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## SAME-SEX MARRIAGE AND THE ESTABLISHMENT CLAUSE

GEOFFREY R. STONE\*

I want to talk about same-sex marriage. Professor Nussbaum addresses this topic in Chapter 8 of her book, and it is, in my view, relevant in an interesting and important way.<sup>1</sup>

It is inevitable that the Supreme Court will hold the ban on same-sex marriage unconstitutional. We are at a moment in history that is analogous to the period between 1948, when Justice Roger Traynor, speaking for the California Supreme Court, held a state law against miscegenation unconstitutional,<sup>2</sup> and 1967, when the U.S. Supreme Court finally embraced that view for the nation as a whole.<sup>3</sup> Morally, legally, historically, and perhaps most importantly, constitutionally, it is right, good, and inevitable that the Supreme Court will similarly invalidate the ban on same-sex marriage.

The Court could take several paths to this result. The Court might build, for example, on the well-settled precedent that marriage is a fundamental personal right and that under the Due Process Clause laws that deny people the right to marry must be subjected to serious constitutional scrutiny.<sup>4</sup> Or, the Court might build on the Equal Protection doctrine of suspect classifications, and hold that laws that discriminate on the basis of sexual orientation, like those that discriminate on the basis of race, gender, national origin, religion, and similar considerations must be subjected to serious constitutional scrutiny. Or, the Court might combine these two themes, as it has in cases like *Plyler v. Doe*,<sup>5</sup> and hold that the ban on same-sex marriage, like other laws implicating both fundamental personal interests and suspect or quasi-suspect classifications, must be subjected to serious constitutional scrutiny.

Under any of these approaches, all of which would be quite sensible, the Court eventually will hold the ban on same-sex marriage unconstitu-

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1. See MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008).

2. See *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948) (holding that miscegenation laws violated equal protection and discriminated between racial groups).

3. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that marriage restrictions based on race are unconstitutional).

4. See, e.g., *id.* at 12 (holding that restricting right to marry based on racial classifications violates Equal Protection Clause and deprives citizens of liberty without due process); *Skinner v. Oklahoma*, 400 U.S. 535, 541 (1942) (holding that compulsory sterilization is deprivation of basic liberty); *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923) (explaining that liberty includes more than just freedom from bodily restraint).

5. 457 U.S. 202 (1982).

tional, because there is today no credible justification for that ban that could withstand serious constitutional scrutiny. Once the analysis moves beyond the realm of rational basis review, the ban on same-sex marriage must fall. But I want to suggest that the ban on same-sex marriage is also constitutionally suspect under the Religion Clauses themselves.

As illustrated by Professor Nussbaum, the Religion Clauses usually are invoked in two types of situations. First, they may be invoked when the government directly or indirectly restricts the freedom of individuals to practice their faith. This sort of claim involves the Free Exercise Clause, and is illustrated, for example, by a law excluding Muslims from serving as jurors or prohibiting animal sacrifice by those who engage in such behavior as a part of their religious practice. Second, the Religion Clauses may be invoked when the government directly or indirectly supports or promotes religious expression or religious activity. This claim involves the Establishment Clause, and is illustrated, for example, by a law using tax money to support religious proselytizing, or by a town's display of a cross on city hall.

I want to explore a third possible claim under the Religion Clauses, not much addressed in the cases. This claim, which draws on the Establishment Clause, posits that it is unconstitutional for the government to enact a law that requires individuals to lead their lives in accord with the religious beliefs of others. For example, suppose a predominantly Jewish community enacts a law forbidding any person to sell or consume non-kosher food or requiring all males to be circumcised, stating expressly in the law that such rules are demanded by "the tenets of orthodox Judaism." Or, suppose a predominantly Catholic community enacts a law forbidding masturbation, stating expressly in the law that such conduct is prohibited because "masturbation is a sin and is contrary to the word of God." Can such laws be squared with the First Amendment?

