Brigham Young University Education and Law Journal

Volume 2011
Number 2 *Symposium: The Impact of Same-Sex Marriage on Education*

Article 16

Fall 3-2-2011

The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education

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THE HEART OF THE CONSTITUTIONAL ENTERPRISE: AFFIRMING EQUALITY AND FREEDOM IN PUBLIC EDUCATION

*William E. Thro**

I. INTRODUCTION

> Once you start dividing the community from whom the Constitution works into "goodies" and "badies," then I think you wander away from the heart of the constitutional enterprise.
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> —Justice Albie Sachs, Constitutional Court of South Africa[1]

Justice Sachs wrote those words to describe his approach when writing the opinion establishing a constitutional right to same-sex marriage in South Africa.[2] He did not want an opinion that regarded gay rights advocates as "a manipulative lobby group" or their religious opponents as "a bunch of benighted bigots."[3] Rather, he wanted both sides to feel that their "convictions, values, and perspectives are being taken seriously and treated thoughtfully and with respect."[4] While South Africa's Constitution mandated a particular result, it was imperative that no individual feel isolated from the constitutional community. Affirmation of one constitutional value—no sexual orientation discrimination—could not eviscerate another constitutional value—freedom of religion.[5]

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1. ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW 239 (2009).
2. *See Minister of Home Affairs v. Fourie* 2006 (9) SA 524 (CC).
3. SACHS, *supra* note 1, at 239.
4. *Id.*
5. *Id.* at 240.

In other words, the opinion of the Court must affirm both equality and freedom.

Although the South African Constitution[6] is fundamentally different from the United States Constitution and although the South African Constitutional Court's analytical approach is substantially different from that of the Supreme Court,[7] Justice Sachs' wisdom is equally applicable to America.[8] Constitutional law is not a zero sum game. The affirmation of one constitutional value does not require the subordination or denial of another constitutional value. It is possible to have a strong national government and maintain the sovereignty of the states.[9] It is possible to have a vigorous and energetic president while respecting the clear prerogatives of both Congress and the judiciary.[10] Most significantly, it is possible to have equality without sacrificing freedom. Indeed, ensuring the affirmation of both equality and freedom is the "heart of the constitutional enterprise."[11]

As our nation confronts demands for state recognition of same-sex marriage,[12] our jurists and policymakers must heed

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6. When the white minority in South Africa voluntarily surrendered its control of the government to black majority in the early 1990's, all segments of the multi-racial society negotiated a Constitution. For a discussion of those negotiations, *see* I.J. RAUTENBACH & E.F.J. MALHERBIE, CONSTITUTIONAL LAW 17–21 (4th ed. 2004); ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW: ANALYSIS & CASES 1–11 (2002).

7. *See* MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 8–10 (2009) (describing how the South African Constitutional Court's approach to constitutional interpretation differs from that of the Supreme Court of the United States).

8. This does not mean that the Supreme Court should adopt or even rely on the law of another nation. Rather, it simply means that Justice Sachs offers a wise insight. As explained elsewhere, the American Constitution and our legal system are unique. *See* William E. Thro, *American Exceptionalism: Some Thoughts on* Sanchez-Llamas v. Oregon, 11 TEX. REV. L. & POL. 219 (2007).

9. The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). This division of sovereignty between the states and the national government "is a defining feature of our nation's constitutional blueprint." Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002).

10. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155–57 (2010).

11. William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 EDUC. L. REP. 473, 473 (2010).

12. While it is dangerous to assume that the present direction of public opinion will continue, it seems likely that many states eventually will have some sort of state recognition of same-sex unions, but this recognition might not include the term "marriage." It seems certain that many people of faith—whether they are Christian,

Justice Sachs' warning—do not divide the constitutional community.[13] Regardless of whether government recognizes same-sex relationships and regardless of whether government describes that recognition as "marriage,"[14] the state must treat gays and lesbians as full and equal members of society.[15] Our Constitution does not tolerate classes among its citizens.[16] Statutes that criminalize certain sexual acts[17] must apply with equal force to both homosexuals and heterosexuals.[18] Similarly, even if every state eventually recognizes same-sex marriage, government may not prescribe what is orthodox in politics[19] or punish religious belief.[20] Government must not persecute people of faith[21] or undermine private charities.[22] The

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Jew, or Muslim—will continue to reject the idea that a same-sex union is equivalent to their faith's definition of marriage.

13. SACHS, *supra* note 1, at 239.

14. Government may choose to defuse some of the objections to same-sex marriage by recognizing same-sex "civil unions" but reserving "marriage" for opposite sex couples. Assuming that the requirements for entering or leaving a civil union are identical to those for marriage and assuming that the legal benefits are identical, the only difference between marriage and civil unions would be semantic and symbolic. In many contexts, particularly religious contexts, issues of semantics and symbols are enormously important.

