that the physician would violate the Act if it could be proven that her refusal to perform the procedure was motivated by the sexual orientation of the patient.<sup>471</sup>

As was explained earlier, the ability of persons or organizations to successfully assert Free Exercise exemption from laws of general applicability is nearly impossible following recent Supreme Court decisions.<sup>472</sup> Instead, persons and organizations must seek protection in accommodation statutes, but these statutes are often so narrowly drawn as to make them unavailable to persons and organizations that do not meet strict guidelines.<sup>473</sup> For example, when California enacted the Women's Contraception Equity Act in 1999,<sup>474</sup> which mandated that all employers in the state provide prescription contraceptives to its female employees, Catholic Charities, a major service

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464. *Id.* at 604.

465. *See* *N. Coast Women's Care Med. Grp. v. Superior Court*, 189 P.3d 959, 963–65 (Cal. 2008).

466. *Id.*

467. *Id.* at 963.

468. *Id.*

469. *Id.* at 964–65.

470. *Id.* (citing CAL. CIV. CODE § 51(a) (West Supp. 2012)).

471. *N. Coast*, 189 P.3d at 969–70.

472. *See supra* Part I.B.

473. *See* CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A)–(D) (West 2008).

474. The Act is comprised of CAL. HEALTH & SAFETY CODE § 1367.25 (West 2008) and CAL. INS. CODE § 10123.196 (West 2005).

provider in the state, refused to comply.<sup>475</sup> The Catholic organization argued that providing contraceptives to its employees would be a significant violation of its religious beliefs<sup>476</sup> and argued that it had a right under the First Amendment's Free Exercise Clause to refuse compliance.<sup>477</sup> But the state court ruled that the Free Exercise Clause provided no immunity from the requirements of the Act.<sup>478</sup> Then, Catholic Charities sought to be exempted from the Act through the state's accommodation statute.<sup>479</sup> The statute was narrowly drawn, requiring those seeking accommodation to, among other things, primarily employ persons of the same religious values, serve people who share the same religious values, and have as its primary goal the inculcation of its religious values.<sup>480</sup> None of these three requirements were applicable to Catholic Charities; therefore, they could not find accommodation in the statute.<sup>481</sup> Left with no alternative, Catholic Charities chose to self-insure its employees, an arrangement that only the federal government, not state government, regulates.<sup>482</sup>

To avoid state mandates that contraception be provided for all employees, many religious organizations that could not find an exemption in the accommodation statutes became self-insuring employers.<sup>483</sup> This seemed an ideal solution to the employer's refusal to violate its religious beliefs. Nonetheless, the federal government enacted a health care provision that would eliminate the possibility of self-insuring employees.<sup>484</sup> In 2010, newly enacted federal health insurance permitted the Department of Health and Human Services (DHHS) to mandate requirements in accordance with the purposes of the federal legislation.<sup>485</sup> Subsequently, in August 2011, the federal department mandated that all employers provide "coverage of sterilization and abortion-inducing drugs and devices as well as contraception."<sup>486</sup> Because DHHS was mandating contraceptive coverage, it effectively removed the option of self-insuring that had allowed religious organizations to avoid

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475. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 75–76 (Cal. 2004).

476. *Id.*

477. *Id.* at 76 (citing U.S. CONST. amend. I).

478. *Id.* at 81–89.

479. CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2008).

480. *Id.* § 1367.25(b)(1)(A)–(C).

481. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76 (Cal. 2004).

482. N.C. Aizenman & Lena H. Sun, *Contraceptive Rules Remain in Flux*, WASH. POST, Feb. 20, 2012, at A3.

483. *Id.*

484. *Id.*

485. 42 U.S.C. §§ 300gg-13, 1396r-1c (2006 & Supp. IV 2010).

486. Mary Ann Walsh, *Six Things Everyone Should Know about the HHS Mandate*, U.S. CONF. OF CATHOLIC BISHOPS BLOG (Feb. 6, 2012, 12:19 PM), <http://usccbmedia.blogspot.com/2012/02/six-things-everyone-should-know-about.html>.

state mandates and still offer health care coverage to its employees.<sup>487</sup> There were a significant number of self-insuring religious employers since approximately twenty-eight states mandated contraceptive coverage.<sup>488</sup> Now, as a result of DHHS's mandates—requiring contraceptive coverage at state and federal levels—religious organizations cannot find exemption through self-insuring their employees.<sup>489</sup> As discussed in reference to the California decision involving Catholic Charities, the First Amendment's Free Exercise Clause will not insulate religious organizations from mandated coverage.<sup>490</sup> Thus, "our schools, hospitals and charitable organizations will be placed in the untenable position of choosing between violating civil law and abandoning our religious beliefs."<sup>491</sup>

There is a long tradition of federal accommodation of religious beliefs in implementing laws. Some of these laws specifically provide protection from forced involvement in contraception or sterilization.<sup>492</sup> Addressing the challenges posed by same-sex marriage, Professor Robin Fretwell Wilson argues that

legislative accommodations in medicine offer a number of approaches for resolving the clash between those who want a service and those who have moral objections to performing it. Many conscience clauses insulate providers from suit by patients, others from coercion by the government itself. Some provide unfettered discretion to refuse, while others provide

487. Aizenman & Sun, *supra* note 482.

488. *Id.*

489. *Id.*

490. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81–89 (Cal. 2004).

