
THE OVERLOOKED BENEFIT OF MINIMALISM: *PERRY V. BROWN* AND THE FUTURE OF MARRIAGE EQUALITY

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I.

INTRODUCTION

Few decisions are so roundly criticized as the United States Court of Appeals for the Ninth Circuit's decision in *Perry v. Brown*.¹ Some same-sex marriage opponents predictably called it a form of "judicial tyranny,"² while some same-sex marriage proponents described it as "dishonest and foolish."³ If the United States Supreme Court affirms Judge Reinhardt's *Perry* opinion in full, neither side will be satisfied fully.

Perry drew this criticism because it dished out cold comfort to both sides of the same-sex marriage debate. Same-sex marriage advocates were elated⁴ when the United States District Court for the Northern District of California found a

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1. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-44).

2. *Family Research Council Criticizes Ninth Circuit Ruling to Overthrow Definition of Marriage*, FAMILY RESEARCH COUNCIL (Feb. 7, 2012), <http://www.frc.org/newsroom/family-research-council-criticizes-ninth-circuit-ruling-to-overthrow-definition-of-marriage>.

3. Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down* (Feb. 7, 2012), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html>. Professor Mazzone predicts the Court would find that there is a fundamental right for same-sex couples to wed if directly presented with the question. *Id.* "[I]f that issue of marriage discrimination and equal protection were presented squarely to the Court, I find it unlikely that Justice Kennedy . . . would join a decision holding a ban on same-sex marriage constitutional. The risk now is that Kennedy will disagree (quite rightly) with the Ninth Circuit's panel use of *Romer v. Evans*, reverse on that basis, and, like Reinhardt, avoid the plain equal protection issue." *Id.*

4. *See generally* Jesse McKinley & John Schwartz, *Court Rejects Same-Sex Marriage Ban in California*, N.Y. TIMES, Aug. 5, 2010, at A1 (noting that after the decision "[e]vening rallies and celebrations were planned in dozens of cities across the state [of California] and several across the nation").

fundamental right for same-sex couples' freedom to marry.⁵ The Ninth Circuit's much narrower ruling—that California's Proposition 8 could not take away, by popular referendum, a right already enjoyed by a minority group—sidestepped the lower court's sweeping opinion.⁶ The victory that advocates had achieved in the District Court, though affirmed, was largely hollowed out as a result.⁷

Just as the Ninth Circuit's process-based, minimalistic decision fell short of the broad, sweeping decision that many same-sex marriage advocates hoped for, it fell short of the full-scale victory that marriage opponents sought, too. The District Court's decision set the stage for the nationalization of same-sex marriage if a fundamental right to same-sex marriage ultimately triumphed in the Supreme Court. Yet, if the Supreme Court affirms the Ninth Circuit's narrower decision, California—the country's most populous state—will nonetheless have same-sex marriage.⁸

Notwithstanding dashed hopes on both sides, the Ninth Circuit's narrower decision, if upheld, would have the singular benefit of allowing the "significant constitutional questions" surrounding same-sex marriage to "percolate[] in the courts such that the 'perspective of time' helps to shed more light on the weighty issues they present."⁹ The need for percolation is particularly imperative because, as the City of San Francisco highlighted in its brief in opposition to certiorari, "this case raises issues that are currently the subject of intense legislative and popular debate."¹⁰

Not least among the issues being resolved by the state legislatures that have considered same-sex marriage legislation to date is how best to balance two compelling societal interests in our plural democratic society—*marriage equality* and *religious liberty*.¹¹ Through sometimes bruising legislative

5. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (finding that California's same-sex marriage prohibition violated the Equal Protection Clause of the Fourteenth Amendment), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. 2012).

6. *Perry v. Brown*, 671 F.3d at 1096.

7. While the District Court's decision would have national implications, the Ninth Circuit's ruling is applicable only to the State of California. *Id.*

8. See Paul Mackun and Steve Wilson, *Population Distribution and Change: 2000 to 2010*, UNITED STATES CENSUS BUREAU (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. Located in the most populous state, it is perhaps not surprising that the 2008 campaign surrounding Proposition 8 was the most expensive social issue campaign in United States history, racking up \$74 million in campaign expenditures. *Gay Marriage Ban Expected to Pass in Expensive Calif. Battle*, PBS NEWSHOUR (Nov. 5, 2008), http://www.pbs.org/newshour/updates/social_issues/july-dec08/ballotmeasures_11-05.html.

