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# All Who Live in Love: The Law & Theology Behind Same-Sex Marriage

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**Table of Contents**

**Introduction..... 1**

**Part I: A Historical Overview of the Development of Marriage ..... 5**

**Part II: The Modern Practice of Marriage..... 16**

*The Jurisprudence of Marriage in the United States..... 16*

*Marriage as the Procreative and Unitive Sacrament in the Catholic Church ..... 23*

**Part III: Marriage as a Fundament Right and a Unitive Sacrament..... 26**

*The Civil Approach to Homosexuality..... 26*

*The Current Roman Catholic Approach to Homosexuality..... 28*

*An American Legal Approach to Same-Sex Unions ..... 32*

*A Holistic Approach to Human Sexuality ..... 46*

**Part IV: Personal Reflections of Law and Theology ..... 54**

**Bibliography ..... 56**

Frank Flaspohler is a candidate for a Juris Doctor, 2009, at Loyola University New Orleans College of Law and a candidate for a Master of Pastoral Studies, 2010, at Loyola University New Orleans Institute for Ministry. This essay was developed as part of an independent study course, overseen by Professor M. Isabel Medina, whom I thank greatly for her insight and support. I dedicate this essay to all those who possess a homosexual orientation and remain active in the practice of their Christian faith. The experience of their love and friendship has deepened my appreciation of the diversity of God’s love in this world, and their courage in standing up for the way God has created them as unique individuals has been a source of inspiration in my own life.

### Introduction

Marriage is arguably the most basic institution of our society. For our economic system, marriage determines the individuals pooled together to form a family, a single unit governed by special tax and property laws.<sup>1</sup> For society, marriage is entrusted with the important duty of overseeing the upbringing of the next generation, including educating children in everything from religious beliefs to the individual freedoms of democracy.<sup>2</sup> In law, marriage exists as a basic contract between two people; in the Catholic Christian faith, that contract is given the special title of “sacrament.”<sup>3</sup> But for both law and theology, marriage represents the way society recognizes the union of two individuals who commit to each other with a common purpose in love.

In our modern culture, understanding how we view marriage is vitally important in understanding both the way humanity interacts with itself through the legal system and the lens through which humanity perceives the divine being in theology. The United States Supreme Court has shown great deference to the protections of individual freedom and privacy within the marital union, explaining marriage as a “basic civil right(s) of man.”<sup>4</sup> For example, the Court has refused to deny the right to marry to prison inmates and other individuals who violate the law.<sup>5</sup> Ensuring every person has access to such basic civil rights is tantamount to ensuring every person has access to the promises of liberty.

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<sup>1</sup> Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially*, 18 (Doubleday 2000)

<sup>2</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (dealing with the parental right to guide the educational upbringing of their children by sending them to private schools).

<sup>3</sup> Joseph Martos, *Doors to the Sacred: A Historical Introduction to the Sacraments in the Catholic Church*, 351 (Liguori/Triumph 2001).

<sup>4</sup> *Loving v. Virginia*, 388 U.S. 1, 17-19 (1967) (striking down a Virginia statute that prohibited interracial marriage).

<sup>5</sup> *Turner v. Safley*, 482 U.S. 78 (1987) (striking down a Missouri law that severely limited inmates’ ability to enter marriage).

Even more crucial for the Catholic Church, the understanding of marriage is quintessential to the understanding of the divine. Christian Scripture refers to the fundamental belief that “God is love,”<sup>6</sup> an understanding echoed in nearly every writing on the Trinitarian nature of the divine being. In Christian theology, it is the loving interpersonal relationship of the Father, Son and Spirit that is the source of all self-revelation.<sup>7</sup> This understanding was echoed by Pope John Paul II in his explanation of the interpersonal love of the Trinity reflected in the institution of marriage.<sup>8</sup> In Christian theology, the understanding of marriage is rooted in the understanding of love.<sup>9</sup> In turn, because Sacred Scripture so aptly states that “God is love,” this understanding of love is directly reflected in the understanding of the nature of God.

The greatest modern debate over the understanding of marriage focuses on whether or not couples of the same sex should be allowed to enter this both civil and sacred institution.

Although homosexuality has existed from pre-historic times, only recently have developments in the understanding of psychology and sociology, as well as the developing understanding of the theology behind marriage, led many academic scholars to call for the recognition of same-sex couples as equally entitled to enter the institution of marriage.<sup>10</sup> These commentators have challenged the current understanding of marriage as being more than a simple contract which two individuals enter.<sup>11</sup> Additionally, they call for recognition of marriage as truly an individual commitment and experience of interpersonal relationship between the two spouses, and one that

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<sup>6</sup> *1 John 4:16*, “God is love, and whoever remains in love remains in God and God in him.” New American Bible, 1991. The title of this article is also derived from this verse.

<sup>7</sup> Christopher West, *Theology of the Body for Beginners*, 121 (Ascension Press 2004).

<sup>8</sup> *Id.* at 78-79.

<sup>9</sup> *Catechism of the Catholic Church* [hereinafter CCC], para.1603 (Doubleday, 1995).

<sup>10</sup> See generally Mark Stasser, *The Challenge of Same-Sex Marriage* (Praeger Publishers 1999).

<sup>11</sup> See generally Linda J. Waite, & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier and Better Off Financially* (Doubleday 2000).

is worthy of protection and recognition, regardless of the sex of the partners of the union.<sup>12</sup>

In Spring 2008, Professor John Tuskey published an article in the Southern University Law Review offering the perspective of a Catholic law professor regarding the understanding of same-sex marriage.<sup>13</sup> In his essay, Professor Tuskey offers his opinion as a Catholic “who considers himself orthodox and faithful to the Church’s teaching on faith and morals” and further disclaims anything he might write in opposition to the Church’s teaching.<sup>14</sup> Professor Tuskey accurately presents a basic assessment of the Church’s current position on homosexuality as a moral disorder and seeks to use this basis to oppose the possibility of same-sex unions in the United States. But, his application is limited to a time-locked understanding, without an appreciation of the pilgrim nature of the Christian Church, which has continually renewed her understanding of the theology of love over the course of nearly two millennia.<sup>15</sup> One of the essential callings of the Christian faith is to be a prophetic voice of love in the world, and in doing so, some occasionally find themselves speaking out against institutions they deeply cherish.<sup>16</sup> One need only to look into recent history to find such honorable dissenters such as

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<sup>12</sup> See generally E. J. Graff, *What is Marriage For? The Strange Social History of a Sacred Institution* (Beacon Press 1999).

<sup>13</sup> John Tuskey, *And They Became One Flesh: One Catholic’s Response to Victor Romero’s “Other” Christian Perspective on Lawrence v. Texas*, 35 S.U. L. Rev. 631 (2008). But also Victor C. Romero, *An “Other Christian Perspective on Lawrence v. Texas*, 45 J. Cath. Legal Stud. 115 (2006).

<sup>14</sup> Tuskey, *supra* note 13, at 635 n.30.

<sup>15</sup> In the most recent ecumenical council, Vatican II, the Church identified herself as a pilgrim Church that continually seeks to move deeper in her understanding of God and the relationship between the creator and the created. See generally *Lumen Gentium, The Dogmatic Constitution of the Church*, (1965), available online at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html).

<sup>16</sup> The Congregation of the Doctrine of the Faith explains that well-informed Catholics may not always be able to conform to the Church's teaching due to their own consciences. In such a case, such individuals are allowed to propose views and questions for discussions by the larger Church community, but the final position of the Church must be judged by those with the solemn

United States veterans opposing the war in Iraq or Vietnam, or the great theologians such as John Courtney Murray who was repeatedly sanctioned by the Church for his theology on religious freedom.<sup>17</sup> In that context, as both a loyal Catholic Christian and an individual willing to prophetically call for a better understanding of marriage, I seek here to present a vision of legal jurisprudence and Christian theology which is more responsive to the developing understanding of the nature of the homosexual person.<sup>18</sup>

It is my hope to show why some commentators believe that same-sex marriage should be legally allowed in the United States under the principle that marriage is a fundamental right of all persons, specifically covering same-sex partners under the equal protection clause. Further, I will present the views of several theologians who believe that the current teaching of the Catholic Church in respect to homosexuality fails to appreciate the growing acceptance of sexuality as an integral aspect of one's created nature. In my conclusion, I will explain why I believe the Court should ensure access to marriage for homosexual couples and how the Church can better develop a theology of sexuality that truly appreciates sexual orientation as an integral aspect of the human person created in the divine image.

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obligation of protecting the Church's teachings, namely the bishops and the pope. *See generally Donum Veritatis: On the Ecclesial Vocation of the Theologian*, available online at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19900524\\_theologian-vocation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19900524_theologian-vocation_en.html) (1990).

<sup>17</sup> Murray's teaching on religious freedom was repeatedly condemned prior to Vatican II, and he was denied the ability to publish or publicly speak on the topic. However, he was later invited to participate in the Council, and his theology was not only accepted, but laid the groundwork for the modern Catholic understanding of religious freedom. *See generally* Pelotte, Donald E., *John Courtney Murray: Theologian in Conflict* (Paulist Press 1975).

<sup>18</sup> The views contained in this paper include legal theories by several experts in the field, theological and biblical perspectives by those trained in Catholic studies, and the current positions of both the United States Congress and the Roman Catholic Church. I will attempt to be clear in defining which views belong to which individual, and I make no claim that my reflections present an official Catholic teaching. To the degree that my conclusions are in tension with those of the United States legal system or the Catholic Church, I seek only a greater dialogue and exploration of the underlying issues covered in this essay.

Given these goals in both law and theology, this paper will consider the institution of marriage in light of the continuing debate over same-sex marriages, in its historical development, in its present form and in the possibilities for a better understanding in the years ahead. Part I will specifically focus on the historical development of marriage, a history that cannot be easily separated into religious and secular distinctions. Part II will explore the current practices of marriage as they apply to same-sex partners, both in the secular legal system of the United States, and in the current teachings of the Roman Catholic Church. Part III will provide an overview of some commentators who have considered the possibility of same-sex marriages and how those unions might affect the current understandings of Constitutional law and Catholic Christian theology. Finally, Part IV will conclude with some personal reflections on homosexuality based on my own experience of legal studies and Christian ministry.

### **Part I**

#### *A Historical Overview of the Development of Marriage*

The origins of marriage seem to be as ancient as the human race itself. The institution is a universal constant throughout all known human societies, but it has defied any single definition because its practice and form have so greatly varied across cultural lines.<sup>19</sup> It would be impossible to touch upon every form of marital institution throughout history in a brief essay. Instead the focus will be confined to the two areas already mentioned. This essay will consider the development of marriage as both a legal institution and religious sacrament as they would come to impact both United States jurisprudence and Roman Catholic theology. Although these two perspectives seem quite independent today, they have shared a unified path through much of history, and in fact, both draw their roots from a common source: the practice of marriage in the Roman Empire.

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<sup>19</sup> David Blakenhorn, *The Future of Marriage*, 11 (Encounter Books 2007).

An early jurist of the third century, Modestinus, defined marriage as “the joining of male and female in a partnership<sup>20</sup> for all of life, a sharing of divine and human law.”<sup>21</sup> In the patriarchal Roman household, marriage required the presence of two key qualities.<sup>22</sup> The first was *conubium*, or the legal right to take a wife; the second, consent.<sup>23</sup> The legal ability to marry another frequently focused on the legal status of both parties.<sup>24</sup> As explained by the jurist Paul, marriage required “all consent, that is, both those who join together and those in whose power they are.”<sup>25</sup> This requirement embodied the paternalistic nature of the Roman Empire, in which the male head of the household possessed control over all the members beneath him.<sup>26</sup> In early Roman marriage, the male head could beat, punish or sell any of the members of his household and could easily divorce his wife if he desired.<sup>27</sup> His consent was necessary to form a valid marriage.<sup>28</sup>

The Roman Empire used marriage to promote and unify the Roman state. In the interest of providing for a continuation of Roman citizens, the Empire actively promoted and encouraged marriage and procreation, even to the point of punishing those unions that did not produce

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<sup>20</sup> The author notes that the Latin word translated as partnership, *consortium*, may be used to refer to business relationships as well. He takes this to reflect the unified interests in both emotional friendship and financial interest where were common to pre-modern marital unions.

<sup>21</sup> Philip L. Reynolds and John Witte, Jr., *To Have and To Hold: Marrying and Its Documentations in Western Christendom, 400-1600*, 43 (Cambridge University Press 2007).

<sup>22</sup> Blakenhorn, *supra* note 19, at 47.

<sup>23</sup> *Id.*

<sup>24</sup> Reynolds, *supra* note 21, at 49. For example, a free person could not marry a slave. Additionally, lower classes were not permitted to marry upper classes based on social taboo.

<sup>25</sup> Reynolds, *supra* note 21, at 54.

<sup>26</sup> Graff, *supra* note 12, at 92-93.

<sup>27</sup> Martos, *supra* note 3, at 353. Martos notes that although the full exercise of these practices may have been uncommon, they were only limited by social pressures and remained legally permissible.