Note that these hypothetical laws do not "establish" a religion in the traditional sense of a law taxing individuals to pay for religious proselytizing or erecting a cross on city hall, because they neither promote religious expression nor forbid religious practice. Eating non-kosher food, not being circumcised, and engaging in masturbation are not commanded by anyone's religion. What makes these hypothetical laws problematic is different from what usually makes laws problematic under the Religion Clauses. Rather than promote or forbid religious expression, these laws conscript the authority of the state to compel individuals to conform their behavior to the dictates of a particular religious belief, whether or not the individuals share that belief.

But do such laws violate the Establishment Clause? In its 1961 decision in *McGowan v. Maryland*,<sup>6</sup> the Supreme Court made clear that the First Amendment prohibits legislation that has a predominantly religious purpose. As the Court explained, a law violates the Establishment Clause

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6. 366 U.S. 420 (1961).

if its purpose, “evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State’s coercive power to aid religion.”<sup>7</sup> Although the First Amendment vigorously protects the right of religious groups to try to persuade others to accept their beliefs, it precludes them from conscripting the power of the state to compel others to act in accord with their beliefs. Thus, to the extent my hypothetical laws expressly state that their purpose is to legally enforce religious doctrine, it would be difficult to imagine the Court upholding them.

The problem, however, is that religious groups know it would be unconstitutional for them to openly enact laws expressly for the purpose of imposing their religious beliefs on others. Thus, like other political actors who want to enact laws for constitutionally impermissible purposes—for example, to disadvantage individuals because of their race, gender, religion, or political views—they will usually attempt to mask their true motives under cover of purportedly legitimate purposes. In fact, we have seen this sort of behavior throughout our history.

One notable example occurred at the turn of the nineteenth century during the Second Great Awakening. The United States was engulfed in an era of intense evangelical enthusiasm. Millions of evangelicals came to believe that only Christianity could save America from sin and desolation.<sup>8</sup> From roughly 1800 through the 1840s, evangelical Christians politicked aggressively for laws to protect the Sabbath, for blasphemy prosecutions, and for the criminal prohibition of sexually-oriented speech.<sup>9</sup> Although some evangelicals were open about their desire to use the law to impose Christian doctrine, such as those who sought to amend the Constitution “to recognize the authority of Christ,”<sup>10</sup> most offered non-religious justifications for their positions. Laws against Sunday mail delivery were said to be necessary in order to give people a day of rest, which happened to be on the Christian Sabbath. Blasphemy prosecutions of those who derided Christianity, but not other religions, were said to be necessary to prevent Christians from attacking freethinkers who insulted their religion. And laws banning sexually-oriented speech were said to be necessary to prevent the grievous illnesses and deaths that would otherwise result from the ravages of masturbation. In truth, these were all just efforts to sacralize the nation.<sup>11</sup>

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7. See *id.* at 452-53 (explaining that state power cannot be used to advance religion).

8. See JOHN G. WEST, JR., *THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION* 119-20 (1996) (describing evangelical belief that society would fall into depravity without moral guidance from Christianity).

9. See *id.* at 106-17 (discussing voluntary religious associations focusing on moral reform in early 1800s).

10. See *id.* at 207-08, 210 (describing moral reform by evangelical reformers).

11. See ROBERT H. ABZUG, *COSMOS CRUMBLING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION* 3-8 (1994) (describing religious reformer’s motivations and visions for sacralizing America and their new religious vocabulary for under-

The challenge of reconciling the often competing values of democracy, religious liberty, and the separation of church and state was most recently illustrated by the controversy over California's Proposition 8, which overturned a California Supreme Court decision holding unconstitutional the state's ban on same-sex marriage.<sup>12</sup> This decision, in my view, was the moral, legal, historical, and constitutional descendant of the 1947 decision of the California Supreme Court that held miscegenation unconstitutional.<sup>13</sup> Presumably, Proposition 8 would violate the Establishment Clause if it had expressly stated that same-sex marriage is banned because "homosexuality is sinful and same-sex marriage is not sanctioned by God." But, of course, Proposition 8 said no such thing; that underlying rationale was left unspoken.<sup>14</sup>