9. City and County of San Francisco's Brief in Opposition at 23, *Hollingsworth v. Perry*, No. 12-144 (U.S. Aug. 24, 2012), 2012 WL 3724711.

10. *Id.* at 24.

11. To be clear, not all religious believers object to same-sex marriage. In fact, some denominations allow ministers to choose whether to marry same-sex couples, resulting in internal divisions over whether to perform same-sex marriages. See, e.g., Shaila Dewan, *True to Episcopal Church's Past, Bishops Split on Gay Weddings*, N.Y. TIMES, July 19, 2011, at A1 (noting that in New York City, two out of five Episcopalian dioceses allow same-sex couples to be wed in

battles,¹² seven jurisdictions crafted nuanced laws that recognize same-sex marriage while providing important, albeit imperfect,¹³ protections for the religious liberty of those who adhere to a purely heterosexual view of marriage.¹⁴

By upholding the Ninth Circuit's narrow decision, the Supreme Court would allow California, along with other states, to contribute to this continuing debate through the democratic process. If the Ninth Circuit's decision is left in place, the California legislature could also enact religious liberty protections like those enacted in other states. The Ninth Circuit's decision explicitly contemplates this when it rejected the claim that Proposition 8 furthered California's religious liberty interests to "decrease the likelihood that religious organizations would be penalized, under California's antidiscrimination laws and other government policies concerning sexual orientation, for refusing to provide services to families headed by same-sex spouses."¹⁵ Instead, Judge Reinhardt said that religious liberty protections were "properly read as an appeal to the Legislature, seeking reform of the State's antidiscrimination laws to include greater accommodations for religious organizations."¹⁶ Dean Martha Minow similarly emphasized the value of incremental change when she wrote, "We do not in the abstract resolve the tension between respecting religious groups and ensuring each individual protection against discrimination; nor do we resolve it quickly. Instead, we struggle over time, in courts, legislatures, private settings, and complex negotiations."¹⁷

As this Essay shows, it is in the crucible of the legislative process that states have hammered out state-specific solutions to the question of how best to balance marriage equality with religious liberty. Experience shows that over the last decade, marriage equality and religious liberty protections have shared an

church); *Churches Debate: May Clergy Marry Gays?*, USA TODAY (July 17, 2011), http://www.usatoday.com/news/religion/2011-07-17-gay-marry-clergy-churches_n.htm.

12. See generally Michael Barbaro, *Behind N.Y. Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html> (recounting the political dynamics surrounding the enactment of the New York Marriage Equality Act); Hamil R. Harris, *Maryland Same Sex Marriage Bill Sparks War of Words*, WASH. POST (Feb. 17, 2012), http://www.washingtonpost.com/blogs/therootdc/post/maryland-same-sex-marriage-bill-sparks-war-of-words/2012/02/17/gIQA08ZLKR_blog.html (describing the politically-tension-filled debate over marriage equality in Maryland).

13. See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417, 1442 (2012) ("Importantly, however, the legislative accommodations in some states were cobbled together quickly during the legislative process, resulting in some drafting problems.").

14. These jurisdictions include Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington. See *infra* notes 29–64 and accompanying text.

15. *Perry v. Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. 2012).

16. *Id.*

17. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 848 (2007).

inseparable fate, rising and falling together.

II.

THE BENEFITS OF THE LEGISLATIVE PROCESS

While the Ninth Circuit's decision in *Perry* emphasized that Proposition 8 is like any "enactment by the Legislature . . . subject to the terms of the state constitution,"¹⁸ it also contrasted constitutional prohibitions with the ordinary legislative process.¹⁹ Judge Reinhardt observed that "[t]o enact a constitutional prohibition is to adopt a fundamental barrier: it means that the legislative process, by which incremental policymaking would normally proceed, is completely foreclosed."²⁰ Judge Reinhardt seems to leave room for the legislative process to take account of multiple, sometimes diverging interests in a plural democratic society.