<sup>28</sup> Reynolds, *supra* note 21, at 54.



children.<sup>29</sup> Laws established that male citizens must bear three legitimate heirs.<sup>30</sup> However, the expansion of the Empire through wars took many of the men away from their households, leaving women with the responsibilities of the head of household.<sup>31</sup> The increasing power of women in Roman society lessened the traditional all-encompassing power of the male head, introducing not only a greater focus on the marital consent, most notably in providing the development of divorce by consent.<sup>32</sup> Although women never attained equal status in Roman marriage, the growth of their equality represented a significant shift from the traditional understanding of Roman marriage.<sup>33</sup>

In addition, Roman practice introduced religion into the state institution. The influences of three separate religions guided the developing path of marriage in the Roman state. Initially, the religion of the Roman state was primarily a family affair, such that as the wife married into the family, she also married into the family religion.<sup>34</sup> As state religion expanded throughout the Empire, elaborate state rituals developed among the wealthy replacing smaller family-centered practices, although but most common Romans continued with simple consent ceremonies.<sup>35</sup> John Boswell documents evidence of state-recognized formal ceremonies to allow for the marriage of

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<sup>29</sup> Reynolds, *supra* note 21, at 48. For instance, spouses that did not produce children were limited in the amounts they could receive from each other's estates upon death.

<sup>30</sup> Graff, *supra* note 12, at 56. The focus on legitimate heirs was particularly important in the state's focus on marriage. Only those children born within marriage were considered legitimate, meaning only they could receive property and citizenship transmitted to them through their parents. The practice of using marriage to determine legal heir-ship has remained important throughout history, as it has only been in the most recent decades of the United States that legal heir-ship has become less important. See also *Levy v. Louisiana*, 391 U.S. 68 (1968).

<sup>31</sup> Martos, *supra* note 3, 353.

<sup>32</sup> Martos, *supra* note 3, 354.

<sup>33</sup> *Id.*

<sup>34</sup> Martos, *supra* note 3, 352.

<sup>35</sup> Patricia Nell Warren, 'Traditional' Marriage: A Secular Affair, 11 *The Gay & Lesbian Review*, May-June 2005.

same-sex partners.<sup>36</sup> Although these family-based religious practices began to meld the state institution with religious ceremonies, the religious involvement in Roman marriage remained fairly limited in the early centuries of the Empire. When it was present, it was rarely the focus of the marital celebration.

The small Jewish religion had very little direct influence on the expansive Roman Empire. However, it is worth noting some of the key aspects of the Jewish understanding of marriage due to its influence on Christianity, which would later permeate nearly every aspect of the Roman Empire and western Europe. The Jewish faith considered marriage a religious duty, one that focused on both procreation and praise of the god, YHWH.<sup>37</sup> Notably, sex was considered a holy act encouraged on the Sabbath and part of the marriage covenant.<sup>38</sup> Additionally, unlike Roman practices, women were treated as equals in bed.<sup>39</sup> Many ancient Jewish writings utilize the image of a man and a woman in marriage as a symbol of the relationship between YHWH and the Jewish people, the Israelites, holding up marriage as both a practical institution and a symbolic reality.<sup>40</sup> This early symbolic reality linked the understanding of marriage intimately alongside the understanding of the human relationship with the divine being, YHWH. However, although marriage may have seemed more of an equal union of man and woman than in Roman practice, Jewish men retained the right to divorce their wife, sometimes for simply anything that displeased the Jewish husband.<sup>41</sup>

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<sup>36</sup> See generally John Boswell, *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe*, (Fontana Press 1995).

<sup>37</sup> Graff, *supra* note 12, at 56.

<sup>38</sup> *Id.*

<sup>39</sup> Graff, *supra* note 12, at 57. See also Graff, 70. Marital intercourse was mandated at regular intervals and specific focus stressed the importance of female pleasure in the sexual relationship.

<sup>40</sup> Martos, *supra* note 3, at 354. See also Ezekiel 16 for the analogy of YHWH and Israel with a husband who gives everything he possesses to an unfaithful wife.

<sup>41</sup> Martos, *supra* note 3, at 355.

As mentioned, the eventual dominance of Christianity in the Roman Empire permeated nearly every aspect of the Roman world. The recorded teachings of Jesus Christ in the Gospels include very little discussion regarding the practice of marriage. The strongest statements came in sharp opposition to the Jewish acceptance of divorce, likening divorce and remarriage to adultery.<sup>42</sup> The Christian understanding of marriage was founded on the similar statement of marriage, taken from the Gospel of Mark:

[Jesus said to the Pharisees,] “From the beginning of creation, God made them male and female. For this reason a man shall leave his father and mother, and the two shall become one flesh. So they are no longer two, but one flesh. Therefore, what God has joined together, let no one separate.”<sup>43</sup>

In biblical exegesis, the passages of the Gospels of Luke and Mark agree, while similar passages in the Gospel of Matthew seem to allow divorce in cases of spousal immorality.<sup>44</sup> Modern biblical scholars believe the texts of Luke and Mark better represent the actual teachings of Jesus, reflecting his high standards of morality.<sup>45</sup> They explain that Matthew likely added the words “except for immorality” to the teaching of Jesus Christ because this text was written for a community of Jewish converts to the Christian faith.<sup>46</sup> As such, it reflects the way divorce was understood in the Matthean community at the time.<sup>47</sup>

This condemnation of divorce, however, became one of the key reforms Christian enacted through the Church’s new bedfellow, the Roman state. The modern separation of church

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<sup>42</sup> *Luke 16:18*. “Everyone who divorces his wife and marries another commits adultery, and the one who marries a woman divorced from her husband commits adultery.” New American Bible, 1991.

<sup>43</sup> *Mark 10:1-12*, New American Bible, 1991.

<sup>44</sup> Martos, *supra* note 3, at 355-56. See *Matthew 5:31-32* and *19:3-6*.

<sup>45</sup> Martos, *supra* note 3, at 356. The Gospel of Mark predates both the Gospels of Matthew and Luke, a fact which many scholars use to indicate the teaching exception in Matthew was likely a later addition by the early Christian Church.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

and state was unknown to the ancient world, and over time, the morality of Christian living was slowly codified into the laws of the Roman Empire. In the realm of civil marriage, this resulted in tightening the restrictions on divorce. In 331, Emperor Constantine imposed greater limitations on the rights of a man to divorce his wife, eliminating the more trivial reasons for divorce.<sup>48</sup> Following the embrace of Christianity as the official state religion of the Roman Empire in 441, Emperor Theodosius II outlawed consensual divorce, allowing divorce only in cases of gross immorality.<sup>49</sup> However, laws permitting or prohibiting divorce would continue to disappear and reappear on the books for several centuries as Christian theologians continued to debate the differences in the texts of the Gospels and the pastoral considerations for allowing divorce and remarriage.

Christianity also introduced an entirely unexpected competitor to the institution of marriage. Where the Roman Empire had previously penalized those who failed to marry and produce children, and the Jewish tradition considered marriage and procreation as a God-given responsibility, Christian celibacy entered as an acceptable alternative to marriage. Over time, celibacy even became a vocation that was exalted above marriage. Paul of Tarsus had first expressed a preference for celibacy over marriage, planting the seeds for the link between the sexual relationship of marriage and the cloud of sin.<sup>50</sup> As Christianity became the new state religion of Rome, the state slowly accepted celibacy as a valid alternative to marriage. Notably, Emperor Constantine abolished penalties on unmarried men and women in 320 C.E.<sup>51</sup> Eventually, even laws protecting the status of consecrated virgins began to appear in the law

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<sup>48</sup> Martos, *supra* note 3, at 360.

<sup>49</sup> Martos, *supra* note 3, at 362.

<sup>50</sup> Reynolds, *supra* note 14, at 52. *See also 1 Corinthians 7:1, 7*, New American Bible, 1991.

<sup>51</sup> Reynolds, *supra* note 12, at 52.

books of the Roman Empire.<sup>52</sup>

In general, Christianity was slow to impose itself into the actual practice of marriage. Marriage in the Christianized Empire was very similar to the format used by Rome before it embraced Christianity.<sup>53</sup> The majority of marriages continued to be celebrated as small family affairs, and there is no evidence of formal liturgical rites in the liturgical books of the early Christian Church.<sup>54</sup> Early Church writers focused on marriage as an important part of Christian life, but did not speak of it as a Church-managed institution.<sup>55</sup> Instead, the Church seemed comfortable to leave the regulation of marriage in the hands of the state, limiting herself to preaching only on the pastoral benefits and goodness of marriage.<sup>56</sup> Drawing from the Jewish view of marriage as a holy relationship, the Church occasionally spoke against groups that condemned marriage and sex as inherently unholy. But over time, reservations about the sanctity of marriage began creeping into Church theology.

In some ways, the Christian Church was even hesitant to oppose traditions and practices of the long-standing Roman Empire. The Roman focus on the equal partners in marriage and the requirement of consent influenced the development of the Christian theology of marriage. Recognizing that the apostle Paul had spoke of marriage as more than a union of two individuals, Pope Leo wrote into canon law requirements that marriage be between equal parties.<sup>57</sup> He

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<sup>52</sup> Reynolds, *supra* note 21, at 52-53.

<sup>53</sup> Warren, *supra* note 35, at 11-12.

<sup>54</sup> Martos, *supra* note 3, at 358.

<sup>55</sup> Martos, *supra* note 3, at 359.

<sup>56</sup> *Id.*

<sup>57</sup> Reynolds, *supra* note 21, at 90. It is worth noting that Pope Leo was addressing a question regarding the validity of a marriage between a slave and a free person. In addressing this issue, Pope Leo stated that a proper marriage could not exist between members of different classes and that any union celebrated between them would be less than a standard marriage. A more complete research of Church history may indicate statements similar to this provided a

stressed an important distinction must be made between a marriage of social equals and a marriage between individuals of separate classes.<sup>58</sup> Although such concepts would later be ejected from Christian theology, their early acceptance by the Christian Church provides an example of the many formally Roman practices that would influence the development of the Christian understanding of the sacrament.

John McNeill notes the influence of the stoic tradition in Christian theology, which focused on God as reason, manifested in the natural order of creation, and came as an influence of Greek thought imbibing the Christian theology.<sup>59</sup> According to McNeill, this stoicism led to the lessening of women's position in the Church, as they were seen as tempters of the flesh, while men embodied the seat of reason.<sup>60</sup> Additionally, stoicism began to downplay the goodness of sexual relationships and stress that even when sex "must" be practiced, it should be done without passion.<sup>61</sup> Some extreme stoics even considered that human beings may have possessed a prelapsarian nature which was androgynous, because they believe all sexuality was linked as a result of sin.<sup>62</sup>

Partially influenced by this stoic tradition, Augustine of Hippo, a bishop of the Church

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foundation for later claims that justified miscegenation laws, or at the least, show grounding in similar reasoning.

<sup>58</sup> *Id.*

<sup>59</sup> John J. McNeill, *The Church and the Homosexual*, 93, (Beacon Press 4th ed. 1993) (1976). McNeill focuses on the development of a stoicism's desire to control all passions. In stoic thought, passions were considered irrational and therefore, unnatural. This focus on only the rational end of actions, he claims, neglects an appreciation of the practice of love which cannot be defined rationally. Under this approach, homosexuality was considered immoral because there is no rational goal to the act (i.e. child bearing). On its face, this appears to be very similar to the argument that homosexual unions are unnatural because they cannot produce offspring.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> McNeill, *supra* note 59, at 94. McNeil neither agrees with this belief, nor does he associate it with any recognized Church theologians of the period.

who had once practiced the moral asceticism of the Manichaean faith,<sup>63</sup> saw marriage as an institution created by God for the continuation of humanity. However, he feared the sexual desire as a dangerous human energy that could destroy society. Augustine was the first Church theologian to write extensively regarding marriage, adding to the pagan understanding of marriage in showing the union to be a sacred sign of the union between Christ and the Church.<sup>64</sup> This symbolic nature of marriage was placed alongside the two traditional benefits of marriage: production of children and the quieting of sexual appetite.<sup>65</sup> However, the addition of this sacred sign, *sacramentum*<sup>66</sup> in Latin, came with the understanding that marriage, like the union of Christ and the Church, was to be a sacred and indissoluble bond of husband and wife.<sup>67</sup>

Over the following centuries, the Christian Church slowly began to take a greater role in the celebration of marriages. Although the practice of marriage in the Christianized empire continued to focus on the consent-giving nature of marriage between the parties, as early as the fourth century, it became common for priests or bishops to give a special blessing to the couple.<sup>68</sup> Over time, the role of the clergy became more pronounced, with some rites in Greece and Asia Minor providing for the clergy to join the couple's hands or place garland over them.<sup>69</sup> By the eighth century, weddings had evolved into liturgical events celebrated in the local church,

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<sup>63</sup> Manicheans were sexual puritans, believing any sensual act was evil. They condemned marriage even among members of their community. The Christian Church condemned Manicheanism as a heresy in the early fourth century.

<sup>64</sup> Martos, *supra* note 3, at 366. Augustine likely draws upon the image expressed by the apostle Paul in Ephesians 5:31-32: "For this reason a man shall leave his father and his mother and be joined to his wife, and the two shall become one flesh.' This is a great mystery, but I speak in reference to Christ and the church."

<sup>65</sup> *Id.*

<sup>66</sup> The use of *sacramentum* by Augustine does not reflect an understanding of marriage as one of the seven Sacraments, as that distinction did not develop until much later in Christian history.

<sup>67</sup> *Id.*

<sup>68</sup> Martos, *supra* note 3, at 363.