15. Romer v. Evans, 517 U.S. 620, 634–36 (1996).

16. *Id.* at 623. *See also* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

17. At first blush, Lawrence v. Texas, 539 U.S. 558 (2003), appears to preclude government from ever criminalizing oral or anal sex. Yet, upon closer examination, a more complex picture emerges. Despite its use of seemingly sweeping language, the holding in *Lawrence* is actually "a narrow as-applied holding." Utah v. Holm, 137 P.3d 736, 742–43 (Utah 2006). Properly understood, *Lawrence* forbids any governmental "intrusion upon a person's liberty interest when that interest is exercised in the form of private, consensual sexual conduct between adults." Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005). In particular, *Lawrence* "explained that the liberty interest at issue was not a fundamental right to engage in certain conduct but was the right to enter and maintain a personal relationship without governmental interference." *Id.* at 369 (emphasis added) (citation omitted). While *Lawrence* established "a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct," Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 815–16 (11th Cir. 2004), it has no impact on the ability of the states to prosecute sexual conduct between an adult and a minor, McDonald v. Va., 645 S.E.2d 918, 922 (Va. 2007); U.S. v. Bach, 400 F.3d 622, 628–29 (8th Cir. 2005), or sexual conduct that occurs in public, Singson v. Va., 621 S.E.2d 682, 688–93 (Va. App. 2005); Tjan v. Va., 621 S.E.2d 669, 672–76 (Va. App. 2005) (both holding that the Commonwealth may criminalize sexual conduct that occurs in public).

18. *Lawrence*, 539 U.S. at 579–83 (O'Connor, J. concurring).

19. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

20. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

21. *See* Douglas W. Kmiec, *Same Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 103 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell

affirmation of equality must not result in the subordination of freedom and vice versa. Rather, the Constitution must affirm both equality and freedom.[23]

Affirming both equality and freedom is particularly challenging in the context of public education. Public education, whether in the context of K-12 or higher education, brings together people of different races, generations, socio-economic classes, faiths, and values. Indeed, public education arguably is the most diverse segment of American society. Moreover, the young frequently express themselves with rhetoric that is rough rather than refined and in a manner that is dramatic instead of dignified. Escalation is all too common and too easy. In this environment, potential for conflict and misunderstanding is exponentially greater than in society. Yet, gays and lesbians justifiably demand that government schools and universities treat them with dignity and equality. Similarly, people of faith and political dissenters understandably demand that their freedoms do not disappear at the schoolhouse gate.[24]

This article seeks to ensure public education does not "wander away from the heart of the constitutional enterprise" as our nation grapples with same-sex marriage.[25] Its purpose is to prevent public education from favoring equality over freedom, or vice versa. It aims to promote the affirmation of equality for homosexuals and freedom for those who disagree with same-sex marriage. While a discussion of all the possible constitutional issues related to the consequences of state recognition of same-sex unions in public education contexts would be a monumental work and well beyond the scope of this article and this symposium, it is possible to articulate some

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Wilson, eds., 2008).

22. See Jonathon Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 59 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008).

23. The affirmation of freedom is important to both advocates of same-sex marriage and those who disagree with the transformation of a vital societal institution. "Religious groups and gay rights groups share common ground in the need for freedom of association. Both are vulnerable (in different parts of the country) to the hostile reactions of university administrators and fellow students." Brief of the Petitioner at 58, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371).

24. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

25. SACHS, *supra* note 1, at 239.

general principles.[26] Those general principles will guide jurists, policy-makers, and educational administrators.

This article has three parts. The first part discusses the constitutional value of equality in the context of same-sex marriage. Although government may not engage in irrational sexual orientation discrimination, the national Constitution does not require recognition of same-sex marriage. Rather, the states, in the exercise of their sovereignty, may choose to establish same-sex marriage, but are not required to recognize same-sex marriages performed in other states. The second part examines the constitutional value of freedom and its significance for those who have political or theological objections to state recognition of same-sex unions. These rights include the freedom of speech, including the freedom of association, the freedom of parents to direct the upbringing of their children, and the freedom of religion. The third part explains how public education may affirm both the equality of homosexuals and the freedom of those who oppose same-sex marriage. Specifically, public schools and universities must refrain from sexual orientation discrimination, must respect the right of faculty to express positions on same sex-marriage, and must allow students, whether individually or in groups, to advocate on issues related to same-sex marriage. In some instances, student groups may have greater rights under the state constitutions or state law.