If left in place, the Ninth Circuit's opinion clears the way for states to continue debating whether and how to recognize same-sex marriage in legislative chambers, even as the question of marriage as a fundamental right is litigated through federal and state courts. Continued debate is a good unto itself²¹ since a number of states stand in the midst of or on the cusp of legislative debates over same-sex marriage, including Delaware,²² Hawaii,²³ Illinois,²⁴ Minnesota,²⁵ New Jersey,²⁶ and Rhode Island.²⁷ Thus, whatever else may be

18. *Perry v. Brown*, 671 F.3d at 1066.

19. *See id.* at 1090.

20. *Id.*

21. Leaving room for the legislative process has a longstanding history in American jurisprudential thought. In 1973, Justice Powell suggested that the Court should not wade into determining whether sex-based classifications were inherently suspect while the Equal Rights Amendment was under debate in state legislatures. *See Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (arguing that the Court should not act "prematurely and unnecessarily" to grant suspect class status to women "at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment" because it "does not reflect appropriate respect for duly prescribed legislative processes"). Along similar lines, Justice Ginsburg recently observed that *Roe v. Wade* might have been premature given the political dynamics of the time. *See* Mark Sherman, *Hope and Fear in Gay Marriage Cases at High Court*, YAHOO! NEWS (Dec. 10, 2012), <http://news.yahoo.com/hope-fear-gay-marriage-cases-high-court-130423431--politics.html> (quoting Justice Ginsburg discussing *Roe v. Wade* as saying "It's not that the judgment was wrong, but it moved too far too fast.").

22. Fred Katayama, Edith Honan & Alice Popovici, *Delaware Governor Says Gay Marriage Is "Inevitable" in His State*, REUTERS (Mar. 2, 2012), <http://www.reuters.com/article/2012/03/02/ususagaymarriagedelawareidUSTRE82116K20120302>.

23. Colin M. Stewart, *Gay Marriage to Go Before Legislature*, HAWAII TRIBUNE-HERALD (Jan. 25, 2013), <http://hawaii.tribune-herald.com/sections/news/local-news/gay-marriage-go-legislature.html>.

24. Trudy Ring, *Marriage Equality Bill Introduced in Illinois*, ADVOCATE.COM (Feb. 8, 2012), <http://www.advocate.com/news/daily-news/2012/02/08/marriage-equality-bill-introduced-illinois>.

25. Rachel E. Stassen-Berger, *Freedom to Marry Pumping More Money into Minnesota's Marriage Battle*, STAR TRIBUNE (Feb. 7, 2013), <http://www.startribune.com/politics/statelocal/190229811.html>.

said of leaving the Ninth Circuit's opinion in *Perry* intact, legislatures across the country will have the chance to build on a burgeoning story of compromise, as the next Part explains, and to pass legislation that benefits same-sex marriage supporters and opponents alike.

III.

COMPROMISES REACHED IN DEMOCRACY'S LABORATORIES

Every time same-sex marriage advocates have embraced expansive religious liberty protections in same-sex marriage bills, they have secured legislative victories.²⁸ The states that have enacted—and retained—same-sex marriage laws have all acknowledged the impact that recognizing same-sex marriage can have on a wide swath of society that remains opposed to same-sex marriages.²⁹ These experiences are healthy for an evolving society grappling with social change. A narrow opinion on the question of the constitutionality of same-sex marriage prohibitions, like the Ninth Circuit's in *Perry*, allows these types of productive exchanges to continue. As Professor Bill Eskridge and Hans Johnson note, “When the population is both evenly and intensely divided on a fundamental public issue, that is not the time to close off debate entirely.”³⁰

Each state's law provides religious liberty protections to the clergy,³¹ but then reaches beyond guarantees given by the First Amendment.³² A core of protections has emerged for religious organizations³³ and individuals³⁴ who

26. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2010, at A19.

27. David Klepper, *Quiet Battle over Gay Marriage Under Way in RI*, BOS. GLOBE (Sept. 9, 2012), <http://www.boston.com/news/world/europe/2012/09/09/quiet-battle-over-gay-marriage-under-way/Syw1SISgCSLtZXn2VdcrPI/story.html>.