<sup>69</sup> *Id.*

and later laws even requiring ordained officials at all weddings.<sup>70</sup>

Even as Church ministers began to play increasing roles in the institution of marriage, the prevailing Church theology continued to affirm marriage as a practice celebrated between two individuals. In 866, Pope Nicholas I affirmed that marriage consisted primarily in the exchange of the consent of the partners, stating that marriage was legal and binding even without a public liturgical ceremony.<sup>71</sup> Ecclesiastical courts began to take on the responsibility for determining marriage disputes, and by 1000, all marriages in Europe fell under the jurisdiction of the Church.<sup>72</sup> By the twelfth century, marriage ceremonies began to appear in liturgical books throughout Europe as events conducted entirely by the clergy, giving the Church control of the exercise of marriage both in its celebration and in adjudication.<sup>73</sup>

As the Church played an ever increasing role in marriages, the dispute over what qualified as a valid marriage replaced the ancient dispute over divorce. Law faculty at the University of Bologna introduced the theory that sexual relations were required for the marriage to be legitimate, while defenders of the consent-only tradition hailed from the University of Paris.<sup>74</sup> Late in the twelfth century, Pope Alexander III attempted to settle the dispute by decreeing that consent was all that was required to have a canonically valid marriage, but that the Church reserved the right to nullify the marriages of couples that had not shared in sexual

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<sup>70</sup> *Id.*

<sup>71</sup> Martos, *supra* note 3, at 371. This proclamation was actually made in opposition to other Church leaders who argued the marriage must be blessed by a priest and made public. The papal affirmation of consent alone was largely ignored throughout Europe, as it was opposed by the nobility who demanded to maintain the requirement that parents approve of their children's marriages.

<sup>72</sup> Martos, *supra* note 3, at 372.

<sup>73</sup> *Id.*

<sup>74</sup> Martos, *supra* note 3, at 373.



relations.<sup>75</sup>

The Reformation and following Council of Trent instigated a battle over who controlled and regulated marriage, resulting in a deepened understanding of the theology and practice of the institution. Martin Luther advocated a return to scriptural sources and abandoned the claim that marriage was a sacrament as defined by the Roman Catholic Church.<sup>76</sup> Civil marriages began to appear in the Netherlands, and later Scandinavian and German-speaking countries who also sided with Luther's new theology, breaking the then understood link between civil and religious marriage that had formed only a few centuries before.<sup>77</sup> Eventually, civil marriages were legalized even within Catholic countries, throughout Europe.<sup>78</sup>

Following the Reformation, the Roman Catholic theology of marriage maintained a fairly consistent approach. Marriage was one of the seven sacraments instituted by Christ, one in which two individuals became permanently united in a indissoluble union.<sup>79</sup> The primary purpose of marriage was the procreation and education of children.<sup>80</sup> The secondary purpose focused on the spiritual union and perfection of the spouses through the mutual support they received from each other.<sup>81</sup> This theology, particularly with its focus on the primary/secondary ends of marriage, would remain the foundation of the Catholic understanding of marriage until the Second Vatican

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<sup>75</sup> Martos, *supra* note 3, at 374. This remains the current standard of Canon Law in the Roman Catholic Church today. *See generally* Code of Canon Law, cann. 1055-1165, available online at [http://www.vatican.va/archive/ENG1104/\\_\\_\\_P3V.HTM](http://www.vatican.va/archive/ENG1104/___P3V.HTM).

<sup>76</sup> Martos, *supra* note 3, at 380. The Reformation and the Council of Trent worked to polarize Christian theology regarding a vast array of subjects, including marriage. For each issue contested by the Reformers, the Catholic Church reasserted the opposing aspects of her teaching as the proper point of view. This led to better defined, albeit polemic, statements by the Council of Trent regarding the nature of marriage.

<sup>77</sup> Warren, *supra* note 35, at 12.

<sup>78</sup> *Id.* Among these countries included Austria, which nevertheless continued to maintain close ties with the Roman Catholic Church for several centuries.

<sup>79</sup> Martos, *supra* note 3, at 385.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Council in the middle of the twentieth century.

## **Part II**

### *The Modern Practice of Marriage*

Today, marriage exists as both a secular legal relationship and a Catholic Christian sacrament; no other institution makes such a cross-over between civil law and religious theology. In considering how society in the United States looks at marriage in the twenty-first century, it is essential to consider both the legal developments of the understanding of marriage alongside movements in religious theology. Part II will therefore be divided into two sub-parts. First, I shall consider the development of federal jurisprudence in the United States, placing particular focus on the current status of marriage as a fundamental right. In the second sub-part, I shall consider the theology of marriage espoused by the Roman Catholic Church in the documents of the Second Vatican Council, as well as some of the prevailing aspects of martial theology today. The basic understanding of the position of marriage in each of these spheres will then provide a basis to consider the possible implications or concerns that may result from the acceptance of same-sex unions both in the United States legal practice and in the Roman Catholic sacramental theology.

#### The Jurisprudence of Marriage in the United States

In the course of over two hundred years of legal jurisprudence in the United States, the right to marry has developed from an early common law right into a modern fundamental right. Just as the Empire in the days of ancient Rome, today the state recognizes a continuing interest in marriage, particularly because the raising of children is most commonly done within the setting of a married family.<sup>82</sup> The state favors so much marriage that the Governmental Accounting

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<sup>82</sup> Strasser, *supra* note 10, at 2.

Office in 1997 identified 1,049 federal rights or benefits that were based on marriage.<sup>83</sup> Legal marriage provides the opportunity for two individuals to consent to sharing responsibility for each others lives, money and emotions.<sup>84</sup> However, the right to marry another person is not provided for in the Constitution, and history has shown that states may have a great deal of leeway in sanctioning or control various aspects of marriage.<sup>85</sup> An analysis of the legal development of marriage in the United States will provide a basis for understanding the modern practice of the institution.

In the early 1800's, the Supreme Court first struggled with how to define marriage in the United States. Initially, the Court seemed comfortable understanding marriage as a common-law right, as it was not listed in the Constitution.<sup>86</sup> In *Meister v. Moore*, the Court recognized that marriage was the most important relationship in one's life, but that such a relationship remained subject to the state legislature under common law.<sup>87</sup> In citing examples, the Court in *Meister* looked to the state regulation of the age at which one is legally permitted to marry, requirements and limits on the form of marriages, the duties and responsibilities created by the union and the effects marriage may have on the property of each of the spouses.<sup>88</sup> This understanding reflected a state legislature which had final control over the marital union, as the union was itself only an element of common law and subject to more specific regulations through state enacted statutes.

Likewise, in *Reynolds v. United States*, the Court examined the practice of polygamy under a First Amendment free exercise claim, noting that a second marriage had always been

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<sup>83</sup> Letter from Barry R. Bedrick, Associate General Counsel United States General Accounting Office, to Henry J. Hyde, Chairman, Committee on the Judiciary, United States House of Representatives (Jan. 31, 1997).

<sup>84</sup> Graffi *supra* note 26, at 52.

<sup>85</sup> Evan Gerstmann, *Same Sex Marriage and the Constitution*, 73 (2004).

<sup>86</sup> *Id.*

<sup>87</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888). See also *Meister v. Moore*, 96 U.S. 76 (1877).

<sup>88</sup> *Maynard*, 125 U.S. at 205 (1888).

void under the common law of the nations of northern and western Europe.<sup>89</sup> The Court referred to marriage as a sacred obligation by nature, but a civil contract by form.<sup>90</sup> The Court recognized that marriage is the foundation upon which society is built and that from the union arise both a social relationship and social duties, many of which must be regulated by the government.<sup>91</sup> Therefore, it would be natural to assume the government must play a role in the regulation of the marital union.

The early references to marriage as a common law right, rather than a fundamental right, are not surprising, as the Supreme Court failed to recognize any fundamental rights in the 1800's.<sup>92</sup> The opinion of *Lochner v. New York* in 1905 brought in a new era of substantive due process and individual rights into play in American jurisprudence.<sup>93</sup> Less than twenty years later, in *Meyer v. Nebraska* the Court struck down a law banning schools from teaching in any language other than English, the Court referred to marriage in a long list of rights which were "definitely stated" as being protected by the Constitution's due process clause.<sup>94</sup> Twenty years after *Meyer*, the Court in *Skinner v. Oklahoma* was even stronger in stating without exception that marriage, together with procreation, was a right "fundamental to the very existence and survival of the race."<sup>95</sup> There, the Court even asserted the need to use strict scrutiny in reviewing

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<sup>89</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>90</sup> *Id.* at 165.

<sup>91</sup> *Id.*

<sup>92</sup> Gerstmann, *supra* note 85, at 74. Gerstmann notes that during this period, even free speech was rarely enforced to a level which would be recognizable today.

<sup>93</sup> *Id.* See *Lochner v. New York*, 198 U.S. 45 (1905) (striking a New York law limiting bakers' hours as interfering with workers' right to sell their labor under the Fourteenth Amendment).

<sup>94</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Among the rights listed alongside marriage included the right to contract, to acquire useful knowledge, to establish a home and bring up children and to worship God as part of the essential path to the pursuit of happiness.

<sup>95</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (reviewing a statute that provided for the forced sterilization of certain felony criminals).

the sterilization law of Oklahoma which violated that fundamental right.<sup>96</sup>

The protection of rights that are “so rooted in the tradition and conscience of our people as to be ranked fundamental” continued in *Griswold v. Connecticut*.<sup>97</sup> There, the Court struck down a law banning the use of contraception based on the principle of marital privacy. The Court recounted the understanding of fundamental rights flowing from the Ninth and Fourteenth Amendments, again specifically recognizing the right to “marry, establish a home and bring up children,” as mentioned in *Meyer*.<sup>98</sup> Additionally, the Court specifically rejected the claim that individual rights should be limited to those listed in the Constitution, finding this belief directly opposed to the intent of the Framers in drafting the Ninth Amendment.<sup>99</sup> In *Griswold*, the Court went further in grounding the right to privacy in the realm of family life, the very basis of which is provided by the fundamental right to marry.<sup>100</sup>

The Court looked at marriage more closely in the landmark case, *Loving v. Virginia*.<sup>101</sup> There, the Court reviewed a state statute that prohibited interracial marriages and struck the law as unconstitutional under the guarantees of the equal protection and due process clauses of the

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<sup>96</sup> *Id.* at 541.

<sup>97</sup> *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965), citing *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>98</sup> *Id.* at 488-89.

<sup>99</sup> *Id.* at 489. The Court includes text from a often-cited speech by James Madison voicing his concern over the inclusion of the Bill of Rights in the Constitution, fearing that listing some rights without listing others would be used to limit the protection of individual rights to only those included in the Constitution. He explains this concern as the basis for his introduction of the Ninth Amendment into Congress.

<sup>100</sup> *Id.* at 495. The Court places the right to privacy, particularly in this case, marital privacy, alongside the right to marry both in “order and magnitude” as fundamental rights given protection under the Constitution.

<sup>101</sup> *Loving*, 388 U.S. 1 (1967). At the time *Loving* was decided, sixteen states had miscegenation statutes on the books which prohibited and punished marriages between different racial classes. In footnote 5, the Court recognized that fourteen states had repealed similar laws within the fifteen years preceding the case, with the State of California being the first to reject miscegenation statute as violating equal protection in 1948.

Fourteenth Amendment.<sup>102</sup> In its analysis, the Court recognized that marriage is a social relationship subject to the state's police power, citing precedent in *Maynard*.<sup>103</sup> However, looking to precedent in *Meyer* and *Skinner*, the Court explained that the state's police power over marriage is not unlimited.<sup>104</sup> Following an in-depth discussion of the racial violations of the equal protection clause present in miscegenation statutes, the Court restated *Skinner*, specifically placing marriage as a basic civil right; one that is "fundamental to our very existence and survival."<sup>105</sup>

Two further cases have struck down limitations placed on marriage under the precedent of *Loving* that marriage is a fundamental civil right protected by the equal protection and due process clauses of the United States Constitution. The first of these cases reviewed a statute which required court permission for an individual paying child support to remarry.<sup>106</sup> In *Zablocki v. Redhail*, Justice Marshall wrote for the Court in striking down a Wisconsin statute as unnecessarily infringing upon the right to marry, which he closely linked with the right to privacy established in *Griswold*.<sup>107</sup> He placed the right to marry on the same level as the fundamental rights to abortion and procreation.<sup>108</sup> He also reaffirmed the state's right to impose reasonable regulations on marriage, provided they do not significantly interfere with the ability to enter into the marital relationship.<sup>109</sup> However, he made it clear that any regulations that do interfere with such an ability must be subjected to "rigorous scrutiny."<sup>110</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 7.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 12.

<sup>106</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>107</sup> *Id.* at 385.

<sup>108</sup> *Id.* at 387.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

In examining the Wisconsin statute, Justice Marshall found that some individuals may be “absolutely prevented from getting married,” “suffering a serious intrusion into their freedom of choice” in such a fundamental area.<sup>111</sup> Under the standard of strict scrutiny protecting exercises of fundamental rights, he questioned whether the statute was supported by an important state interest and looked to consider if it was narrowly tailored to achieve that interest alone.<sup>112</sup> In the analysis, Justice Marshall found the Wisconsin statute did not pass this rigorous test because it failed to achieve the government’s purpose and was both too narrow and too broad in attempting to do so.<sup>113</sup>

The final Supreme Court case which I shall discuss regarding the fundamental right to marry is *Turner v. Safley*.<sup>114</sup> Decided in 1987, the Court struck down a Missouri statute limiting the ability of prison inmates to enter the marital union with other inmates or civilians. In doing so, the Court found the statute was not reasonably related to any governmental purpose.<sup>115</sup> Justice O’Connor wrote for the majority stating that although the right to marry may be subject to substantial restrictions during incarceration, the government cannot deny individuals the expressions of “emotional support and public commitment” that attach to the marital relationship.<sup>116</sup> Additionally, the Court included the motivation of religious faith and personal dedication, as well as the legal and financial benefits that attach to marriage as potential reasons for seeking the marital union.<sup>117</sup> In *Turner*, these benefits were used to justify protecting the

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<sup>111</sup> *Id.* at 388.