II. EQUALITY

A. Government May Not Engage in Irrational Sexual Orientation Discrimination

The Equal Protection Clause,[27] which applies to "*persons*, not *groups*,"[28] is "essentially a direction that all persons

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26. Constitutional problems in public education—like constitutional problems in other areas—are always context specific. A subtle change in policy or circumstances may create or alleviate constitutional problems.

27. U.S. CONST. amend. XIV, § 1.

28. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Wygantv. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986). Indeed, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

similarly situated . . . be treated alike."[29] If a program treats everyone equally, there is no equal protection violation.[30] The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[31] At the same time, this general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications.[32] Because racial classifications "are by their very nature odious to a free people whose institutions are founded on the doctrine of equality"[33] and "call for the most exacting judicial examination,"[34] they are, regardless of their purpose,[35] "constitutional only if they are narrowly tailored to further compelling governmental interests."[36] Similarly, classifications based on gender are subject to "quasi-strict scrutiny" and are valid only if the classifications (1) serve important governmental objectives; and (2) substantially relate to the achievement of those objectives.[37] In contrast, classifications based upon age,[38] disability,[39] income,[40] or sexual orientation[41] receive rational basis scrutiny. The law or policy is constitutional unless it "lacks a rational relationship to legitimate state interests."[42]

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29. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

30. Romer v. Evans, 517 U.S. 620, 623 (1996).

31. *Cleburne*, 473 U.S. at 440; Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

32. *Cleburne*, 473 U.S. at 440-41; Graham v. Richardson, 403 U.S. 365 (1971); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

33. Shaw v. Reno, 509 U.S. 630, 643 (1993).

34. Bakke v. Bd. of Regents of the Univ. of Cal., 438 U.S. 265, 291 (1978).

35. Indeed, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." Johnson v. Cal., 543 U.S. 499, 505 (2005) (citations omitted).

36. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted).

37. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976).

38. Vance v. Bradley, 440 U.S. 93, 97 (1979).

39. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985).

40. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 18–21 (1973).

41. Romer v. Evans, 517 U.S. 620, 623 (1996).

42. *Id.* at 632.

B. The National Constitution Does Not Require Recognition of Same-Sex Marriage

While the Constitution prohibits irrational sexual orientation discrimination, this does not mean that the Constitution requires same-sex marriage.[43] If the state chooses to recognize marriage—and there is no constitutional obligation for the state to do so[44]—then the state may restrict marriage to opposite couples.[45] Quite simply, it is rational for the state to adopt the definition of marriage that has dominated human culture for the past four millennia.[46]

Moreover, if the protections of the Due Process Clause are limited to "those fundamental rights and liberties which are objectively, deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed,"[47] then the fundamental right to marry[48] does not encompass same-sex marriage.[49]

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43. *But see* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that, if the states recognize traditional marriage, the national Constitution requires the states to recognize same-sex marriage), *stay denied*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010). For the reasons stated in the monumental opening brief of the Defendant-Intervenors-Appellees, I believe it is doubtful that the reasoning and logic of *Perry* will survive appellate review. *See* Brief of Defendant-Intervenor-Appellees at 43–113, Perry v. Schwarzenegger, No. 10-16966 (9th Cir. 2010).

44. A state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." Pennoyer v. Neff, 95 U.S. 714, 734–35 (1878). *See also* Sosna v. Iowa, 419 U.S. 393, 404 (1975). Thus, "a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife." Zablocki v. Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring).

45. *See* Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867–68 (8th Cir. 2006). Moreover, in Baker v. Nelson, 409 U.S. 810 (1972), the Supreme Court dismissed an appeal of Minnesota's refusal to grant marriage license to same sex couple for lack of a substantial federal question. Unlike a denial of certiorari, a dismissal of an appeal for lack of a substantial federal question is a decision on the merits. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

46. *Bruning*, 455 F.3d at 867–68. *See also* Brief of Defendant-Intervenor-Appellees at 75–113, Perry v. Schwarzenegger, No. 10-16966 (9th Cir. 2010).

47. Washington v. Glucksberg 521 U.S. 702, 720–22 (1997). *See also* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2322 (2009) (reiterating the *Glucksberg* standard). *Cf.* McDonald v. City of Chi., 130 S. Ct. 3020, 3034–36 (2010) (adopting similar standard for determining when a provision of the Bill of Rights is incorporated against the States).

48. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

49. *See* Brief of Defendant-Intervenor-Appellees at 47–69, Perry v. Schwarzenegger, No. 10-16966 (9th Cir. 2010) (explaining why the right to marry a

C. *Establishment of Same-Sex Marriage is Within the States' Sovereign Sphere*

1. Exercising its sovereignty, a state may choose to establish same-sex marriage

"An integral component of that 'residuary and inviolable sovereignty' retained by the States,"[50] is control over domestic relations.[51] "Family relations are a traditional area of state concern,"[52] and "domestic relations are preeminently matters of state law."[53] "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."[54] Thus, the states, in the exercise of their sovereignty,[55] may choose to establish same-sex marriage[56] or may decline to do so.[57]

Unfortunately, the judiciary frequently interferes with this sovereign choice. Indeed, of the five states that allow same-sex marriage, only New Hampshire did so without judicial

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person of the same sex is not firmly rooted in the nation's history).

50. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751–52 (2002).

51. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–13 (2004).

52. Moore v. Sims, 442 U.S. 415, 435 (1979).

53. Mansell v. Mansell, 490 U.S. 581, 587 (1989).

54. Rose v. Rose, 481 U.S. 619, 625 (1987).

55. Prior to the adoption of the Constitution, the thirteen states effectively were thirteen sovereign nations. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

56. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire have established same-sex marriage.

57. Exercising their sovereignty, the people of twenty-nine states have rejected same-sex marriage. *See* ALA. CONST. art. I, § 36.03; ALASKA CONST. art. 1, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, §§ 1–3; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I § 27; GA. CONST. art. I, § IV, ¶ i; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263a; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. rt. X, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-a; WIS. CONST. art. XIII, § 13.

Moreover, several states have enacted statutes reaffirming the traditional view of marriage. *See* DEL. CODE ANN. tit. 13, § 101 (2010); HAW. REV. STAT. §§ 572-1, 572-3 (2010); 750 ILL. COMP. STAT. 5/212 (2010); IND. CODE § 31-11-1-1 (2010); ME. REV. STAT. tit. 19-A, § 701.5 (2011); MD. CODE, FAM. LAW § 2-201 (LexisNexis 2011); MINN. STAT. § 517.01 (2010); N.C. GEN. STAT. § 51-1.2 (2010); 23 PA. CONS. STAT. § 1704 (2011); WASH. REV. CODE § 26.04.010 through .020 (2011); W. VA. CODE § 48-2-603 (2011); WYO. STAT. ANN. § 20-1-101 (2010). *See also* 1 U.S.C. § 7 (2011); N.M. STAT. ANN. §§ 40-1-1 through 40-1-7 (2010); R.I. GEN. LAWS §§ 15-1-1 through 15-1-5 (2010).

intervention.[58] In Vermont, the judiciary mandated recognition of same-sex unions, [59] and the legislature later decided to recognize same-sex marriage.[60] In Connecticut,[61] Iowa,[62] and Massachusetts,[63] the judiciary interpreted the state constitution as requiring same-sex marriage.[64]

Such judicial intervention into the state's sovereign choice is problematic. Because an expansive judicial interpretation endures until the people amend the state constitution,[65] courts "must never forget that it is a constitution we are expounding."[66] Constitutions are "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[67] Constitutions "are not ephemeral enactments, designed to meet passing occasions . . . . The future is their care and provision for events of good and bad tendencies of which no prophecy can be made."[68] When confronting a challenge, judges must recognize that they are not "a bevy of Platonic Guardians"[69] as the "myth of the legal profession's omnicompetence . . . was exploded long ago."[70] "There was a time when [the judiciary] presumed to make such binding judgments for society, under the guise of interpreting

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58. *See* N.H. REV. STAT. ANN. § 457:1 (2011) *et seq.*

59. *See* Baker v. Vermont, 744 A.2d 844 (Vt. 1999).

60. *See* 2009 VT. ACTS & RESOLVES 3.

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

62. *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

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

64. *But see* Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2004), *review denied sub nom*, Standhart v. MCSC, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 219 (Md. 2007); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (rejecting the argument that the state constitution requires same-sex marriage); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006). *See also* Dean v. D.C., 653 A.2d 307 (D.C. 1995) (per curiam).

65. This is exactly what happened in California. The Supreme Court of California held that the California Constitution required same-sex marriage. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). The people then amended their constitution to prohibit same-sex marriage. *See* Cal. Const. art. I, § 7.5. Of course, a federal judge subsequently held that the constitutional amendment violated the federal Constitution. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d at 921, 991–1004 (N.D. Cal. 2010).

66. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

67. *Id.* at 415.