28. See Robin Fretwell Wilson, *Charting the Success of Same-Sex Marriage Legislation* (Sept. 1, 2012) (unpublished manuscript), available at <http://scholarlycommons.law.wlu.edu/wlufac/132> (summarizing the religious liberty provisions contained in failed and successful marriage equality legislation).

29. Those jurisdictions are Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington. See CONN. GEN. STAT. § 46b–20–35b (2012); D.C. CODE §§ 46–401–421 (2011); MD. CODE ANN., FAM. LAW § 2–201 (LexisNexis 2013); N.H. REV. STAT. ANN. §§ 457:31–37 (2011); N.Y. DOM. REL. LAW § 10–25 (McKinney 2011); VT. STAT. ANN. tit. 18, §§ 5131–5151 (2011); WASH. REV. CODE §§ 26.04.010–26.04.900 (2013).

30. William Eskridge & Hans Johnson, *Commentary on Marriage Grants: Marriage Equality's Cinderella Moment*, SCOTUSBLOG (Dec. 9, 2012, 2:10 AM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-marriage-equalitys-cinderella-moment/>.

31. See CONN. GEN. STAT. ANN. § 46b–35a (2012); D.C. CODE § 46–406(c) (2012); N.H. REV. STAT. ANN. § 457:31 (2011); N.Y. DOM. REL. LAW § 11 (McKinney 2011); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); VT. STAT. ANN. tit. 18, § 5144(b) (2011); WASH. REV. CODE § 26.04.010(2)(4) (2013).

32. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990) (holding that otherwise valid laws of general applicability that incidentally interfere with the free exercise of religion are constitutionally permissible).

33. See, e.g., CONN. GEN. STAT. ANN. § 46b–35a (2011) (covering “a religious organization, association or society, or any nonprofit institution or organization operated, supervised or

cannot celebrate or facilitate *any* marriage when doing so would violate their religious convictions.³⁵

Although each law describes the exempt activities in slightly different terms, the laws generally allow religious objectors to step aside from providing services, accommodations, advantages, facilities, goods, or privileges to an individual if the services or goods are related to the solemnization or celebration of a marriage. All insulate religious entities, including religiously affiliated not-for-profit organizations, like Catholic Charities and the Salvation Army, from the duty to facilitate marriages that violate their religious tenets.³⁶ Four extend these protections to benevolent religious organizations, like the Knights of Columbus, or to religious groups that sponsor marriage retreats or provide

controlled by or in conjunction with a religious organization, association or society”); D.C. CODE § 46–406(e)(1) (2012) (covering “a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society”); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (covering any “religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by a religious organization, association, or society”); N.H. REV. STAT. ANN. § 457:37(III) (2011) (covering “a religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society”); N.Y. DOM. REL. § 10–b(1) (McKinney 2011) (covering “a religious entity . . . or a corporation incorporated under the benevolent orders law . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation”); VT. STAT. ANN. tit. 9, § 4502(l) (2011) (covering “a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society”); WASH. REV. CODE § 26.04.010(2)(5) (2013) (a religious organization “includes, but is not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, and other entities whose principal purpose is the study, practice, or advancement of religion”).

34. Three states (Maryland, New Hampshire and New York) expressly exempt individual employees “being managed, directed, or supervised by or in conjunction with” a covered entity from celebrating same-sex marriages if doing so would violate “religious beliefs and faith.” See N.Y. DOM. REL. § 10–b(1) (McKinney 2011). See also H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); N.H. REV. STAT. ANN. § 457:37(III) (2011).

35. These religious exemptions encompass “all” marriages, including interfaith marriages, second marriages, and same-sex marriages. N.H. REV. STAT. ANN. § 457:37(III) (2011) (“A religious organization *shall not be required* to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if such request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of *a marriage*, the celebration of *a marriage*, or the promotion of marriage . . .”) (emphasis added); N.Y. DOM. REL. LAW § 10–b(1) (McKinney 2011) (“Religious corporations . . . *shall not be required* to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of *a marriage*.”) (emphasis added).