491. Letter from Cardinal Donald Wuerl, Archbishop of Washington, to the Priests (Jan. 26, 2012), *available at* <http://apriestlife.blogspot.com/2012/01/letter-from-cardinal-donald-wuerl-there.html>.

492. *See* SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONF. OF CATHOLIC BISHOPS, CURRENT FEDERAL LAWS PROTECTING CONSCIENCE RIGHTS (2008), *available at* <http://old.usccb.org/prolife/issues/abortion/crmay08.prd>; *see also* CAL. HEALTH & SAFETY CODE § 1374.55(e)–(f) (West 2005) (providing a religious exemption to individuals or corporations providing treatment of infertility); MD. CODE ANN., INS. § 15-810 (West 2002) (allowing for an exclusion of insurance coverage for in vitro fertilization when it conflicts with religious beliefs of an organization); N.Y. DOM. REL. LAW § 11 (McKinney 2011) (protecting the rights of religious and certain other institutions to decline to sponsor or sanction same-sex marriages); Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 25, 2011, at A20 (noting that religious exemptions included within the amended language of New York's bill allowing for same-sex marriage was key in getting it passed). *But see* Matthew W. Clark, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 SUFFOLK U. L. REV. 871, 872–73 (2008) (outlining Catholic Charities decision to withdraw from adoption services in the wake of the failure of a Massachusetts proposed bill allowing for a religious exemption to the state's antidiscrimination laws).



an exemption only when it poses no hardship to the individual requesting the service.<sup>493</sup>

The rules issued by DHHS offer only a narrow accommodation, the same accommodation provided in California and illustrated in the state's supreme court decision mandating that state employers provide similar contraceptive coverage.<sup>494</sup>

To be eligible an organization must meet four strict criteria, including the requirements that it both hire and serve primarily people of its own faith. Catholic schools and hospitals would have to eject their non-Catholic employees, students and patients, or purchase health coverage that violates their moral and religious teachings.<sup>495</sup>

Accommodations in statutes as narrowly drawn as the one in California would offer little solace to worldview providers that seek to serve all, not only those selected by similar faith convictions. Arguably, however, making the accommodation so limited serves to make the laws neutral as to religion. But by denying a religious accommodation to those that may claim a denial of Free Exercise, although minimal, the law is guaranteeing to all the right to equal treatment under the law. Those who can muster their political forces to enact specific accommodation statutes have the right to do so.

It is reasonable to assume that there will be an increasing number of challenges made to a worldview that maintains a strict approach to issues such as marriage and parentage. Same-sex marriage will proliferate domestically and internationally. Technological advances will continue in respect to assisted reproduction; therefore, even if states meet the challenge of providing better regulation of fertility clinics, ethical and moral concerns will persist. The true challenge to worldview proponents is reformulating the issues so that the impetus does not lie with private-ordering. Instead, the issues must be formulated in such a way to create a preference for the values that lie behind the historical, philosophical, and religious approaches to marriage and procreation. Then the political process will benefit from an enlivened debate and a more productive resolution. But worldview proponents must reeducate its adherents to bring about a political solution, whether it is one of accommodation or one of reestablishing a preeminent worldview.

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493. Robin Fretwell Wilson, *Matters of Conscience: Lesson for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 80, 80–81 (Douglas Laycock, Jr. et al. eds., 2008).

494. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81 (Cal. 2004).

495. U.S. CONF. OF CATHOLIC BISHOPS, *THE HHS MANDATE FOR CONTRACEPTION/STERILIZATION COVERAGE: AN ATTACK ON RIGHTS OF CONSCIENCE* (2012), available at <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/preventiveqanda2012-2.pdf>.