68. Weems v. U.S., 217 U.S. 349, 373 (1910).

69. Griswold v. Connecticut, 381 U.S. 479, 513 (1965) (Black, J., dissenting).

70. People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205, 111 F.3d 528, 536 (7th Cir. 1997).

the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy . . ."[71] Absent a clear violation of the constitutional text and structure, jurists should uphold even "uncommonly silly" laws and policies.[72]

In sum, if a state is going to adopt same-sex marriage, the decision should come from the legislature or from a popularly enacted amendment to the state constitution. The transformation of marriage should not come from the judiciary suddenly declaring that the meaning of the state constitution has "evolved."[73]

2. A state may decline to recognize a same-sex marriage performed in another state

A state may decline to recognize a same-sex marriage performed in another state. The "very purpose" of the Full Faith and Credit Clause was:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[74]

Yet, "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."[75] "Nor is there any authority which lends support to the view that the Full Faith and Credit Clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state."[76] Indeed, a state is not compelled to "[s]ubstitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate."[77] "Neither the Due Process Clause nor Full Faith and Credit

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71. United Haulers v. Oneida Harkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007) (citation omitted).

72. Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

73. None of the state constitutions has an explicit provision guaranteeing same-sex marriage. In the absence of such explicit provisions, it is difficult to argue that the state constitution's text mandates recognition of same-sex marriage.

74. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 276-77 (1935).

75. Nevada v. Hall, 440 U.S. 410, 422 (1979).

76. Williams v. North Carolina, 317 U.S. 287, 296 (1942).

77. Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 493–94 (2003).

Clause requires [a state] 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state.'"[78] If the public policy exception allows a state to refuse to recognize the sovereign immunity of another state,[79] then surely a state may refuse a marriage performed in another state that is contrary to the state's fundamental law.

III. FREEDOM

As explained above, the issue of whether to have same-sex marriage ultimately is a decision for each state. Yet, no matter what a state decides with respect to same-sex marriage, those who agree or disagree with that decision retain certain freedoms.

A. Freedom of Speech

Individuals who disagree with the state on same-sex marriage have the right to express their disagreement.[80] "The proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[81] "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits,"[82] but also "embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high."[83] "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than

78. Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 822–23 (1985).

79. *See Hyatt*, 538 U.S. at 496–98.

80. Although some may object to a pro- or anti-same-sex marriage message, the Court has consistently rejected attempts to ban speech that is offensive to the audience. *See* U.S. v. Playboy Entm't Group, 529 U.S. 803, 814–816 (2000); R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871–872 (1982) (plurality opinion); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

81. Christian Legal Soc'y v. Martinez, 130 S. Ct 2971, 3000 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas JJ., dissenting) (quoting U.S. v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting)).

82. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

83. Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010). *See also R.A.V.*, 505 U.S. at 391.

promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[84] "[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."[85] Indeed, "it is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive."[86]

Moreover, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[87] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[88] "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[89] This freedom of association "is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[90]

B. Parental Rights

The Constitution protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[91] "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[92] Since "the custody, care and

84. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995).

85. Democratic Party of the U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 124 (1982).

86. *Rodriguez*, 605 F.3d at 708. *See also* Brandenburg v. Ohio, 395 U.S. 444, 448–49, (1969); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995).

87. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

88. Boy Scouts of America v. Dale, 530 U.S. 640, 647–48 (2000).

89. Rumsfeld v. Forum for Academic & Inst'l Rights, 547 U.S. 47, 68 (2006).

90. *Dale*, 530 U.S. at 650.

91. Troxel v. Granville, 530 U.S. 57, 66 (2000).

92. Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535 (1925).

nurture of the child reside first in the parents,"[93] parents may send their children to private schools,[94] or educate the children at home.[95]

C. *Freedom of Religion*

To the extent that one's religious belief compels one to favor or oppose same sex-marriage, the Constitution absolutely protects that belief.[96]

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.[97]

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."[98] The Constitution "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people."[99] "No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance."[100] "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities nor employ the taxing power to inhibit the dissemination of particular religious

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93. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

94. *Pierce*, 268 U.S. at 534–35.

95. *See* Peterson v. Minidoka Sch. Dist. No. 331, 118 F.3d 1351, 1357 (9th Cir. 1997) (First Amendment right of free exercise includes right to home school a child); Murphy v. Arkansas, 852 F.2d 1039, 1043 (8th Cir. 1988) (acknowledging the right to home school a child, but upholding state regulation of that right). To date, more than thirty states have enacted statutes that allow parents to home school their children. In the remainder of states, home schooling is legal pursuant to a variety of types of regulations.

96. Feldblum suggests that Court should treat religious claims "as belief liberty interests under the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than as free exercise claims under the First Amendment." Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 123, 125 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008).