36. Each expressly insulates religious objectors from private suit. See VT. STAT. ANN. tit. 9, § 4502(l) (2011) (“Any refusal to provide services, accommodations, advantages, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action.”); CONN. GEN. STAT. § 46b–35a (2011); D.C. CODE § 46–406(e)(1) (2012); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); WASH. REV. CODE § 26.04.010(2)(6) (LEXISNEXIS 2013); N.H. REV. STAT. ANN. § 457:37(III) (2011); N.Y. DOM. REL. LAW § 10–b(2) (McKinney 2011).

housing for married individuals.³⁷ In New York, New Hampshire, and Maryland, individual employees of these groups receive protection, too.³⁸

Each jurisdiction shields covered groups or persons from civil suits for refusing to facilitate marriages when doing so would contravene their religious beliefs.³⁹ Six of the seven jurisdictions explicitly protect such organizations from punishment at the hands of the government.⁴⁰ Such robust religious liberty

37. Three states (Maryland, New Hampshire, and Vermont) expressly allow religiously-affiliated fraternal organizations, like the Knights of Columbus, to limit insurance coverage to spouses in traditional marriages. *See* H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); N.H. REV. STAT. ANN. § 457:37(IV) (2011); VT. STAT. ANN. TIT. 8 § 4501(b) (2011).

As to religious counseling programs, three jurisdictions, the District of Columbia, Maryland, and New Hampshire, expressly protect religious organizations from the promotion of marriage through religious counseling programs and retreats. *See* D.C. CODE § 46–406(e)(1) (2012) (“Notwithstanding any other provision of law, a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society’s beliefs.”); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (exempting “social or religious programs or services” that do not receive public funds); N.H. REV. STAT. ANN. § 457:37(III) (2011) (exempting certain organizations from “the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs and faith”). New York’s exemption may reach this as well. *See* N.Y. DOM. REL. LAW § 10–b(2) (McKinney 2011) (“Nothing in this article shall limit or diminish the right, . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

Two jurisdictions (New Hampshire and New York) expressly protect religious organizations from promoting marriage through housing designated for married individuals. *See* N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10–b(2).

38. N.Y. DOM. REL. LAW § 10–b (McKinney 2011) (“Any employee being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation as described in this subdivision, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any such refusal to provide services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action.”); N.H. REV. STAT. ANN. § 457:37(III) (2011) (“Any individual . . .”); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (“[A]ny individual . . .”). These provisions immunize employees of religious organizations from civil suit directly and possibly also from being compelled by their employers to participate in marriage celebrations.

39. *See* VT. STAT. ANN. tit. 9, § 4502(l) (2011) (“Any refusal to provide services, accommodations, advantages, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action.”). *See also* CONN. GEN. STAT. ANN. § 46b–35a (2011); D.C. CODE § 46–406(e) (2012); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); N.H. REV. STAT. ANN. § 457:37(III) (2011); N.Y. DOM. REL. LAW § 10–b (1) (McKinney 2011); WASH. REV. CODE § 26.04.010(2)(6) (2013).

40. These jurisdictions (the District of Columbia, Connecticut, Maryland, New Hampshire, New York, and Washington) expressly protect religious objectors, including religiously affiliated nonprofit organizations, from being “penalize[d]” by the government for such refusals through, e.g., the loss of governments grants. D.C. CODE § 46–406(e)(2). *See also* CONN. GEN. STAT. ANN. § 46b–35a (2011); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); N.H. REV. STAT. ANN. §

protections sweep far beyond the church sanctuary, providing accommodations that exceed what most scholars believe would be constitutionally demanded.⁴¹

As the next Part explains, the success of marriage recognition rested in no small part on expansive protections for persons who have a heterosexual vision of marriage and yet are worthy of respect.⁴²

IV.

THE COMMON FATE OF RELIGIOUS LIBERTY PROTECTIONS AND MARRIAGE EQUALITY

In New York, Maryland, and Washington, religious liberty accommodations helped same-sex marriage advocates secure long-sought victories. In each, proposed legislation offering “clergy-only protection” failed to garner enough support to become law only months before the successful legislation.⁴³ After

457:37(III) (2011); N.Y. DOM. REL. § 10-b (1) (McKinney 2011); WASH. REV. CODE § 26.04.010(2)(4) (2013).