<sup>112</sup> *Id.* at 389

<sup>113</sup> *Id.* at 390-91.

<sup>114</sup> *Turner*, 482 U.S. 78 (1987).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 96.

<sup>117</sup> *Id.*

fundamental right to marry even in the prison setting.<sup>118</sup>

Gathering these cases together, the Court has defined a concept of marriage that focuses on the freedom of individuals to enter into the marital union under the protection of individual privacy.<sup>119</sup> However, this right may still be subject to reasonable regulation by the government,<sup>120</sup> but if that regulation interferes with one's decision to enter marriage, the standard for review must be strict scrutiny.<sup>121</sup> Finally, in *Safley*, the Court outlines some of the benefits considered valid for supporting marriage: emotional support, public commitment, religious faith, personal dedication and the attached legal benefits.<sup>122</sup>

Many modern scholars have questioned whether the marital union should be open to couples of the same-sex as a fundamental civil right. It would seem at first glance that the concept of marriage outlined above does not include any basis for denying same-sex couples the same access to the marital union as heterosexual couples. Several state courts have, in fact, found that to be precisely the case.<sup>123</sup> However, in an effort to clarify a national standard for marriage, and in direct reaction to the decisions of the states that have accepted same-sex marriages, Congress passed into law the Defense of Marriage Act (DOMA) in 1996.<sup>124</sup> In pertinent part, DOMA defines marriage as a "legal union between one man and one woman as husband and wife," thereby seemingly preventing same-sex couples from attaining marriage under federal law.<sup>125</sup> *Gill et. al. v. Office of Personnel Management et al.* was filed in the District Court of Boston, Massachusetts to contest the validity of DOMA on March 3, 2009, claiming that DOMA

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<sup>118</sup> *Id.*

<sup>119</sup> *See supra* text accompanying notes 98-101.

<sup>120</sup> *See supra* text accompanying note 88.

<sup>121</sup> *See supra* text accompanying notes 108-111.

<sup>122</sup> *See supra* text accompanying notes 115-118.

<sup>123</sup> *See infra* text accompanying notes 205-222.

<sup>124</sup> 1 U.S.C. § 7 (1996).

<sup>125</sup> *Id.*



violates the constitutional promise of equal protection by denying the benefits of marriage to same-sex couples.<sup>126</sup> In the discussion below, I shall consider whether the fundamental right of marriage outlined by the Court could be extended to constitutionally guarantee same-sex couples the right to legal marriage in the United States, a constitutional guarantee that could invalidate state and federal statutes such as DOMA.

#### Marriage as the Procreative and Unitive Sacrament in the Catholic Church

The Church's understanding of marriage remained essentially unchanged from the Middle Ages up to the eve of Vatican II.<sup>127</sup> Disputes between Protestants and Catholics continued to harden the lines of both sides, while civil regulation of marriage and acceptance of divorce threatened the traditional understanding of the institution.<sup>128</sup> Slowly, the Church began to accept the notion that sex may have other positive benefits beyond simply producing children and shifted away from looking at marriage as a social duty, instead considering it an individual vocation.<sup>129</sup> A new pastoral understanding of the marital relationship through Vatican II tempered the legalistic approach that had dominated the Church theology for centuries.<sup>130</sup>

Although not the final statement of all belief in the Catholic Church as is too often espoused,<sup>131</sup> the Catechism of the Catholic Church serves as a useful starting point in examining

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<sup>126</sup> Stephen J. Hyland, *DOMA Challenge Filed in MA*, [http://www.stephenhyland.com/2009/03/doma\\_challenge.html](http://www.stephenhyland.com/2009/03/doma_challenge.html) (last visited March 28, 2009).

<sup>127</sup> Martos, *supra* note 3, at 385.

<sup>128</sup> *Id.*

<sup>129</sup> Martos, *supra* note 3, at 386.

<sup>130</sup> Martos, *supra* note 3, at 387.

<sup>131</sup> Pope John Paul II notes in his Apostolic Constitution *Fidei Depositum* on the publication of the catechism (1992) that the *Catechism of the Catholic Church* is meant as a reference point for those interested in learning more about their faith, and to provide a reference point for local catechisms that can better take into account the customs of various regions. He specifically mentions that this new catechism is not intended to supercede or replace any such local catechisms currently approved for use, but should serve as encouragement for the writing of other local catechisms.

the modern theology of marriage. Beginning Article 7 on the Sacrament of Matrimony, the Catechism states:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.<sup>132</sup>

Immediately, two motivations for the marital union become clear. First, the loving unity for the good of the spouses arises from the mutual self-giving of two partners.<sup>133</sup> Second, the marital union is directed toward the procreation and education of offspring.<sup>134</sup> This section will take each element in turn to consider its connection and importance in the sacrament of marriage.

The unitive end of marriage finds its expression through the self-giving of each of the spouses in both tenderness and action that permeates their entire lives.<sup>135</sup> This unity stresses the equality of the two persons through mutual affection and increasing virtue of both of the spouses.<sup>136</sup> This unitive aspect of marriage is used symbolically to show the unity of God and the Church by Pope Benedict: Jesus through his self-gift of body and blood, deepen the covenant between YHWH and his people by drawing them into an active union.<sup>137</sup> However, unlike the pre-Vatican II era, the unity of the spouses is placed alongside procreation in importance.<sup>138</sup>

Although no longer primary in place, the Church retains the understanding that the

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<sup>132</sup> CCC, *supra* note 9, at para. 1601 (Doubleday, 1995).

<sup>133</sup> CCC, *supra* note 9, at para. 1646.

<sup>134</sup> CCC, *supra* note 9, at para. 1652. *See also The Pastoral Constitution on the Church in the Modern World* [hereinafter *Pastoral Constitution*], para. 48 & 50 (1965), available online at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html).

<sup>135</sup> *Pastoral Constitution*, *supra* note 119, para 49.

<sup>136</sup> *Id.*

<sup>137</sup> *Deus Caritas Est*, para. 13 (2005), available online at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html).

<sup>138</sup> *Code of Canon Law*, *supra* note 75, can. 1055, 1.

sacrament of marriage is by its nature ordered to the procreation of children and their education.<sup>139</sup> This fruitful aspect of the marriage is not limited to producing biological offspring, but extends to the education and sharing of the moral and spiritual life that parents give to their children.<sup>140</sup> Additionally, even those spouses who may be unable to have children for a myriad of reasons may enjoy a fruitful marriage that shares in charity with others, including, but not limited to, adopting other children.<sup>141</sup>

André Guindon explains the sexual relationship between married couples is essential to the Christian understanding of human beings as both body and spirit.<sup>142</sup> Building upon an understanding of Blaise Pascal,<sup>143</sup> his model of theology shows that acting as a human requires acting with both body and spirit in such a way that expresses one's self in both dimensions.<sup>144</sup> Using the terms of sensuality to represent the physical elements of a loving expression, and tenderness to denote the spiritual aspects, Guindon argues against approaches in both hedonistic and purity ethics, each of which take an extreme position by embracing only one of the dimensions of human existence.<sup>145</sup> He claims Christianity has always rejected such a dichotomy through the *sensus fidelium*.<sup>146</sup>

Taken together, the modern theology of marriage reflects a union that is both unitive and

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<sup>139</sup> CCC, *supra* note 9, at para. 1652, quoting *Pastoral Constitution*, para. 48.

<sup>140</sup> CCC, *supra* note 9, at para. 1653.

<sup>141</sup> CCC, *supra* note 9, at para. 1654.

<sup>142</sup> André Guindon, *The Sexual Creators* (University Press of America 1986).

<sup>143</sup> Blaise Pascal states that human beings do no better to act like angels (solely from a spiritual perspective), than to act like animals (solely from a physical perspective). Instead, he humans that humans act “humanly,” in a way that integrates both aspects of their humanity.

<sup>144</sup> Guindon, *supra* note 142, at 23.

<sup>145</sup> Guindon, *supra* note 142, at 24.

<sup>146</sup> *Id.* The *sensus fidelium* is translated as the “sense of the faithful.” This concept holds that any beliefs held by the entire community of the faithful, regardless of their previous level of codification, cannot be in err, through the protection of the Holy Spirit.

procreative.<sup>147</sup> Yet the Church realizes that not all marital unions are capable of biological fruitfulness.<sup>148</sup> However, an essential element of the sexual relationship must be interacting with the other through both the dimensions of the body and the soul.<sup>149</sup>

### **Part III**

#### *Marriage as a Fundamental Right and a Unitive Sacrament*

In the dichotomy of church and state in the United States, the practice of marriage represents a cross-over as both a civil institution and a religious expression of faith. Before considering the legal and theological aspects of same-sex unions, it is prudent to look at how each discipline approaches and deals with homosexuality. To accomplish this purpose, this section will look to the most recent Supreme Court cases dealing with homosexuality, as well as several documents released by the Roman Catholic Church in the last twenty-five years. This will then provide a basis for understanding how the modern society in the United States approaches marriage as a fundamental right and a unitive sacrament.

#### The Civil Approach to Homosexuality

The most recent landmark Supreme Court case to deal with the general principles surrounding homosexuality was *Lawrence v. Texas*, which reviewed a challenge to a Texas statute that prohibited “deviate sexual intercourse with another individual of the same sex.”<sup>150</sup> In an opinion by Justice Kennedy, the Court struck down the statute as a violation of the due process clause of the Fourteenth Amendment and specifically overruled the prior precedent set by the Court in *Bowers v. Hardwick*.<sup>151</sup> Even though several parties involved argued for simply

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<sup>147</sup> See *supra* text accompanying notes 132-134.

<sup>148</sup> See *supra* text accompanying notes 140-141.

<sup>149</sup> See *supra* text accompanying notes 142-146.

<sup>150</sup> *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). For the statute under review, see Tex. Penal Code Ann. § 21.06(a) (2003).

<sup>151</sup> *Lawrence*, 539 U.S. at 579. *Bowers v. Hardwick* may be found at 478 U.S. 186 (1986).

using the equal protection clause to invalidate the statute,<sup>152</sup> the Court instead relied on a constitutional standard making it clear that a prohibition similar to that encountered in the Texas statute could not pass constitutional scrutiny under the due process clause, regardless of how it might be reworded.<sup>153</sup>

Justice Kennedy considered the traditional laws against same-sex behavior, but found that many of these laws existed in an era prior to the recognition of the distinctions between heterosexuals and homosexual orientations.<sup>154</sup> Instead of seeking to prohibit sexual behavior between same-sex parties, Justice Kennedy found that the prior laws had been focused on prohibiting non-procreative sexual activity.<sup>155</sup> In fact, he stated that laws targeted against same-sex couples did not develop in the United States until the “last third of the 20th century.”<sup>156</sup> Although he noted that homosexual behavior had long found condemnation through a Judeo-Christian moral standard, Justice Kennedy cited prior Court precedent to remind the Court that its “obligation is to define the liberty of all, not to mandate our own moral code.”<sup>157</sup>

The Court placed individual liberty as the standard against which laws prohibiting same-sex behavior must be measured, recalling the statement from *Planned Parenthood v. Casey* that the constitutional rights should protect “one’s own concept of existence, of meaning, of the

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<sup>152</sup> *Lawrence*, 539 U.S. at 579-80 (O’Connor, J., concurring).

<sup>153</sup> *Lawrence*, 539 U.S. at 574-75. The Court expressed concern that had the statute been struck on equal protection grounds, states may have sought to resurrect similar prohibitions on private same-sex activity by rewording the statutory language.

<sup>154</sup> *Id.* at 568. This finding is similar to that of many biblical scholars who have determined that the scriptural treatment of homosexuality occurs within a context of a society that has no understanding of sexual orientation. *See infra* text accompanying note 281.

<sup>155</sup> *Id.* Justice Kennedy did, however, note that the failure to outright condemn homosexual behavior does not necessarily indicate approval of such conduct.

<sup>156</sup> *Id.* at 570.

<sup>157</sup> *Id.* at 571, citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

universe, and of the mystery of human life.”<sup>158</sup> Most notably, the Court did this in the protection of private decisions, among which it specifically mentions “decisions relating to marriage,... [and] family relationships.”<sup>159</sup> The Court found that laws which prohibit same-sex couples from sharing in private sexual relationships only serve to support discrimination against them, thereby violating their rights under the due process clause.<sup>160</sup> Finally, the Court recognized that the understanding of constitutional rights continues to develop through the ages, as the Framers wisely left open many questions in the components protected by the Fifth and Fourteenth Amendments:

“They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>161</sup>

In recognizing the progressive understanding of Constitutional principles, the Court opened the door for future developments of truths held by previous generations that no longer match with modern experience.<sup>162</sup> In light of the modern developments in the understanding of homosexuality, the Court has recognized that condemnations against homosexual behavior no longer merit criminal sanctions in the United States.<sup>163</sup> Thus, the Court has expressed an understanding that although homosexuality may have been condemned in the past, the developing understanding of human sexuality may pave the way toward greater constitutional protections for homosexual behavior.