97. Epperson v. Ark., 393 U.S. 97, 103–04 (1968).

98. Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

99. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

100. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

views."[101] Indeed, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[102] Thus, religious groups may profess any beliefs they wish and may exclude those who disagree with their beliefs.[103] Insofar as the state is not required "to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice,"[104] the government may treat religious organizations *more favorably* than non-religious groups without violating the Establishment Clause.[105]

While belief is absolutely protected, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[106] Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even [if] the law has the incidental effect of burdening a particular religious practice."[107] In determining whether a law is neutral and generally applicable, judges must ask if "the object of the law is to infringe upon or restrict practices because of their religious motivation"[108] and if the law "in a selective manner impose burdens only on conduct motivated by religious belief."[109] "Neutrality and general applicability are interrelated, and

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101. *Sherbert*, 374 U.S. at 403.

102. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

103. *See generally* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–40 (1987).

104. Bd. of Educ. v. Grumet, 512 U.S. 687, 705 (1994).

105. *See* Cutter v. Wilkinson, 544 U.S. 709, 719–24 (2005) (Religious Land Use and Institutionalized Persons Act, which requires preferential treatment for religion, does not violate the Establishment Clause). *See also* Texas Monthly v. Bullock, 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); *Amos*, 483 U.S. at 335 (recognizing that the government may sometimes accommodate religious practices without violating the Establishment Clause).

106. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990). *See also* U.S. v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). The Court first enunciated this principle in Reynolds v. United States, 98 U.S. 145 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

107. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).

108. *Id.* at 533.

109. *Id.* at 543.

failure to satisfy one requirement is a likely indication that the other has not been satisfied."[110]

IV. AFFIRMING BOTH EQUALITY AND FREEDOM IN PUBLIC EDUCATION

Although all controversial political issues are problematic for public education,[111] the issue of same-sex marriage goes far beyond objections to the curricular treatment of the issue.[112] In many ways, the debate over same-sex marriage, like all debates over gay rights, is a "clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality."[113] As Eugene Volokh observed, one goal of the gay rights movement is "delegitimizing and legally punishing private behavior that discriminates against or condemns homosexuals."[114] Kmiec believes, "apparently one of the main aspirations of the homosexual movement is retaliation against the defenders of traditional marriage."[115] As the Constitution allows the government to punish private religious organizations that advocate racist views,[116] government logically could punish those who oppose same-sex marriage or regard homosexual conduct as sinful.[117] In an environment where some want not only to affirm equality, but

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110. *Id.* at 531.

111. *See* David Schimmel symposium piece.

112. For a discussion of curricular objections, *see generally* Charles J. Russo, *The Child is Not the Mere Creature of The State: Controversy over Teaching About Same-Sex Marriage in Public Schools*, 232 EDUC. L. REP. 1 (2008); Charles J. Russo & William E. Thro, *Curricular Control and Parental Rights: Balancing the Rights of Educators and Parents in American Public Schools*, 12 AUSTL. & N.Z. J. L. & EDUC. 91 (2007).

113. Michael McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 43–44 (2000). *See also* Feldblum, *supra* note 96, at 133–34 (discussing McConnell).

114. Eugene Volokoh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1178 (2005).

115. Kmiec, *supra* note 21, at 104. Kmiec also notes that some gay rights advocates have openly declared their intent to discredit and marginalize traditional religious practices. *Id.* (quoting Larry W. Shackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 792 (1993)).

116. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593–96 (1983) (denying tax-exempt status to private religiously affiliated university that espoused racist beliefs).

117. Kmiec, *supra* note 21, at 104–05. *See also* William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Soc'y v. Martinez, 261 EDUC. LAW REP. 473 (2010).

also to deny freedom to those who disagree, the potential for explosive confrontation is at its highest.[118] Despite the volatile nature of the situation, the Constitution requires that public education affirm both equality and freedom.[119]

A. Public Education Must Not Engage in Sexual Orientation Discrimination

Regardless of whether a particular state recognizes same-sex marriage, government, including institutions of public education, must refrain from irrational sexual orientation discrimination against employees and students.[120] Government may not deny employment or the ability to study simply because of one's sexual orientation. Similarly, the state may not deny opportunities because an individual is involved in a same-sex marriage or advocates for or against same-sex marriage. To the extent that harassment based on sexual orientation is discrimination based on sex,[121] educational institutions must respond effectively to harassment against students[122] and teachers.[123] Refraining from discrimination and responding to harassment, which is a form of discrimination, represents an affirmation of equality.[124]

B. Teachers May Express Their Positions on Same-Sex Marriage

When speaking outside of the classroom or in their personal capacities, teachers and professors have the right to express their approval or disapproval of same sex-marriage.[125] Public

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118. *See* Charles J. Russo symposium piece.

119. *See* Alli Fetter-Harrott symposium piece.

120. *See* Romer v. Evans, 517 U.S. 620, 633–34 (1996).

121. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78–82 (1998) (holding that Title VII prohibits same-sex sexual harassment).

122. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650–52 (1999) (Title IX liability for sexual harassment of student by another student); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 276, 288–92 (1998) (Title IX liability for sexual harassment of student by faculty member).

123. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807–09 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 754–65(1998).

124. These steps are the minimum that an educational institution can and must do. Of course, the institution may do more to affirm equality, but doing more may well subordinate freedom.

125. However, this right has nothing to do with a claim of individual academic freedom. *See* Urofsky v. Gilmore, 216 F.3d 401, 415 (4th Cir. 2000) (en banc). Indeed, "to the extent the Constitution recognizes any right of 'academic freedom' above and

employees, including public school teachers and faculty members at state universities, retain broad First Amendment rights.[126] While the Court recently held that public employees lack First Amendment rights when speaking in their official capacities,[127] the Court has "made clear that public employees do not surrender all their First Amendment rights by reason of their employment."[128] Thus, while the administration may require that the faculty member adhere to the institutional position concerning same-sex marriage when in the classroom or while representing the school, it may not prevent the faculty member from criticizing or endorsing same-sex marriage.

C. Students, As Individuals or In Groups, May Express Their Positions on Same-Sex Marriage

Subject to restrictions that reflect the unique nature of the school environment, students may express their approval or disagreement with same-sex marriage.[129] "Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular."[130] "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[131] "Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched."[132]

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beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." *Id.* at 410.

126. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

127. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

128. *Id.* at 417.

129. Morse v. Frederick, 551 U.S. 393, 403–10 (2007). *See also id.* at 422–25 (Alito, J., joined by Kennedy, J., concurring) (emphasizing the limited ability of government to control student speech).

130. Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010).

131. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

132. *Rodriguez*, 605 F.3d at 708. *See also* Gitlow v. New York, 268 U.S. 652, 667 (1925); *id.* at 673 (Holmes, J., dissenting).

1. Educational institutions must recognize student groups that advocate for or against same-sex marriage

Similarly, public schools and universities must recognize student organizations that advocate for or against same-sex marriage. Since there is "no doubt that the First Amendment rights of speech and association extend to [public educational institutions],"[133] "the mere disagreement of the [institution] with the group's philosophy affords no reason to deny it recognition"[134] or funding.[135] In granting recognition and/or funding, the school or university does not adopt the group's speech as its own[136] or "confer any imprimatur of state approval" on the student group.[137] If there were disagreement with the message of the student groups, then, "[other] students and faculty are free to associate to voice their disapproval of the [student organization's] message."[138] Indeed, in the higher education context, the practice of requiring students to pay mandatory fees that are distributed to student groups is permissible only if institutions do not favor particular viewpoints.[139] Simply stated, the "avowed purpose" for granting official status to student organizations is supposed to be "to provide a forum in which students can exchange ideas."[140] Thus, groups with racist, sexist, homophobic, anti-Semitic, and/or anti-Christian views are entitled to recognition, access to facilities, and funding.[141]

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133. Widmar v. Vincent, 454 U.S. 263, 269 (1981).

134. Healy v. James, 408 U.S. 169, 187–88 (1972).

135. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

136. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

137. *Widmar*, 454 U.S. at 274.

138. Rumsfeld v. Forum for Academic & Inst'l Rights, 547 U.S. 47, 69–70 (2006).

139. *Southworth*, 529 U.S. at 233–34.

140. *Widmar*, 454 U.S. at 272 n.10. *See also Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate the free and open exchange of ideas by, and among, its students); *Rosenberger*, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

141. While institutions may not refuse to recognize student organizations due to their viewpoints, they may require organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. WILLIAM A. KAPLIN & BARBARA H. LEE, THE LAW OF HIGHER EDUCATION 1051 (4th ed. 2007) (interpreting Healy v. James, 408 U.S. 169 (1972)). As a practical matter, this means that institutions can impose some neutral criteria for recognition such as having a faculty advisor, a constitution, and a certain number of members. Even so, institutions cannot deny recognition simply because officials or a significant part of the campus community dislikes the organization. Moreover, according to *Healy*, institutions may not deny recognition because members of organizations at other

2. State constitutional provisions may allow student groups to exclude those who disagree with the group's viewpoints

Of course, as a matter of federal constitutional law, educational institutions may require student groups that favor or oppose same-sex marriage to admit members who hold the opposite view as a condition of recognizing the student organization. In *Christian Legal Society v. Martinez*,[142] a sharply divided Supreme Court held that officials at a public institution in California might require an on campus religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of being recognized.[143] Put another way, the Court declared that the government, through university officials, might force religious groups to choose between compromising their values and receiving benefits that other student groups receive as a matter of constitutional right. While the government "surely could not demand that all Christian groups admit members who believe that Jesus was merely human,"[144] the government "may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints."[145] In other words, what the Constitution forbids government from doing directly, it may accomplish indirectly by restricting access to the limited-public forum.[146]

Yet, while *Christian Legal Society* resolves the issue as a matter of federal constitutional law, it does not definitively resolve the issue of whether educational institutions may force student groups to admit those who disagree with the group's ideology. Because state constitutions often are more protective

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campuses or in the outside community engaged in certain conduct. *Healy*, 408 U.S. at 185–86.