41. See, e.g., Letter from Robin Fretwell Wilson, Professor of Law, Washington & Lee Univ. School of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Policy, Univ. of St. Thomas School of Law (Minnesota), Carl H. Esbeck, Professor of Law, University of Missouri, Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law School, Marc D. Stern, & Edward McGlynn Gaffney, Professor of Law, Valparaiso Univ., to Chris Gregoire, Governor, Wash. (Jan. 29, 2012), available at <http://mirrorofjustice.blogs.com/files/washington-letter---governor---1-29-2012.pdf>.

42. Professor Chai Feldblum argues that the “identity liberty” same-sex couples have in marriage and the “belief liberty” objectors have in their religion both constitute core values and deserve protection, but these values directly conflict when civil rights laws force one to accommodate the other. See Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008). Professor Feldblum concludes that the conduct demanded by civil rights laws “can burden an individual’s belief liberty interest,” but that “acknowledging [the burden’s impact] does not necessarily mean that [civil rights] laws will be invalidated or that exemptions . . . will always be granted to individuals holding such beliefs.” *Id.* See also Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL’Y 206, 219–20, 230–32 (2010) (critiquing Feldblum’s argument).

43. On May 12, 2009, proposed legislation with a clergy-only exemption passed in the New York Assembly by a vote of 89 to 52. It was then defeated in the New York Senate on December 2, 2009, by a vote of 24 to 38. See Jeremy W. Peters, *Assembly Passes Gay Marriage Bill; Senate Fight Awaits*, N.Y. TIMES, May 12, 2009, at A24; Wilson, *supra* note 28; Dwyer Arce, *New York Senate Rejects Same-Sex Marriage Legislation*, JURIST (Dec. 2, 2009), <http://www.jurist.org/paperchase/2009/12/new-york-senate-rejects-same-sex.php>. Two years later, in 2011, Governor Andrew M. Cuomo proposed The Marriage Equality Act, a revised bill, which included more robust religious liberty protections. The New York Assembly approved that bill on June 15, 2011, by a vote of 80 to 63. See Nicholas Confessore & Danny Hakim, *G.O.P. Senators Are Stalled in Talks on Marriage Bill*, N.Y. TIMES, June 15, 2011, at A30. The New York Senate then revised the bill to include yet more protections, which successfully passed on June 24, 2011, by a vote of 33 to 29. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

Efforts to pass same-sex marriage legislation in Maryland followed a similar trajectory. In 2008, Maryland legislators introduced bills containing clergy-only exemptions, but neither chamber voted upon either House Bill 351 or Senate Bill 290. See Wilson, *supra* note 28. In 2009, bills containing identical clergy-only exemptions died in their respective committees. In 2011, the

Governor Andrew Cuomo signed New York's same-sex marriage law in the summer of 2011, *The New York Times* commented on the impact of the religious exemptions:

[They were] just a few paragraphs, but they proved to be the most microscopically examined and debated—and the most pivotal—in the battle over same-sex marriage Language that Republican senators inserted into the bill legalizing same-sex marriage provided more expansive protections for religious organizations and helped pull the legislation over the finish line Friday night.⁴⁴

Others, like Washington State Governor Christine Gregoire, took note. Governor Gregoire, working with members of the Legislature, drafted legislation with religious liberty provisions that were more expansive than the clergy-only protections provided in earlier drafts.⁴⁵ Governor Gregoire said in a telephone interview:

I looked at what New York had done. I worked with our gay community. I told them that that was the only way I would introduce the bill. There were some people who wanted to compromise on [the religious liberty protections] in the future. But I said, “No,” that this was in part a reflection of my evolution on the issue, and it wasn't compromisable.⁴⁶

As in New York and Washington, in Maryland religious liberty exemptions shifted the question for some Maryland legislators from *whether* to embrace

Maryland House considered two bills that contained the same clergy-only exemption. The Senate, however, added more robust protections for religious objectors to the original House bill. The Senate bill passed by a vote of 25 to 21 on February 24, 2011, but languished in a House committee, never to be voted upon by the full House. In the next legislative session, the House took up legislation proposed by Governor O'Malley, which contained additional protections. The Maryland House passed that bill on February 17, 2012, by a vote of 72 to 67 and the Senate approved it on February 23, 2012, by a vote of 25 to 22. *See* Sabrina Tavernise, *In Maryland, House Passes Bill to Let Gays Wed*, N.Y. TIMES, Feb. 17, 2012, <http://www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html>.