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<sup>158</sup> *Lawrence*, 539 U.S. at 571, citing *Casey*, 505 U.S. at 851.

<sup>159</sup> *Lawrence*, 539 U.S. at 574.

<sup>160</sup> *Id.* at 578.

<sup>161</sup> *Id.* at 579.

<sup>162</sup> See *supra* text accompanying note 161.

<sup>163</sup> See *supra* text accompanying note 150-161.

The Current Roman Catholic Approach to Homosexuality

As one of the basic tenets of nearly all western religions is leading the followers in determining the morality of certain actions, the Catholic Church is more assertive in condemning behavior which she determines as against the teachings of Christ. In brief, the *Catechism of the Catholic Church* states that homosexual acts are “intrinsically disordered” and cannot be approved under any circumstances.<sup>164</sup> Further, although the Church respects that individuals who possess a homosexual orientation may have to suffer trials to follow Christ, it offers only the practice of chastity to achieve Christian perfection.<sup>165</sup>

The *Catechism* draws its roots from several documents released by the Congregation of the Doctrine of the Faith (CDF), which is responsible for official Church teaching. The *Declaration on Certain Questions Concerning Sexual Ethics* was released by the CDF in 1975, explaining the Church should treat homosexuals with understanding and support.<sup>166</sup> However, the document went on to clarify that homosexual acts were intrinsically evil, and as such, no right intention could justify them as moral.<sup>167</sup>

In 1986, the CDF issued a *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Letter)*, which it drafted in response to what it believed was a

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<sup>164</sup> CCC, *supra* note 9, para. 2357.

<sup>165</sup> CCC, *supra* note 9, para. 2358-59. All Christians are called to a life of chastity, but since homosexuals have no opportunity to enter a marital union with another individual, calling homosexuals to chastity amounts to a *de facto* call to celibacy. This important distinction has been noted by some theologians who have pointed to the tradition view of celibacy as a special vocation and divine gift, rather than something imposed without choice. *See also* Paul G. Crowley, S.J., *Homosexuality and the Counsel of the Cross*, 65 *Theological Stud.* 500 (2004).

<sup>166</sup> *Declaration on Certain Questions Concerning Sexual Ethics* [hereinafter *Declaration*], sec. VIII (1975), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19861001\\_homosexual-persons\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html).

<sup>167</sup> *Declaration*, *supra* note 166, sec. VIII. For instance, even homosexual acts that were shared within a sincerely committed relationship of life and love, similar to that of marriage, would continue to be defined as immoral due to the inherent evil in the act itself.

growing acceptance of homosexual behavior.<sup>168</sup> The CDF referred to the growing understanding that homosexuals do not choose their orientation, but “find themselves” to be homosexual.<sup>169</sup> Further, the *Letter* explained that the homosexual orientation itself was not sinful, but that it represents a strong tendency toward a moral disorder.<sup>170</sup> Finally, the CDF recognized that the Church should condemn all actions of hate or violence against persons possessing a homosexual orientation, while also cautioning that legalized acceptance of homosexual behavior could result as a basis for greater acts of hatred and violence.<sup>171</sup>

In addition, two important documents have been released by the CDF since the publishing of the *Catechism*. In 1992, the CDF issued *Considerations Concerning the Catholic Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons (Legislative Proposals)* to all bishops of the United States.<sup>172</sup> In *Legislative Proposals*, the CDF expressed concerns that legislation allowing homosexuals greater civil rights might have an adverse effect on the common good of family life.<sup>173</sup> In seeking to protect the common good, the document allows for discrimination against homosexuals, explaining that there is no “right” to homosexual behavior.<sup>174</sup> The CDF expresses the continued desire of the Catholic Church to uphold the values of marriage and family, while also protecting the individual dignity of every

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<sup>168</sup>*Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* [hereinafter *Letter*], (1986), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19861001\\_homosexual-persons\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html).

<sup>169</sup> *Letter*, *supra* note 168, at no. 1.

<sup>170</sup> *Letter*, *supra* note 168, at no. 7.

<sup>171</sup> *Letter*, *supra* note 168, at no. 10.

<sup>172</sup> *Considerations Concerning the Catholic Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons*, [hereinafter *Legislative Proposals*], (1992).

<sup>173</sup> *Legislative Proposals*, *supra* note 172, at no. 9.

<sup>174</sup> *Legislative Proposals*, *supra* note 172, at no. 10. Those familiar with Church history may recall that prior to Vatican II, a similar mantra was used to civilly oppress members of protestant denominations in predominately Catholic countries: “error has no rights.”



person.<sup>175</sup>

Perhaps the most crucial document to examine for the purposes of this essay is *Consideration Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons (Legal Recognition)*.<sup>176</sup> Although admitting that it does not present any new doctrine, *Legal Recognition* seeks to address all persons interested in the common good of society.<sup>177</sup> It makes frequent references to the documents previously cited and states that there “are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.”<sup>178</sup> The CDF establishes a distinction between permitting private homosexual behavior and allowing legalized recognition of same-sex unions, and the document demands that Christians oppose any such legal recognition.<sup>179</sup> The document argues that same-sex unions would change “the entire organization of society” by disrupting the institution of marriage.<sup>180</sup> Among the possible harms from supporting same-sex unions, the CDF includes “doing violence” to children who might be raised by homosexual parents<sup>181</sup> and

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<sup>175</sup> *Legislative Proposals*, *supra* note 172, at no. 17.

<sup>176</sup> *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* [hereinafter *Legal Recognition*], (2003), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html).

<sup>177</sup> *Legal Recognition*, *supra* note 176, at no. 1. Other Church documents, notably the *Pastoral Constitution of the Church in the Modern World*, have also sought to address those both within and without the Christian community. See also *Pastoral Constitution*, *supra* note 134.

<sup>178</sup> *Legal Recognition*, *supra* note 176, at no. 4. Similar definitive language is reflected throughout the document, with other examples in paragraph 7 including statements that homosexual unions would be “totally lacking” in both the biological and conjugal elements of marriage. Statements of this kind, which are so frequently overstated, are easily refuted by finding even one example of a case which contradicts the given statement.

<sup>179</sup> *Legal Recognition*, *supra* note 176, at no. 5.

<sup>180</sup> *Legal Recognition*, *supra* note 176, at no. 6.

<sup>181</sup> *Legal Recognition*, *supra* note 176, at no. 7. In the sense of “doing violence” the CDF explains that this would include any situation that places children in an environment which is not supportive of their full human development. The CDF stresses that the interests of the child must always be of paramount consideration.

degrading the nature of the heterosexual institution of marriage.<sup>182</sup> Finally, the document closes by clearly stating that any Catholic politician who acted in support of same-sex unions would be acting in a gravely immoral fashion.<sup>183</sup>

In summary, the position of the Catholic Church toward homosexuality is a stance of respect for the individual human person, but unconditional condemnation for all homosexual acts. While unjust discrimination should be avoided, the Church expects that Christians will act to protect the institution of family and marriage by opposing laws which protect same-sex behavior and relationships.

#### An American Legal Approach to Same-Sex Unions

Following the discussion above, it may seem reasonable to pursue access to marriage for same-sex couples through the understanding of marriage as a fundamental civil right which would be protected by the Constitutional guarantee of equal protection. In fact, this is exactly the approach advocated by Evan Gerstmann.<sup>184</sup> Others have favored an approach through the equal protection clause, similar to that used by the Supreme Court of Hawaii to authorize same-sex marriages in 1993.<sup>185</sup> Each of these options will be considered in turn. However, this section will

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<sup>182</sup> *Legal Recognition*, *supra* note 176, at no. 8. The CDF states that extending the title of marriage to same-sex couples would impose a radical transformation by giving this benefit to couples that cannot participate in the procreation of new life and of raising children.

<sup>183</sup> *Legal Recognition*, *supra* note 176, at para. 10. The document states Catholic lawmakers have a moral duty to express opposition and publicly vote against proposals in support of same-sex unions. If such provisions are already in force, Catholic politicians must oppose them in any way possible and make such opposition publicly known. They may licitly support proposals that limit the harm done by same-sex marriages, even if they do not result in total prohibitions.

<sup>184</sup> Gerstmann, *supra* note 85. Gerstmann is careful to mention that the approach of attacking same-sex marriage bans through the equal protection clause should not be abandoned in favor of a new method, but that rather, the fundamental rights approach simply seems more apt to succeed.

<sup>185</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) focused on Hawaii's state-level equal protection clause, finding that denying marriage to same-sex couples violated that section of the state

first consider some of the recent court cases which have dealt with same-sex unions.

One of the earliest court decisions to deal with same-sex marriages considered whether the benefits of marriage should be extended to same-sex couples under the Immigration and Nationality Act (INA).<sup>186</sup> In *Adams*, the two male petitioners received a marriage license in Colorado and were married by a local minister; they then petitioned for immediate relative status under the INA based on Adam's United States citizenship.<sup>187</sup> The 9th Circuit passed on deciding whether or not the marriage would be valid under Colorado law, but instead looked at whether a union between two men would be eligible to receive the benefits of marriage under the INA.<sup>188</sup> After finding a same-sex union was not intended to be viewed as a marriage for immigration purposes by Congress, the court also rejected a constitutional claim under the equal protection clause, based on the broad discretion the court gives to Congress in areas of immigration law.<sup>189</sup>

Over ten years later, the first major state case to review the ban on same-sex marriages was *Baehr v. Lewin*.<sup>190</sup> In *Baehr*, the same-sex plaintiffs alleged their applications for marriage licenses were denied in violation of the right to privacy and equal protection clauses of the Hawaii Constitution.<sup>191</sup> In looking to federal precedent, the court determined that the fundamental right to marry applied only to couples of opposite sexes, as only unions between men and women were sanctioned by the United States at the time the right was outlined.<sup>192</sup>

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constitution. However, before same-sex marriages could be authorized, the state amended the constitution to limit marriage to a union between a woman and a man.

<sup>186</sup> *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982)

<sup>187</sup> *Id.* at 1038.

<sup>188</sup> *Id.* at 1039.

<sup>189</sup> *Id.* at 1040-42.

<sup>190</sup> *Baehr*, 852 P.2d 44 (Haw. 1993).

<sup>191</sup> *Id.* at 48.

<sup>192</sup> *Id.* at 56. The court looked at precedent from both *Skinner* and *Zablocki*, stating that the fundamental right to marry draw from those cases implicitly considers only unions between men

Accordingly, the court considered any efforts to extend the fundamental right to marry to same-sex couples would, in fact, be creating a new fundamental right to same-sex marriage.<sup>193</sup> In considering creating such a new right, the court declined to do so, based on same-sex unions as not been a part of the “traditional ... conscience of our people” that is “so rooted ... as to be ranked fundamental.”<sup>194</sup>

The court then considered the application of the equal protection clause, noting that Hawaii’s equal protection clause is more elaborate than the United States counterpart.<sup>195</sup> The equal protection clause of the Fourteenth Amendment of the United States Constitution prohibits a state from denying “to any person within its jurisdiction the equal protection of the laws.”<sup>196</sup> However, the Hawaii Constitution provides that no person shall “be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”<sup>197</sup> In Hawaii, the promise of equal protection prohibits discrimination based on sex on the very face of the state constitution.<sup>198</sup>

The court dismissed the argument by the defendant that marriage is by both definition and usage a special relationship between a man and a woman as a circular argument.<sup>199</sup> The court noted that the state in the *Loving* case had claimed that “Divine Providence had not intended that

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and women. For instance, *Zablocki* links marriage as the predicate for the rights to procreation, child-birth, abortion and child rearing.

<sup>193</sup> *Id.* at 56-57.

<sup>194</sup> *Id.* at 57, citing *Griswold*, 381 U.S. at 493.

<sup>195</sup> *Baehr*, 852 P.2d at 59-60.

<sup>196</sup> U.S. Const. amend. XIV.

<sup>197</sup> Haw. Const. art. 1 § 5.

<sup>198</sup> *Baehr*, 852 P.2d at 60.

<sup>199</sup> *Id.* at 61.

the marriage state extend to interracial unions;”<sup>200</sup> but this position was rejected on appeal to the Supreme Court who considered the classification a form of arbitrary and invidious discrimination.<sup>201</sup> The court in *Baerh* used *Loving* to show that customs change with the developing social order and that arguments based in an arbitrary definition of marriage or claims of a judge’s special knowledge of the Divine Will cannot be used to protect behavior which violates constitutional principles.<sup>202</sup>

After wading through the constitutional precedent, the Hawaii Supreme Court remanded the case to a trial court, demanding the court apply strict scrutiny and placing the burden on the state to show a compelling state interest in prohibiting same-sex couples from entering civil marriage and that was narrowly drawn in excluding such individuals from equal protection of the law.<sup>203</sup> However, prior to the State of Hawaii being forced to accept same-sex marriages, a referendum amended the state constitution to specifically limit marriage to a union between a man and a women and prevented the state supreme court from reviewing this issue further.<sup>204</sup>

Six years later, the Supreme Court of Vermont took up the issue of same-sex unions in *Baker v. State of Vermont*.<sup>205</sup> The question faced by the court in *Baker* was plainly stated by the opinion written by Judge C. J. Amestoy: “May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples?”<sup>206</sup> In doing so, the court directed its attention, not at the right of the individuals to marry, but at their

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<sup>200</sup> *Loving*, 388 U.S. at 3. The claim relying on the will of Divine Providence is similar to many such claims made against same-sex unions to this day. One of the focuses of this essay is to reveal that serious questions remain in attributing a particular position on homosexuality to the Divine Will.