## VI. CONCLUSION

This is not an article about religious liberty. Rather, it is an article about the evolution of family law that has precipitated challenges to worldview, which encompasses religion. Family law has evolved from a set of local laws and practices to an international amalgamation of state, federal, and international laws and treaties. As a result, American culture is no longer grounded in local communities but is increasingly drawn into an international conglomerate of ideas, practices, and beliefs. Both developments have occurred in part because of the electronic milieu of the Internet. As a result of expanding internationalization, the governing culture does not necessarily support and enforce the values of a locality. Instead, politicians and the laws they enact often operate within the confines of strict neutrality, treating each individual person and organization in a neutral fashion so as to avoid discrimination and to promote acceptance. Within this milieu of neutrality, the private-ordering of individual citizens has taken shape and flourishes. Its progress has been nourished by a series of Supreme Court decisions beginning with the right to privacy announced in *Griswold* in 1965 and, most recently, with the right to individual liberty established in *Lawrence* in 2003.

The culture of private-ordering has prompted state and federal legislatures to enact certain family law initiatives that have had significant impact upon worldview practices defining form families for centuries. With the adoption of no-fault divorce in the latter part of the 1960s, either party could file for divorce, regardless of fault, and dissolve a marriage in a manner far easier than previously. If marriage could be dissolved so easily, then the definition of marriage could change—evolve—to include persons of the same sex. Following from this, no longer would sexual intercourse within the confines of marriage be the sole means of parentage. Parentage may result from an increasing number of adoption possibilities, including adoption by single persons, same-sex couples, and opposite-sex couples, whether married or not. Indeed, the options of parentage expanded radically with the technological advances introduced by assisted reproductive technology. A person, single or not, could parent a child without any genetic connection with the child, either during that person's lifetime or even after death through posthumous conception. These possibilities of adoption and assisted reproductive parentage are significant developments for advocates of a worldview, offering alternatives to a worldview based on history, natural law, and religious observance. When these possibilities are mandated and codified by secular political action, there is a challenge to worldview advocates and, impliedly, to religious liberty. Inevitably, government will in-

creasingly define religion and what is religious, “so that only the most rigid and separatist groups are exempt” from government regulation.<sup>496</sup>

When challenged by government initiatives, religious persons and organizations have sought exemption from compliance through recourse to the First Amendment’s guarantee of free exercise of religion. Religious accommodation was necessary to insulate the beliefs of religious adherents so that they could continue to practice their beliefs without governmental restraints. But because the beliefs involved action, there was little respite in the First Amendment because of the judicial dichotomy established by decisions such as *Reynolds*. In that early 1878 decision the Court held that government could regulate actions, and any Free Exercise claim was restricted to beliefs only. The effect of this decision and others like it was to permit religious practitioners to believe anything that they wanted, but these practitioners had to act in conformity with the law of the land, even though the law may pose a significant obstacle for believers. Arguments abound stating that this dichotomy approach is the only logical one; otherwise the law would become a patchwork of exceptions based on religious beliefs.

A short period of protection for religious persons and organizations arose in 1963. In that year the Supreme Court held in *Sherbert* that state statutes would have to demonstrate a compelling state interest if they infringed on the free exercise rights of claimants. This offered religious persons and organizations a respite from the strict neutrality of *Reynolds*. But the respite was short-lived. In 1990, the Supreme Court held in *Smith* that the state was not required to demonstrate a compelling state interest. All that was required was that the law not be directed towards any one particular religion. The ruling in *Smith* revived the applicable test established in *Reynolds*, the separation of belief and actions. Significant changes in the laws pertaining to divorce, marriage, adoption, and parentage challenge proponents of religious beliefs advocating a worldview based, in addition to religious texts, on historical practice and natural law principles. Today, religious proponents are no longer insulated by the *Sherbert* holding, and often their views cannot overcome the state’s rational basis for the law.

The vast majority of the laws infringing on Free Exercise provide that worldview adherents are forbidden from performing an action. For instance, polygamy was forbidden, and recently, states have enacted statutes forbidding discrimination against those who are most likely to enter into same-sex marriages, who seek to utilize assisted reproductive technologies, or who wish to hire or fire persons solely on religious beliefs. Recently, governments have sought to compel religious persons and organizations to do something in compliance with rational government initiatives. Instances would include compelling religious adoption agencies to permit adoption by

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496. John Garvey, *What Counts as Catholic?*, WASH. POST, May 27, 2012, at B2.

persons unacceptable to the religious beliefs of the agency. In addition, the government mandates that religious organizations provide contraception and abortion services to all employees or pay significant fines for not doing so. Another instance would include compelling religious ministers to reveal what was said in confidential and sacramental confessional situations. These instances further complicate the recourse allowed to persons and organizations seeking to insulate themselves under claims of Free Exercise. Religious persons and organizations seek recourse in accommodation statutes.