In Washington, a bill offering protection only to the clergy failed to get traction in 2011 and was reintroduced in 2012. *See* Wilson, *supra* note 28. Legislators then introduced a competing bill containing more robust protections. That bill was then substantially amended and passed in the Senate on February 1, 2012, by seven votes, 28 to 21. The Washington House passed the Senate's engrossed bill by a vote of 55 to 43 on February 8, 2012. Governor Gregoire signed the bill into law on February 13, 2012. *See* Joel Connelly, *Gregoire Signs Same-Sex Marriage Bill*, SEATTLE P.I. (Feb. 13, 2012), <http://www.seattlepi.com/local/connelly/article/Make-History-Gregoire-signs-same-sex-marriage-3312315.php>; Andrew Garber, *Gay Marriage Bill Passes House, Awaits Gregoire's Signature*, SEATTLE TIMES (Feb. 9, 2012), http://seattletimes.com/html/localnews/2017459861_gaymarriage09m.html.

44. Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at A20.

45. *See* H.B. 1963, 62nd Legislature, Reg. Sess. (Wash. 2011).

46. Telephone Interview with Christine Gregoire, Governor of Wash. (July 27, 2012).

marriage equality to *how* to balance that good with religious liberty.⁴⁷ That shift resulted in successful legislation in 2012 where it had failed in 2011. One legislator, Delegate John Olszewski, said that his vote was solidified between 2011 and 2012 because of “the attention to the religious institution protections.”⁴⁸

Like Delegate Olszewski, the Speaker of the Maryland House of Delegates, Michael Busch, suggested that members of the House changed positions between the failed non-vote in 2011 and 2012’s victory. Specifically, Speaker Busch stated:

We didn’t want to inhibit any religious organization from practicing their beliefs. One of the issues was the adoption issue. We wanted to make sure we didn’t impede on the Catholic Church for adoption services. We had a clearer initiative in 2012 and I know for a fact that for two or three delegates [including religious liberty protections] was an important component in their decision to vote for it.⁴⁹

Religious liberty protections proved vital in the earlier contests over same-sex marriage, too. In Vermont, where legislators in the House overrode Governor Jim Douglas’ veto by the exact number of votes required, some legislators took comfort in the religious liberty exemptions. One Republican member of the Vermont House Judiciary Committee who voted for Vermont’s same-sex marriage law suggested that, for her, including religious liberty exemptions “was [the] most significant concern. I wanted to ensure that equality was there, but at the same time, I wanted to make sure that the language in the public accommodations act allowed [religious organizations] to keep doing the things they’ve always done.”⁵⁰

Similarly, in New Hampshire the House and Senate passed a same-sex marriage bill—by a razor-thin majority—that contained no meaningful religious

47. See Annie Linskey, *After Soul Searching, Swing Votes Make Difference for Same-Sex Marriage: Measure That Put Md. in National Spotlight Moves to Senate*, BALT. SUN (Feb. 18, 2012), http://www.baltimoresun.com/news/maryland/politics/bs-md-same-sex-sunday-20120217_0,232363.story (noting that bill passed with one vote to spare and that one of the votes needed “to push[] the vote count past the 71 needed to pass the measure” came from Delegate Olszewski, a “devoted Methodist [who] was worried about churches that did not want to perform same-sex marriages”); John Wagner & Aaron C. Davis, *O’Malley Unveils Agenda, Including Same-Sex Marriage Bill*, WASH. POST (Jan. 23, 2012), http://www.washingtonpost.com/local/dc-politics/omalley-unveils-agenda-including-same-sex-marriage-bill/2012/01/23/gIQAV8gMMQ_story.html (“Religious-exemption language included in O’Malley’s same-sex marriage bill is intended to pick up additional support in the House of Delegates, where a bill fell unexpectedly short last year after clearing the Senate.”).