<sup>201</sup> *Baehr*, 852 P.2d at 62.

<sup>202</sup> *Id.* at 63.

<sup>203</sup> *Id.* at 69.

<sup>204</sup> Gerstmann, *supra* note 85, at 4.

<sup>205</sup> *Baker v. State*, 744 A.2d 864 (1999).

<sup>206</sup> *Baker*, 744 A.2d at 867.

right to receive the same benefits as married couples.<sup>207</sup>

To examine the statute which limited the benefits of marriage to opposite-sex couples, the court looked to the state's common benefits clause, the Vermont counterpart of the United States equal protection clause.<sup>208</sup> The court noted distinctions between the common benefits clause and the equal protection clause, not the least of which include the ratification of the common benefits clause predating the Fourteenth Amendment by nearly a century.<sup>209</sup> In addition, the court noted that Vermont jurisprudence does not use the "suspect" classification used by the Supreme Court of the United States.<sup>210</sup> Instead, the court required any restrictions on benefits affecting a particular group must be based on "and appropriate and overriding public interest."<sup>211</sup>

To begin its analysis, the court considered the statutory basis for preventing same-sex couples from receiving the benefits offered to opposite-sex married couples.<sup>212</sup> The standard applied was one of reasonable necessity in relation to the government's purpose.<sup>213</sup> After reviewing the case law, both in Vermont and other states, the court concluded that the distinction was not based on gender, but affected only those who wished to wed someone of the same gender.<sup>214</sup>

The government stated a purpose to further "the link between procreation and child

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<sup>207</sup> This careful move allowed the court to avoid directly considering marriage as both a civil and religious institution, and instead look at it as only a civil relationship with attached benefits. It also directly guided the court's outcome by setting the goal of provided the same benefits, regardless of whether homosexuals had access to the same formal union.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 870.

<sup>210</sup> *Id.* at 873.

<sup>211</sup> *Id.*, citing *State v. Ludlow Supermarkets, Inc.*, 448 A.2d 791 (1982).

<sup>212</sup> *Id.* at 878.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 880. The court found the distinction applied equally to both genders, and therefore, did not target a single gender. This shifted the focus from considering discrimination based on gender to discrimination based on sexual orientation.

rearing,” arguing same-sex couples could further separate the connection between procreation and raising children.<sup>215</sup> However, the court noted that excluding only same-sex couples from receiving benefits based on this purpose was under inclusive because it failed to exclude opposite-sex couples who marry for reasons other than child rearing.<sup>216</sup> Further, in referring to a great deal of research and study material, the court noted that many same-sex couples are involved in childrearing through a variety of avenues.<sup>217</sup> Therefore, the court concluded, if the state’s purpose was to legitimize children and provide for their safety, the statute excluded same-sex couples who were similarly situated to opposite-sex couples and treated same-sex differently.<sup>218</sup> Thus, the court reasoned this different treatment constituted a violation of the state’s constitutional guarantee of equal benefits. In fashioning a remedy, the court ordered the legislature to enact provisions to provide the same benefits to same-sex couples that are offered to opposite-sex couples.<sup>219</sup>

Following legalization of same-sex civil unions in Vermont, the Supreme Court of Massachusetts also found that preventing same-sex couples from entering into a state recognized marriage was in violation of the state constitution.<sup>220</sup> In 2006, the Supreme Court of New Jersey made a similar finding providing a basis for civil unions in New Jersey.<sup>221</sup> The Massachusetts decision was key in that, unlike in Vermont or New Jersey, the court in Massachusetts refused to

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<sup>215</sup> *Id.* at 881.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 881-82.

<sup>218</sup> *Id.* at 882.

<sup>219</sup> *Id.* at 886. Although the state argued a change in the marriage standards could result in a “destabilization” of the institution, the court specifically rejected this argument in the long term. The court granted only a ‘reasonable period of time to enable the legislature to consider and enact implementing legislation in an orderly and expeditious fashion.’ *See Id.* at 887.

<sup>220</sup> *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003). Here, the Supreme Court specifically required same-sex couples be granted full access to the institution of marriage.

<sup>221</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

allow civil unions for homosexuals as presumed equal with heterosexual marriages.<sup>222</sup> California also recognized same-sex marriages through court action in 2008, but that decision was later overruled by a constitutional amendment in the fall of 2008.<sup>223</sup>

The most recent state court to deal with the issue of same-sex marriage was the Supreme Court of Iowa, which recently provided for same-sex marriage in Iowa as a constitutional guarantee of equal protection under the state constitution. In the first state case to allow same-sex marriage in the Midwest, the court in *Varnum v. Brien* affirmed the decision of the lower district court and struck down a state statute limiting civil marriage to a union between a man and a woman as unconstitutional.<sup>224</sup> Writing for a unanimous court, Justice Cady carefully determined the court should apply a heightened standard of scrutiny, and in apply such a standard, found that the state had not presented a substantial state interest that was sufficiently related to the ban on same-sex marriages.

*Varnum* presented a challenge by twelve individuals from a variety of backgrounds who had sought marriage licenses for their same-sex unions that were prohibited by a 1998 statute limiting marriage to a union between a man and a women.<sup>225</sup> The court recognized the array of benefits sought by these couples, including a fundamental right to marry, protection for themselves and their children and the ability to demonstrate a public commitment to each other would be accessible to them if they were in opposite-sex marriages.<sup>226</sup> Additionally, the court

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<sup>222</sup> *Id.*

<sup>223</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). See also Jessica Garrison, Cara Mia DiMassa, and Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. Times, Nov. 5, 2008, available at <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story> (last visited March 28, 2009).

<sup>224</sup> *Varnum v. Brien*, No. 07-1499 (Iowa 2009).

<sup>225</sup> *Varnum*, at 8. See also Iowa Code § 595.2(1) (2009) which provides “[o]nly a marriage between a man and a female is valid.”

<sup>226</sup> *Varnum*, No. 07-1499 (Iowa 2009).



considered several harms which befell the same-sex couples due to their inability to enter a statutorily valid marriage, including the “inability to make many life and death decisions affecting their partner,” the “inability to share in their partners’ state-provided health insurance,” as well as the “personal and public affirmation that accompanies marriage.”<sup>227</sup>

In defense of the ban on same-sex marriages, the state provided five interests in support of the prohibition, each of which was considered at length by the court. First, the state provided the interest of promoting procreation.<sup>228</sup> Second, the state sought the interest of providing for child rearing by a mother and father within an opposite-sex marriage.<sup>229</sup> Third, the state explained promoting stability within opposite-sex marriages aided in raising and nurturing children.<sup>230</sup> Fourth, the state identified conservation of state resources as an interest.<sup>231</sup> Finally, the state sought to rely on the interest of protecting the traditional understanding of marriage.<sup>232</sup> As the first three state-specified interests rely on the understanding that opposite-sex couples are more suitable to nurture and raise children, the court initially noted the finding by many leading national organizations that work with children that “There is no scientific evidence that parenting effectiveness is related to parental sexual orientation.”<sup>233</sup>

Citing the United States Supreme Court decision in *Lawrence*, the court recognized its responsibility to protect the constitutional rights of individuals, “even when the rights have not

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<sup>227</sup> *Id.* at 9.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 10.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 11, citing Am. Psychological Ass’n Council of Representatives, Am. Psychological Ass’n, *Resoultion on Sexual Orientation, Parents, and Children* (2004), available in Ruthe Ullmann Paige, *Proceedings of the American Psychological Assocation for the Legislative Year 2004: Minutes of the Annual Meeting of the council of Representatives July 28 & 30, 2004, Honolulu, HI*, 60 *Am. Psychologist* 436-511 (July-August 2005), available at <http://www.apa.org/pi/lgbc/policy/parents.html>.

yet been broadly accepted.”<sup>234</sup> The court determined that the state statute limiting marriage to opposite-sex unions excluded a class of Iowans from civil marriage and such an exclusion must be reviewed under the principle of equal protection.<sup>235</sup> The court based this classification on sexual orientation, finding that the ban on same-sex marriage was specifically targeted against those possessing a sexual orientation other than heterosexuality.<sup>236</sup>

To determine the appropriate level of scrutiny, the court considered four traditional factors affecting the application of heightened standards for judicial review. First, the court found that gay and lesbian individuals have suffered a history of discrimination.<sup>237</sup> Second, the court found that sexual orientation bears no relation to an individual’s ability to contribute to society, refuting the state’s claim that the inability to procreate “naturally” showed an inability to contribute similar to heterosexual couples.<sup>238</sup> Third, the court found that sexual orientation represented an immutable and integral aspect of an individual’s identity, such that it would be unjust to discriminate based on the quality.<sup>239</sup> Finally, the court considered the factor of political powerlessness and found that same-sex couples have continued to lack the power to achieve access to civil marriage through legislative means, indicating that as a class of individuals, they continued to lack the political power needed to negate the justification for a heightened standard of scrutiny.<sup>240</sup> Based on these factors, the court determined that a heightened standard of review was justified, but because the court found the same-sex marriage ban could not pass intermediate review, it declined to determine whether classifications based on sexual orientation should be

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<sup>234</sup> *Id.* at 15.

<sup>235</sup> *Id.* at 18.

<sup>236</sup> *Id.* at 31.

<sup>237</sup> *Id.* at 37.

<sup>238</sup> *Id.* at 39.

<sup>239</sup> *Id.* at 44.

<sup>240</sup> *Id.* at 47.

subject to the highest standard, strict scrutiny.<sup>241</sup>

Applying intermediate scrutiny to the interests put forth by the state, the court found the state statute violated the equal protection promise of the Iowa constitution. First, the court rejected the claim of preserving a traditional understanding of marriage, pointing out that any such argument was based in circular reasoning creating a justification for a classification based on the classification itself.<sup>242</sup> Looking to research presented by the plaintiff and verified by the court itself, the court found that same-sex parents were equally suitable for child rearing and that any ban on same-sex marriage based in promoting an “optimal” environment for child rearing was both over and under inclusive, indicating that it lacked the substantial relationship to the government’s interest required by heightened scrutiny.<sup>243</sup> Additionally, the court easily rejected the claims that a ban on same-sex marriage promoted procreation or preserved the stability of opposite-sex relationships.<sup>244</sup> Finally, the court rejected the state’s interest in conservation of resources, showing that this motivation only ensured that same-sex couples were treated differently from opposite-sex couples with respect to marriage, a practice prohibited by the principle of equal protection.<sup>245</sup>

In conclusion, the Supreme Court of Iowa determined the promise of equal protection could not allow the ban on same-sex marriage to continue based on the state’s provided interests alone.<sup>246</sup> In its remedy, the court specifically considered both civil unions and marriage as possible courses of action, but it determined that any separation of same-sex couples into a different class of unions would simply continue the constitutional infirmity of treating similarly

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<sup>241</sup> *Id.* at 49.

<sup>242</sup> *Id.* at 53.

<sup>243</sup> *Id.* at 55-58.

<sup>244</sup> *Id.* at 59-60.

<sup>245</sup> *Id.* at 63.

<sup>246</sup> *Id.*

situated classes differently.<sup>247</sup> Thus, the Supreme Court of Iowa ordered the state statute limiting marriage to a male/female union struck as unconstitutional and specified that all remaining statutory language should be interpreted to allow gay and lesbian individuals “full access to the institution of civil marriage.”<sup>248</sup>

In addition to Iowa, two other states currently allow same-sex marriage (Connecticut and Massachusetts), while nine states, including California, offer same-sex couples wither civil unions or domestic partnerships.<sup>249</sup> Notably, Vermont, the first state to allow for same-sex civil unions by a court order in 2000, recently became the first state to authorize full access to marriage for same-sex couples through the act of the legislature.<sup>250</sup> Additionally, New Hampshire has legislation currently pending to allow same-sex marriage within its borders.<sup>251</sup> A further forty states have statutory bans on same-sex marriages, with twenty-seven of those states holding prohibitions in their state constitutions.<sup>252</sup>

As the debate over allowing homosexual marriage continues in courtrooms and legislatures across the United States, scholars continue to weigh in with arguments in support of same-sex marriage. In his book *Same Sex Marriage and the Constitution*, Even Gerstmann looked to the Constitution to find a fundamental right to marry under the Court’s twentieth

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<sup>247</sup> *Id.* at 68.

<sup>248</sup> *Id.*

<sup>249</sup> Christine Vestal, *Conn. 3rd State to Legalize Gay Marriage*, <http://www.stateline.org/live/details/story?contentId=347390> (last visited Feb. 24, 2009).

<sup>250</sup> Abby Goodnough, *Gay Rights Groups Celebrate Victory in Marriage Push*, *New York Times* (April 8, 2009).

<sup>251</sup> Stephen J. Hyland, *Vermont Marriage Bill Advances*, <http://www.stephenhyland.com/blawg/mt/mt-tb.cgi/218> (last visited March 28, 2009). *See also* Jennifer Vanasco, *Reconsidered! NH House Passes Gay Marriage*, <http://www.stephenhyland.com/blawg/mt/mt-tb.cgi/218> (last visited March 28, 2009).