Seeking accommodation for religious beliefs is necessary because it is no longer possible to insulate belief by requiring the state to establish a compelling interest for what it does. Requiring this higher level of proof was established in *Sherbert* but revoked in *Smith*. Also, accommodation is increasingly necessary because of continuing challenges made to worldview positions. No-fault divorce initiated a significant change that has become international in application. But since the adoption of no-fault divorce, there have been additional challenges, such as same-sex marriage, protection of nonmarital cohabitation, expanding adoption rights for adopters, advances in assisted reproductive technology, and government mandates for reproductive rights such as contraceptive insurance coverage. The only recourse for worldview adherents is to participate in the political process with the goal of gaining broader constitutional protection or to enact specific accommodation statutes.

An obstacle for worldview proponents seeking to enter the political arena is that oftentimes, the adherents of a worldview advocating resistance to private-ordering are themselves private proponents of private-ordering. Media communications have lessened the attractiveness and restraint of local mores, thereby increasing the tendency to see the value of another's perspective, another's right to private-order his or her life. Among many of the religious organizations advocating a worldview based on religious texts and a natural law world order, significant changes have occurred during the same period when private-ordering was evolving. For instance, during the 1960s, the Roman Catholic Church underwent a major transformation when it convened and implemented the Second Vatican Council. At the end of the Council, many significant changes were introduced throughout the Catholic world. There were many theological refinements, liturgy innovations, and implementations of a policy of inclusion rather than exclusion. But among the most significant features introduced was what Garry Wills, a Catholic commentator, called "the dirty little secret."<sup>497</sup> That is, "[i]t forced upon Catholics, in the most startling symbolic way, the fact that the church changes."<sup>498</sup> As occurred with the *Loving* decision and same-sex marriage,

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497. JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE* 426 (1985).

498. *Id.*

the inclusion of change fostered a blurring of religious cohesiveness; this precipitated a loss of mass-identity, resulting in private-ordering among adherents. Thus, after the Second Vatican Council,

The major feature of the new Catholic theology is its diversity or pluralism . . . . No longer is there one Catholic way to do theology; rather, plurality of method and style has taken over. Coupled with freedom of inquiry, it constitutes the major trademark of American Catholic theology in the post-Vatican II era.<sup>499</sup>

This was inculcated in the practice of Catholic adherents.

The new theology emphasized the individual's relation with Christ, sought the authentic meaning of the Scriptures, tried to recapture the spirit and simplicity of the liturgies of the primitive Church, and groped for an inclusiveness that made the Eucharist a shared meal, rather than a distant ritual on cold marble altars.<sup>500</sup>

Developments in family law including divorce, marriage, adoption, and parentage, have precipitated a significant challenge to worldview adherents, and, by implication, religious liberty. What must worldview proponents do to address the challenge? Worldview adherents, including religious persons and organizations must regenerate their message. Any worldview that results from history, natural law principles, and is preached from pulpits throughout the world has something to offer society.

There seems to be growing agreement that the country could better balance its commitment to individualism and self-expression with some shared standard of what is substantively, not just procedurally, decent and good and just, some external criterion of right behavior compelling enough, for example, to quell pornography and violence, to keep families together even during hard times, and to prevent parents from deserting their children.<sup>501</sup>

Media communications must be utilized, and there must be a reinvigoration of the premises upon which the worldview relied. Change, private-ordering, and internationalism are here to stay and must be included in any worldview response. The point must be to regenerate the message so that worldview adherents will respect it enough to accommodate its liberty with adherence and then with statutory protection. Admittedly, Christian worldview adherents, most of whom are Roman Catholic in the United States, are not a minority community. “[M]ost religious-liberty cases involve minority religious

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499. *Id.* at 445.

500. MORRIS, *supra* note 84, at 279.

501. *Id.* at 421.

groups seeking to be left alone to pursue holiness as they see fit, free from the baleful attention or coercion of the majority.”<sup>502</sup>

The protection of religious liberty will not result from condemnation, denouncement or threats coming from worldview leaders, including religious prelates. As is evidenced in the Catholic Church,

[adherents] still look to their Church for moral guidance, but they are searching for principles, not for rules. The traditional Catholic codebook of behavior was perfect for peasants fighting their way out of the bogs, and it worked well enough for second-generation immigrants on the first rungs of middle-class respectability . . . [But Catholics] exercise control over their own lives in ways their grandparents never did. When they turn out by the hundreds of thousands to listen to and pray with the Pope, it is because they see him as a symbol of the authority and continuity of their religion, and proof of the workings of the Spirit and the power of changeless principles in an unsettled moral era. But *not* because they are prepared to obey him “on all matters,” as he occasionally demands.<sup>503</sup>

Worldview accommodation, to include religious accommodation and the statutory protection proponents seek to insulate the message from the effects of private-ordering, will result from the regeneration of the message, well-delivered and well-received by those willing to accommodate it in their lives.

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502. Cathleen Kaveny, *The Bishops & Religious Liberty*, COMMONWEAL, June 15, 2012, at 13.

503. MORRIS, *supra* note 84, at 431.