Similar to nineteenth-century disputes over Sunday mail delivery and closing laws, blasphemy prosecutions, and the ban on sexually-oriented expression, the proponents of Proposition 8 invoked a variety of non-religious justifications for the prohibition of same-sex marriage. But despite those invocations of tradition, morality, and family values, it is hard to ignore that the only honest explanation for Proposition 8 was religion. The extraordinary efforts undertaken by some religious groups to promote Proposition 8, in addition to the striking voting patterns revealed in the exit polls, evidence the religious rationale driving the same-sex marriage ban. Proposition 8 was enacted by a razor-thin vote of 52% to 48%.<sup>15</sup> Those identifying themselves as evangelicals, however, supported Proposition 8 by a margin of 81% to 19%, and those who claim to attend church

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standing America); *see also* West, *supra* note 8, at 207-10 (noting that while most evangelical reformers limited their goals to moral issues, some reformers actually wanted government recognition of Christian authority).

12. *See In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008) (finding California law limiting marriage to man and woman unconstitutional).

13. *See Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948) (holding that miscegenation laws were unconstitutional).

14. *See CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE 128* (2008), available at [http://traynor.uchastings.edu/ballot\\_pdf/2008g.pdf](http://traynor.uchastings.edu/ballot_pdf/2008g.pdf) (providing information and analysis of ballot measures).

#### PROPOSITION 8

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution. This initiative measure expressly amends the California Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in italic type to indicate that they are new.

##### SECTION 1. Title

This measure shall be known and may be cited as the "California Marriage Protection Act."

SECTION 2. Section 7.5 is added to Article I of the California Constitution, to read: SEC. 7.5. Only marriage between a man and a woman is valid or recognized in California.

*Id.* at 128.

15. *See DEBRA BOWEN, STATEMENT OF VOTE, NOVEMBER 4, 2008, GENERAL ELECTION 7, 13* (2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf) (certifying election results for California).

weekly supported Proposition 8 by a vote of 84% to 16%.<sup>16</sup> Non-Christians, on the other hand, opposed Proposition 8 by a margin 85% to 15%, and those who do not attend church regularly opposed Proposition 8 by a vote of 83% to 17%.<sup>17</sup> Quite strikingly, the voting patterns reveal that Proposition 8 was, in large part and in practical effect, a successful effort by persons holding a specific religious belief to use the authority of the law to impose their belief on their fellow citizens.<sup>18</sup>

In my view, this represents a serious threat to basic tenets of a free society that is committed to the separation of church and state. But from a strictly legal perspective, it is exceedingly difficult for courts to enforce the First Amendment in the context of laws like Proposition 8. When a law does not directly restrict religious activity or expressly endorse or promote religious expression, it is awkward at best for courts to sort out the “real” purpose of the law. As a consequence, courts are reluctant to invalidate laws on the ground that they surreptitiously enact a particular religious faith.

This reluctance was evident in the Supreme Court’s most direct encounter with this sort of Establishment Clause claim. In *McGowan v. Maryland*, the Court considered the constitutionality of a state’s Sunday Closing Law which, with a few exceptions, proscribed all labor, business, and other commercial activities on Sunday.<sup>19</sup> Although conceding that the law was originally “motivated by religious forces,” the Court nonetheless argued that “secular justifications [had more recently been] advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week’s work to come.”<sup>20</sup> Thus, the “proponents of Sunday closing legislation,” the Court noted, “are no longer exclusively representatives of religious interests.”<sup>21</sup>

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16. See CNN, CALIFORNIA GENERAL EXIT POLL 6 (2008), [http://media.sacbee.com/smedia/2008/11/05/18/prop8.source.prod\\_affiliate.4.pdf](http://media.sacbee.com/smedia/2008/11/05/18/prop8.source.prod_affiliate.4.pdf) (last visited April 15, 2009) (identifying trends in voting for or against Proposition 8).