<sup>252</sup> Vestal, *supra* note 249.

century precedent.<sup>253</sup> He rightly included marriage among the fundamental rights to travel between states,<sup>254</sup> to vote,<sup>255</sup> and to bear children.<sup>256</sup> Gerstmann rejected arguments against same-sex marriage by comparing it with exceptions made to heterosexual marriages.<sup>257</sup> He also points to several examples of ways in which allowing legalized same-sex unions could enhance the appreciation and benefits of marriage to society.<sup>258</sup>

In seeking to extend the fundamental right to marry to same-sex couples, Gerstmann noted two possible arguments of opposition.<sup>259</sup> First, if the right to marry was based on the ability of a heterosexual union to have children, then same-sex couples would not be appropriate candidates for that right.<sup>260</sup> Second, if marriage was dual-gendered by its own definition, then same-sex couples would be excluded by the very definition of the institution.<sup>261</sup> However, he

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<sup>253</sup> Gerstmann, *supra* note 85.

<sup>254</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>255</sup> *Kramer v. Union school District*, 395 U.S. 621 (1969).

<sup>256</sup> *Skinner*, 316 U.S. 535 (1942).

<sup>257</sup> Gerstmann, *supra* note 85, at 26. Gerstmann points out that many heterosexual couples either choose not to have children, or find themselves unable to do so based on age or other fertility reasons. He concludes that the ability to have children cannot be used to limit the definition of the procreative aspect of marriage. A related discussion by André Guindon focuses on same-sex unions as possessing their own type of fruitfulness. *See infra* discussion accompanying notes 298-303.

<sup>258</sup> Gerstmann, *supra* note 85, at 29-39. He points out that children raised by homosexual parents are often as well adjusted as those raised by heterosexual parents and that concerns over adoption need not be addressed directly, as adoption is always made on a case-by-case basis judging the fitness of the parents. Allowing same-sex marriage would only prevent the couple's sexual orientation from being used against them in determining eligibility. For additional reading regarding how denying same-sex couples access to adoption may disproportionately harm minority children, *see* Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 *Hastings Race & Poverty L. J.* 1 (2009).

<sup>259</sup> Gerstmann claims to make three points, but I have combined points one and two in this section as many of the same defenses apply to both. Gerstmann's original three points include: first, the right to marry is based on a procreative union; second, the ability to have children is at the core of marriage; and third, marriage is dual-gendered by definition.

<sup>260</sup> Gerstmann, *supra* note 85, at 105.

<sup>261</sup> Gerstmann, *supra* note 85, at 107.

pointed out that simply because some of the citizens United States, even if posses a majority, should find the concept of same-sex marriage offensive, the majority-rule has never been sufficient to prevent extension of constitutional protection to minority groups.<sup>262</sup>

Taking each point in turn, Gerstmann first looked at children as the *sine qua non* of marriage, reviewing the claim that the right to marry is based on the couple's ability to procreate through producing biological offspring.<sup>263</sup> He noted that not only have infertile couples been allowed to marry since time immemorial, most citizens would likely find the state's inquiry of fertility prior to marriage to be unreasonably intrusive.<sup>264</sup> He considered a long list of cases in which the Court provided extensive protections for marital privacy and looked to marriage as being more than simply based on procreation.<sup>265</sup> Gerstmann even pointed to *Wendel v. Wendel*, in which the court of New York determined that even the lack of reproductive organs does not present a bar to marriage.<sup>266</sup>

In considering whether marriage had traditionally been defined as a dual-gendered institution, Gerstmann recalled that modern laws allowing contraception and divorce both seem to go against a traditional understanding of marriage.<sup>267</sup> Additionally, he noted that courts have never been bound to dictionary definitions for the purposes of judicial review.<sup>268</sup> The many

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<sup>262</sup> Gerstmann, *supra* note 85, at 109. Gerstmann explained that ideas which are commonly accepted rarely need constitutional protection from the majority, since the majority itself would already be respectful of the institution.

<sup>263</sup> Gerstmann, *supra* note 85, at 93.

<sup>264</sup> Gerstmann, *supra* note 85, at 94.

<sup>265</sup> Gerstmann, *supra* note 85, at 86-92. For example, in *Moore v. East Cleveland*, 431 U.S. 494 (1977), the Court acknowledged a "private realm" of family life into which the state could not interfere. In *Zablocki*, 434 U.S. at 385, the court provided a long list of marital benefits beyond simply begetting children.

<sup>266</sup> Gerstmann, *supra* note 85, at 94. See also *Wendel v. Wendel*, 52 N.Y.S. 72 (N.Y. App. Div. 1898).

<sup>267</sup> Gerstmann, *supra* note 85, at 94.

<sup>268</sup> Gerstmann, *supra* note 85, at 97.

variations in the tradition of marriage, evolving from an ancient patriarchal institution of betrothal and property to the modern concept of equals sharing a loving commitment, present further support that a definitional defense of marriage cannot stand.<sup>269</sup> Gerstmann also recalled that claims of a divine definition were unsuccessfully used to support the miscegenation law struck down in *Loving*.<sup>270</sup>

In his argument for the fundamental right of marriage to be applied to same-sex unions, Gerstmann recognized that some will oppose the court's role in extending a fundamental right not explicitly listed in the Constitution.<sup>271</sup> He pointed to the *Federalist Papers* that explain the Framers understood that judges would be called upon to define the principles of liberty that the legislature could not be expected to recognize, due to its functioning in an imperfect world.<sup>272</sup> Gerstmann argued that allowing same-sex marriage for homosexual couples is the proper course for the courts, as civil unions and domestic partnerships represent a "separate-but-equal" standard that could not stand in congruence with the Court's precedent in *Brown*.<sup>273</sup>

The more traditional method for approaching same-sex unions was outlined by Mark Strasser in his text, *The Challenge of Same-Sex Marriage*.<sup>274</sup> Strasser pointed out that the approach used by the Supreme Court of Hawaii was an examination under the state constitution's

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<sup>269</sup> Gerstmann, *supra* note 85, at 21-22.

<sup>270</sup> Gerstmann, *supra* note 85, at 99. *See also Loving*, 388 U.S. at 3 (1967). Gerstmann also cites to statements by John Stuart Mill who stated that laws used to dominate over others always "appear natural to those who" are in power.

<sup>271</sup> Gerstmann, *supra* note 85, at 192-93.

<sup>272</sup> Gerstmann, *supra* note 85, at 192-93.

<sup>273</sup> Gerstmann, *supra* note 85, at 202. A complete treatment of the issues surrounding different legalized unions for heterosexual and homosexual couples will not be attempted here. This is a related topic that is certainly pertinent to the same-sex union debate, but it is one which is better left for a time of separate research and reflection.

<sup>274</sup> Strasser, *supra* note 10.

guarantee of equal protection.<sup>275</sup> He acknowledged, however, a distinction between the Hawaiian precedent of holding gender-based discrimination as a suspect class, while the federal precedent places it only as quasi-suspect.<sup>276</sup> An important part of Strasser's treatment recognized that state-level constitutions, including those which have amended their constitutions to prevent same-sex marriages, would be required to comply with any federal precedent treating the equal protection clause of the United States Constitution.<sup>277</sup>

An examination of United States case law has revealed that the courts acknowledge many special benefits to those in marriage.<sup>278</sup> These benefits are reasonable protected by the standards of equal protection as applied in several state courts. A federal review of the ban on same-sex unions may focus on the fundamental right to marry or the equal protection clause of the United States Constitution. However, any federal review could pre-empt not only federal statutes such as DOMA, but state statutes and state constitutional amendments as well.

#### A Holistic Approach to Human Sexuality

In many ways, the laws of a society reflect the accepted morality of the community. However, although our federal Constitution and Court precedent have shown that our laws are not intended to enforce a particularly morality upon our citizens, it is sometimes argued that our Judeo-Christian heritage should justify some allowance in regulating the morals of society. Therefore, this section will examine the aspects of Christian theology in order to uncover what areas of discussion surrounding homosexuality and same-sex unions might best be explored in

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<sup>275</sup> Strasser, *supra* note 10, at 31.

<sup>276</sup> Strasser, *supra* note 10, at 32-33.

<sup>277</sup> Strasser, *supra* note 10, at 39. This important argument provides a basis for federally re-examining state bans on same-sex unions. Federal precedent has already recognized that although a ban may apply equally to both sexes, the state must still provide a reasonable basis for its action. *See also McLaughlin v. Florida*, 379 U.S. 184, 188 (1964).

<sup>278</sup> *See supra* text accompanying notes 205-219.



the future to develop a better understanding of the human person as a loving, interpersonal being created in the divine image.

The *Catechism* notes that the Church's teachings on homosexuality are based in Sacred Scripture.<sup>279</sup> In analyzing how Scripture has influenced moral theology, however, John McNeill has noted that it is a truism that biblical language must be interpreted in its historical context and not merely used as a proof text for moral arguments.<sup>280</sup> In explaining that context, McNeill has pointed out that neither the Bible, nor the early Christian Church, had any understanding of homosexuality as an orientation comparable to our modern knowledge.<sup>281</sup> Based on this, McNeill has explained that biblical texts dealing with homosexuality are primarily targeted toward heterosexual individuals committing homosexual acts.<sup>282</sup>

McNeill began his text, *The Church and The Homosexual*, by considering the text of *Genesis 19:4-11*, commonly known as the story of Sodom and Gomorrah, which he believed to be the basis for later moralizing against homosexual behavior.<sup>283</sup> Drawing from previous research by D. Sherwin Bailey, McNeill demonstrated that the text need not be interpreted within a sexual context at all, but instead, may be seen as a condemnation of the inhospitality of the

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<sup>279</sup> CCC, *supra* note 9, at para. 2357.

<sup>280</sup> McNeill, *supra* note 59, at 36. This understanding is reflected in the *Dogmatic Constitution on Divine Revelation* (hereinafter *Divine Revelation*), para. 12, (Vatican II 1965). *Divine Revelation* encourages attention to literary genres and the intent which the writers hoped to convey. In addition, exegesis must consider the context of Scripture as a whole to derive the true meaning of sacred texts.

<sup>281</sup> McNeill, *supra* note 59, at 41 (citing D. Sherwin Bailey, *Homosexuality and the Western Christian Tradition*, 10 (Longmans 1955)).

<sup>282</sup> McNeill, *supra* note 59, at 41-42. McNeill identified homosexuality as a psychological condition for which the individual cannot be held responsible. Therefore, he argued the condition should be considered morally neutral. He distinguished between inverts and perverts, explaining that perverts are those individuals, either homosexual or heterosexual, who engage in practices against their sexual orientation. In contrast, inverts are simply defined as individuals whose sexual orientation is inverted toward members of the same-sex, such as those having a homosexual orientation.

<sup>283</sup> McNeill, *supra* note 59, at 42-50.

city.<sup>284</sup> He pointed to the reference in *Ezekiel 16:49-50*<sup>285</sup> to the sin of Sodom as pride as confirmation that the original understanding of the story was not associated with homosexual practices.<sup>286</sup>

In the New Testament, McNeill noted some concerns over the translation of several words, particularly in the Revised Standard Version, which blurs the line between homosexual persons and practices.<sup>287</sup> In looking to the key text of the New Testament dealing with homosexuality, *Romans 1:26-27*,<sup>288</sup> McNeill professed difficulty in establishing the actual intent Paul hoped to communicate by presenting homosexuality as *para physin* (translated “against nature”).<sup>289</sup> He referenced other contexts of the New Testament that show the use of “nature” as being associated with the cultural and social understanding of a society, such that Jews are “by

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<sup>284</sup> McNeill, *supra* note 59, at 43-44. McNeill demonstrated the Hebrew word, *yāhaà*, need not be limited to a interpretation of “engage in coitus,” but may simply be translated with the more basic understanding of “get acquainted with.” Additionally, he drew comparisons with other ancient stories that focus on visitors to a city being refused hospitality except by a poor family, who is in turn saved when the city was destroyed. Particularly, he cites Ovid’s account of Philemon and Baucis, found in *Metamorph*, viii. 625ff.

<sup>285</sup> *Ezekiel 16:49-50*: “And look at the guilt of your sister Sodom: she and her daughters were proud, sated with food, complacent in their prosperity, and they gave no help to the poor and needy. Rather, they became haughty and committed abominable crimes in my presence; then, as you have seen, I removed them.” New American Bible, 1991.

<sup>286</sup> McNeill, *supra* note 59, at 46. McNeill referenced other Old Testament passages, including, *Wisdom 19:13-14* and *Ecclesiasticus 16:8* and notes the first scriptural references to the sin of Sodom as associated with sexual acts seem to come in *2 Peter* and *Jude*.

<sup>287</sup> McNeill, *supra* note 59, at 50-53. McNeill’s concerns center on the lack of a pre-modern understanding of homosexual as a condition as opposed to ancient traditions involving male prostitution and concubines.

<sup>288</sup> *Romans 1:26-27*: “Therefore, God handed them over to degrading passions. Their females exchanged natural relations for unnatural, and the males likewise gave up natural relations with females and burned with lust for one another. Males did shameful things with males and thus received in their own persons the due penalty for their perversity.” New American Bible, 1991.