142. 130 S. Ct. 2971 (2010). For a commentary on the case and its implications, see Thro & Russo, *supra* note 117.

143. *Christian Legal Soc'y*, 130 S. Ct. at 2978.

144. *Id.* at 3014 (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting). *See also id.* at 2997 (Stevens, J., concurring).

145. *Id.* at 3014 (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting).

146. Perry v. Sindermann,408 U.S. 593, 597 (1972) ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'"). *See also* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 716–17 (1996).

of individual liberty,[147] a student group may have a state constitutional right to exclude those who disagree with the group's views.[148] Indeed, since the Burger Court's decisions prompted a revival of state constitutional law in the early 1970s,[149] "it would be most unwise these days not also to raise the state constitutional questions."[150] Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its state constitution prohibited the government from indirectly forcing an organization to admit members who disagreed with the organization's objectives.[151] Moreover, state religious freedom restoration acts[152] prohibit government from imposing a substantial burden on the free exercise of religion unless there is a compelling governmental interest pursued through the least restrictive means.[153] To the extent that a student group's position on same-sex marriage is the result of religious belief, these state laws seem to prohibit government from indirectly

147. A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1, 14 (1988).

148. State constitutions are fundamentally different from the national Constitution—the national Constitution is a grant of power and the state constitutions are limitations on power. Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 785 (Md. 1983); Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982). Thus, the presumptions concerning legislative authority are reversed. Congress may not act unless it can identify a specific enumerated power, United States v. Morrison, 529 U.S. 598, 607 (2000), but the state legislature may act unless there is an explicit restriction, Almond v. R.I. Lottery Comm'n, 756 A.2d 186, 196 (R.I. 2000).

149. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

150. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

151. Indeed, after the U.S. Supreme Court diminished religious freedom in *Smith*, several state courts held that the state constitutions provided greater protection for religious freedom. *See* Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes*, 118 HARV. L. REV. 155, 211–12 (2004) (discussing cases).

152. *See* ARIZ. REV. STAT. ANN. §§ 41-1493 through 1493.02 (2011); CONN. GEN. STAT. § 52-571b (2010); FLA. STAT. §§ 761.01 through .05 (2011); IDAHO CODE ANN. §§ 73-401 through 73-404 (2010); 775 ILL. COMP. STAT. 35/1-99 (2010); MO. REV. STAT. §§ 1.302 through .307 (2010); N.M. STAT. ANN. §§ 28-22-1 through 28-22-5 (2010); OKLA. STAT. tit. 51, §§ 251–258 (2010); 71 PA. CONS. STAT. §§ 2401–2407 (2010); R.I. GEN. LAWS §§ 42-80.1-1 through 42.80.1-4 (2010); S.C. CODE ANN. §§ 1-32-10 through 1-32-60 (2010); TENN. CODE ANN. § 4-1-407 (2010); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 through 110.012 (West 2009); UTAH CODE ANN. §§ 631-5-101 through 631-5-403 (LexisNexis 2010); VA. CODE ANN. §§ 57-1 through 57-2.02(2011).

153. *See* Christopher C. Lund, *Religious Freedom After* Gonzales, 55 S.D. L. REV. 467, 476 (2011); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 426 (2010).

forcing the inclusion of dissenters. In sum, state law may prohibit what *Christian Legal Society* permits.

V. CONCLUSION

Americans define our Nation not by language, religion, blood, or place, but by two self-evident truths—that all "are created equal" and that the Creator has endowed us with "inalienable rights."[154] Under our Constitution, government may not deny either truth. In affirming equality, the state must not deny freedom of individuals. In upholding freedom, government must not diminish equality. As our society confronts profound questions regarding same-sex marriage, our public schools and universities must ensure that homosexuals enjoy full dignity regardless of whether the state recognizes same-sex marriage. At the same, public education must affirm freedom—the rights of those who disagree with the state's position on same-sex marriage. By affirming both equality and freedom, public education unites the constitutional community. That is the heart of the constitutional enterprise.

154. THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).