17. See *id.* (noting religious affiliation of voters in exit polling).

18. No thoughtful person takes seriously the claim that the hostility to same-sex sex and same-sex marriage is not rooted in Christian religious belief. A few days after the Scarpa Conference, I was interested to see an op-ed in the *New York Times*, written by two scholars who “take very different positions of gay marriage,” but who thought it uncontroversial that “many Americans of faith and many religious organizations have strong objections to same-sex unions” and that as a matter of religious belief they object to being “forced to support or facilitate gay marriage.” See David Blankenhorn & Jonathan Rauch, Op-Ed., *A Reconciliation of Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11. I should note that, because I respect the principle underlying the Free Exercise Clause, I agree with them that religious organizations whose faith requires them to resist same-sex marriage should not be compelled by law to recognize such unions.

19. 366 U.S. 420, 422-24 (1961) (describing laws at issue).

20. See *id.* at 431, 434 (reviewing purposes for Sunday closing laws).

21. See *id.* at 431, 434-35 (discussing whether Sunday closing laws establish religion).

The Court emphasized that the Establishment Clause does not ban the “regulation of conduct” merely because the regulation “happens to coincide . . . with the tenets” of the dominant religion, for “in many instances” the “general welfare . . . demands such regulation” without regard to “religious considerations.”<sup>22</sup> As an example, the Court pointed out that murder can be made unlawful “for temporal purposes,” even though the prohibition accords “with the dictates of the Judeo-Christian religions.”<sup>23</sup> In the context of the Sunday closing law, the Court reasoned that because it would be “unrealistic” for the state “to choose a common day of rest other than that which most persons would select,” there was a sufficiently secular basis for the law to withstand constitutional challenge.<sup>24</sup> In closing, however, the Court emphasized that a Sunday closing law, or any other legislation, would violate the Establishment Clause if its purpose was “to use the State’s coercive power to aid religion.”<sup>25</sup>

Thus, *McGowan* evidenced both the principle that a law intended “to use the State’s coercive power to aid religion” is unconstitutional and the difficulty of applying that principle when secular purposes are advanced in defense of the law.<sup>26</sup> The problem of ferreting out impermissible motive is common in constitutional law. It occurs not only in the context of the Establishment Clause, but also in dealing with laws that might have been motivated by impermissible racial, religious, political, or gender prejudice. Addressing that challenge is beyond the scope of this essay, but I want to make a related observation.

That courts may have difficulty ascertaining and candidly naming a constitutionally impermissible purpose does not mean that that purpose is legitimate. We know that as responsible citizens we should not support laws because they advance our discriminatory biases about race, religion, politics, or gender, even if we could succeed in doing so. We know that as good and moral citizens we should strive to be tolerant, self-critical, and introspective about our own values, beliefs, and motives, and to strive faithfully to honor our highest national aspirations.

The separation of church and state is one of those aspirations. Regardless of whether courts can effectively intervene in this context, it is just as un-American for us to violate the separation of church and state by insidiously using the power of the state to impose our religious beliefs on others as it is for us to insidiously use the power of the state to implement our discriminatory prejudices about race, religion, politics, or gender.

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22. See *id.* at 442 (stating that regulations are not invalid merely because they parallel religious tenets).

23. See *id.* (discussing murder as example of law that agrees with Christian morality).

24. See *id.* at 452 (rejecting other ways states can achieve goal of a day of rest).

25. See *id.* at 452-53 (finding a statute that used coercive power of state to aid religion unconstitutional).

26. See *id.* at 453 (holding that even though Sunday closing law legitimized Sunday as day of rest, non-religious purposes made law constitutional).

This is the fundamental point that the advocates of Proposition 8 and of similar prohibitions of same-sex marriage fail to comprehend. As citizens, opponents of same-sex marriage are free to support laws because they honestly believe those laws serve constitutionally legitimate ends, just as they are free to urge others to embrace and abide by their religious beliefs. But what they are not free to do—if they want to be good American citizens—is to use the law disingenuously to impose their religious beliefs on others.

It is, to be sure, difficult for individuals to separate the difference between sound public policy and public morality, on the one hand, and their personal religious beliefs, on the other. But just as we would expect a predominantly Muslim community in the United States to strive to know the difference between their religious beliefs about alcohol and legitimate concerns about public policy and public morality, so too should we expect such self-scrutiny and respect for the law by predominantly Christian communities. Conscience, after all, is not just a liberty, but a responsibility.