<sup>289</sup> McNeill, *supra* note 59, at 53. The same phrase, *para physin*, is used in *Romans 4:18*. McNeill states this passage indicates God himself acting *para physin* by bringing the Gentiles into the Jewish-Christian faith.

nature” circumcised.<sup>290</sup> He concluded that Paul’s use of *para physin* may actually apply to practices that were not common to the Jewish faith, and therefore, shows the underlying condemnation of homosexuality may simply have been based on its practice outside the normal Jewish experience.<sup>291</sup>

However, even if the traditional interpretation of Scripture on the morality of homosexuality can be called into question, the basis for marriage in the Christian tradition lies within a separate origin of the Old Testament: the story of Creation.<sup>292</sup> This passage of *Genesis* is used in the opening statements of the *Catechism* in identifying the divine institution of the sacrament of marriage.<sup>293</sup> However, those familiar with *Genesis* know there are two accounts of creation in the Old Testament; the first account, *Genesis 1:1-2:4*, from the Priestly tradition, and the second, *Genesis 2:4-25*, from the Yahwist tradition.<sup>294</sup> The Priestly tradition focuses on the creation of male and female and the call to procreation, “Be fertile and multiply; fill the earth and subdue it.”<sup>295</sup> However, the Yahwist tradition, which McNeill dated as approximately five hundred years older, seems to focus on the union of the couple in mutual love and fulfillment.<sup>296</sup> However, even if theology were to place a greater focus on the unitive aspect of a union of two

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<sup>290</sup> McNeill, *supra* note 59, at 54. See *Galatians 2:15*: “We, who are Jews by nature and not sinners from among the Gentiles...”

<sup>291</sup> McNeill, *supra* note 59, at 55-56.

<sup>292</sup> *Genesis 1:26-27*: “Then God said: ‘Let us make man in our image, after our likeness. Let them have dominion over the fish of the sea, the birds of the air, and the cattle, and over all the wild animals and all the creatures that crawl on the ground.’ God created man in his image; in the divine image he created him; male and female he created them.” New American Bible, 1991.

<sup>293</sup> CCC, *supra* note 9, para. 1602.

<sup>294</sup> Lawrence Boadt, *Reading the Old Testament*, 114-119 (Paulist Press 1984). Boadt explained that the Priestly writer affirmed several basic aspects of Israel’s faith, including the calling of humanity to share in the divine gift of pro-creating life. In the Yahwist story, Boadt explained that God builds up creation around the need of the first human for companions.

<sup>295</sup> McNeill, *supra* note 59, at 60. See *Genesis 1:28*.

<sup>296</sup> McNeill, *supra* note 59, at 60-61. McNeill complained that many moralists neglect attention to the second story of creation, and therefore, place an undue focus solely on procreation as the goal of man and woman.

persons, an aspect of fruitfulness would have to be maintained to continue the long-standing tradition of marital love as both unitive and procreative.

André Guindon attempted to present just such a theological model in his text, *The Sexual Creators*.<sup>297</sup> Guindon based his approach to sexual morality in the understanding of the human being as both a physical and spiritual being, but he sought to move beyond a dualism approach, in favor of a more integrated understanding of the person.<sup>298</sup> He used the terms sensuality, referring to the body as the origin of erotic actions, and tenderness, as linked with the origin of love, attention and other emotions.<sup>299</sup> Morality, then, should focus on how best the human person may express their tenderness through sensual actions.<sup>300</sup>

Based on this foundation, Guindon extended his model to show that love can be fruitful through sexual intimacy without limiting that fruit to only recognizing the production of biological offspring. He explained that creative love arises from the collaboration of the sensual and tender qualities when they focus on the self-fulfillment of both partners.<sup>301</sup> Human sexuality, therefore, reveals the fruitful creative nature of God through the experience of truly being loved

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<sup>297</sup> Guindon, *supra* note 142.

<sup>298</sup> Guindon, *supra* note 142, at 22. Guindon explained that sexuality should be viewed as both physical and spiritual, in opposition to what he sees as a traditionally functional approach. He referred to Blaise Pascal's claim that human beings would do "no better acting bestially than ... acting angelically." As such, our sexual morality should encompass both physical and spiritual values.

<sup>299</sup> Guindon, *supra* note 142, at 23-24. Guindon recognized that different schools of thought have at time favored one aspect of the sensual/tender dynamic, nearly to the exclusion of the other. For instance, hedonistic activity may appreciate only the sensual quality of the person, while "purity ethics" seem to deny the sensual qualities of love. He claimed these approaches are unbalanced, and have been traditionally rejected by the *sensus fidelium*.

<sup>300</sup> Guindon, *supra* note 142, at 24.

<sup>301</sup> Guindon, *supra* note 142, at 30-32. Through interpersonal relationships, Guindon showed that true love for another is not based in considering what the other may provide, but in loving directed toward the good of the other. Failing to love in a way that is self-giving, is, for Christians, inherently sinful.

by another individual.<sup>302</sup> Guindon believed the sexual act is fruitful to the extent that it liberates each within each spouse the creative nature instilled within his or her heart.<sup>303</sup>

In applying his model to homosexual love, Guindon began by looking to biblical references for same-sex love.<sup>304</sup> He referenced examples such as Ruth and Naomi<sup>305</sup> and David and Jonathan.<sup>306</sup> Unlike heterosexual relationships which may be motivated for a host of social reasons, not the least of which may be childbearing, Guindon believed that homosexual relationships would not suffer from outside pressures as such, as therefore would be based solely on mutual attraction.<sup>307</sup> Thus, Guindon taught that homosexual love was clearly fruitful when it is authentic and self-giving, similar to heterosexual love.<sup>308</sup>

The Second Vatican Council noted that God continually reveals the divine presence through created realities, citing *Romans 1:19-20*.<sup>309</sup> Therefore, through the lens of the modern understanding and occurrence of the homosexual orientation, it is prudent to ask what such individuals may reveal about the divine nature. Ronald Modras explains the existence of homosexuality as a result of original sin, stating that “God could not, would not and did not

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<sup>302</sup> Guindon, *supra* note 142, at 32. Guindon quoted Francis Mugavero, Bishop of Brooklyn, as saying, “Sexuality is that aspect of personhood which makes us capable of entering into loving relationships with others.”

<sup>303</sup> Guindon, *supra* note 142, at 97.

<sup>304</sup> Guindon, *supra* note 142, at 164.

<sup>305</sup> See *Ruth 4:15*

<sup>306</sup> See *1 Samuel 18:1*: “Jonathan had become as fond of David as if his life depended on him; he loved him as he loved himself.” See also *1 Samuel 18:3*: “Jonathan had become as fond of David as if his life depended on him; he loved him as he loved himself.”

<sup>307</sup> Guindon, *supra* note 142, at 165.

<sup>308</sup> Guindon, *supra* note 142, at 175. To support this belief, Guindon pointed to several studies that indicate homosexual couples typically score at similar “happiness” levels to similarly situated heterosexual couples. Guindon offered the caveat that only love preserved in fidelity to a committed relationship can be truly humanizing and receive the benefits of fruitful love.

<sup>309</sup> *Divine Revelation*, *supra* note 280, at para. 3.

create homosexuals as such.”<sup>310</sup> However, together, Guindon and McNeill present a more positive explanation for the presence of homosexuality within creation which focuses on what they may add to a predominately heterosexual community.

McNeill began his analysis of a positive approach to homosexuality by asking the teleological question regarding the reason for the existence of homosexuality.<sup>311</sup> For McNeill, homosexuals make a positive contribution to the human community by breaking down male/female gender stereotypes, giving homosexuals and heterosexuals alike greater freedom in expressing their own individuality without being bound by societal pre-conceptions.<sup>312</sup> As examples, he pointed to the numbers of homosexual individuals who function in professional roles that are traditionally dominated by members of the opposite sex, particularly those which are typically more empathetic, such as nursing or teaching.<sup>313</sup>

Guindon brought out points similar to McNeill, but he focused his perspective on the non-violent nature of homosexual relationships.<sup>314</sup> He based this in the understanding that homosexual partners are less likely to take on traditional family roles and more likely to share in equality-based partnerships.<sup>315</sup> Particularly, he focused on the unique ability of homosexuals to challenge the aggressive aspects of the stereotypical partnership models, recalling that the

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<sup>310</sup> Ronald Modras, “Pope John Paul II’s Theology of the Body,” in *The Vatican and Homosexuality*, 119-126 (J. Gramick & P. Furey eds., 1988).

<sup>311</sup> McNeill, *supra* note 59, at 130-31. He focused on the question of “Why do homosexuals exist?” placing it higher in importance than determining “Where did they come from?”

<sup>312</sup> McNeill, *supra* note 59, at 136. Particularly, McNeill noted that the nature of the homosexual relationship is based on equality of individuals, rather than any traditional notions of male/female roles in relationships. By living outside of these boundaries, homosexuals contribute to the human community by providing examples of individuals living in true individuality.

<sup>313</sup> McNeill, *supra* note 59, at 142. For instance, McNeill cited homosexual men who participate in the arts, such as dancing, painting or decorating, which bring to the male community a greater appreciation of aesthetic values. Likewise, homosexual women could more easily confront patristic structures in a way that helps to liberate all women.

<sup>314</sup> Guindon, *supra* note 142, at 172-73.

<sup>315</sup> Guindon, *supra* note 142, at 172.

Christian ethic for interrelationship must always be an act of love.<sup>316</sup> Therefore, just as McNeill pointed out homosexual individuals breaking down gender-roles in the professional world, Guindon looked to the ways that homosexuals can break down gender-roles within the dynamics of interpersonal relationships.

As both McNeill and Guindon have demonstrated, serious questions surround the Church's current teaching on homosexuality as an intrinsic moral evil, and a greater dialogue treating these issues could provide a basis for greater acceptance of homosexual behavior in Christian theology. Although the CDF claims that homosexual unions bear "absolutely" no similarity to heterosexual marriage,<sup>317</sup> this statement is flawed in its refusal to acknowledge any similarities between the two types of interpersonal unions. Guindon showed that interpersonal relationships, regardless of the gender of the parties involved, can possess a fruitful nature without limiting that fruit to the production of biological offspring.<sup>318</sup> Looking beyond the biological aspect as a defining aspect of interpersonal love, McNeill presented a challenging model for showing homosexuals as a sign and presence of the diversity of the divine spirit in creation.<sup>319</sup> Theology must continue to develop in understanding the divine nature, and in doing so, should be challenged to embrace a dialogue on the presence and symbolism of homosexuality in the world.

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<sup>316</sup> Guindon, *supra* note 142, at 174.

<sup>317</sup> See *supra* text accompanying note 180.

<sup>318</sup> See *supra* text accompanying notes 302-304.

<sup>319</sup> See *supra* text accompanying notes 312-314.

## **Part IV**

### *Personal Reflections of Law and Theology*

A short time ago, I opposed legalizing same-sex marriage and supported the Church's position that homosexuality was an intrinsic moral evil. When the state of Missouri proposed an amendment to change the state constitution to limit marriage to a man and a woman, I voted in favor of it. And when I encountered an individual, active in Church ministry, with a homosexual orientation, I secretly wished someone "more qualified" would take his job. I have since completed three years of law school and spent a great deal of time in active ministry on a college campus. Today I find, governed by my experience as a student of the law and of ministry, that I must, in good conscience, question the validity of both the legal opposition to access to the marital union for my homosexual brothers and sisters and the Church's teaching that they are intrinsically disordered.

In the United States, our citizens are guaranteed an opportunity for self-determination through the constitutional promise of liberty. Our courts have developed an understanding of marriage as a fundamental right and have sought to ensure we do not discriminate such rights based on one's gender. Legal marriage provides a plethora of benefits to those permitted to participate in it, resulting in more stable unions that provide a basis for the pursuits of life, liberty and happiness. To my mind, denying same-sex couples the right to a legal marriage violates these basic principles of our society.

The benefits that the state provides to couples that are married are benefits to which same-sex couples can also find support and enhancement for their relationships. The stability of the home is a state interest, but that stability does not depend upon the sex of the two individuals in charge of the household. Health care rights, tax and retirement benefits and legal recognition all foster the life-long stability and enjoyment that marriage provides. It makes little sense to



deny these benefits to individuals who possess a homosexual orientation, particularly when denying them has no benefit to the remainder of society.

In the Church, any change will understandably come at a slower pace. Since Christianity's basic tenet must always be an approach of love, I call upon the Catholic Church to review her statements regarding the presence of love within same-sex unions. It may be that even after closer reflection, greater minds than mine determine that the sacrament of marriage is ontologically ordered toward a male/female union. If that is the case, then so be it. At the least, perhaps it would be appropriate for the Church to offer a blessing over the committed love between same-sex couples, a commitment that my experience indicates can also be a sign of fidelity and mutual self-giving similar to that of marriage. And if a millennia from now, the leaders of the Christian Church choose to elevate that blessing to a sacrament, as was done with marriage in the twelfth century, then I would accept it as nothing less than the guidance of the Holy Spirit.

St. Paul encouraged the early Christians of Philippi to test everything in love, and retain what is good.<sup>320</sup> It is my hope that in the years ahead, the Church will do exactly that. My experiences working among homosexuals who are active in their Catholic faith has shown them to be men and women enlivened by the Holy Spirit. They do not exist as intrinsically disordered human beings, but as vessels and instruments of God's divine grace. I pray that others within the Church, particularly those responsible for directing her teaching, will take the time to share in the experiences and faith of those who were created with a homosexual orientation. If they do, I have no doubt they will discover that all who live in love, truly do live in God.

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<sup>320</sup> Phil. 1:9-10.

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