48. Telephone Interview with John Olszewski, Member of the Md. House of Dels. (June 14, 2012).

49. Telephone Interview with Michael Busch, Speaker of the Md. House of Dels. (July 3, 2012).

50. Telephone Interview with Heidi Schuermann, Member of the Vt. House of Reps. (June 28, 2012).

liberty protections.⁵¹ Governor Lynch threatened to veto the bill unless the legislature adopted more robust religious liberty exemptions.⁵² He stated: “If the legislature passes this [religious liberty] language, I will sign the same-sex marriage bill into law. If the legislature doesn’t pass these provisions, I will veto it.”⁵³ The Legislature heeded his caution⁵⁴ and New Hampshire has same-sex marriage today, notwithstanding later efforts to repeal that legislation.⁵⁵

Contrast these legislative victories with the experience in Maine. In 2009, legislators refused to include religious liberty protections in Maine’s same-sex marriage legislation. The Maine legislature enacted a law that allowed religious institutions to control their religious doctrines and protected clergy and authorized celebrants from fines or other penalties for refusing to “join persons in marriage.”⁵⁶ It provided no other protection.⁵⁷

Later in 2009, Maine voters narrowly rejected the same-sex marriage law in a people’s veto—53% to 47%.⁵⁸ The lack of any meaningful protections in the Maine statute gave rise to the question raised by Professor Dale Carpenter the morning after the people’s veto: Would “includ[ing] broader protection for religious liberty in the legislature’s SSM bill” have made a difference?⁵⁹

51. See Andrew J. Manuse, *New Hampshire Senate Passes Gay-Marriage Bill*, REUTERS (Apr. 29, 2009), <http://uk.reuters.com/article/2009/04/29/us-gaymarriage-newhampshire-idUKTRE53S72J20090429>.

52. Press Release, Governor John Lynch, Governor Lynch Statement Regarding Same-Sex Marriage Legislation (May 14, 2009), *available at* <http://www.governor.nh.gov/media/news/2009/051409same.htm>.

53. *Id.*

54. See *supra* notes 28–40 and accompanying text.

55. See Abby Goodnough, *Challenge to Gay Marriage Fails in New Hampshire*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/22/us/politics/new-hampshire-refuses-to-repeal-gay-marriage-right.html>.

56. Maine’s same-sex marriage law provided “protection” that was coterminous with constitutional guarantees. ME. REV. STAT. ANN. tit. 19–A, § 650 (repealed 2009). It expressly did “not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution.” *Id.* It also provided protections for authorized celebrants. *Id.*

57. *Id.*

58. Maria Sacchetti, *Maine Voters Overturn State’s New Same-Sex Marriage Law*, BOS. GLOBE (Nov. 4, 2009), http://www.boston.com/news/local/maine/articles/2009/11/04/maine_voters_overturn_states_new_same_sex_marriage_law/.

59. Dale Carpenter, *There’s Always Next Year*, THE VOLOKH CONSPIRACY (Nov. 4, 2009, 1:21 PM), <http://volokh.com/2009/11/04/theres-always-next-year/> (“Some will say that we should have included broader protection for religious liberty in the legislature’s [same-sex marriage] bill.”). Professor Carpenter did not attribute the law’s demise to this omission: “I don’t get the sense that the supposed erosion of religious liberty was the main Maine issue or that broader protection would have made an electoral difference Instead, the central concern seems to have been what will be taught in public schools to children being raised by heterosexual parents.” *Id.* Others chalk up the demise of Maine’s same-sex marriage law to the vitriol in the referendum. Jeff Jacoby, *Wedded to Vitriol, Backers of Gay Marriage Stumble*, BOS. GLOBE (Nov. 11, 2009),

Maine's experience three years later suggests that meaningful protections would have mattered. A 2012 ballot initiative asked Maine voters: "Do you want to allow the State of Maine to issue marriage licenses to same-sex couples?"⁶⁰ A majority of voters, 52.59%, answered affirmatively, while 47.41% responded "no."⁶¹ Notably, the ballot measure itself authorized a specific act to "allow marriage licenses for same-sex couples and protect religious freedom." These protections include a religious exemption for clergy as well as "any church, religious denomination or other religious institution." Each of these may not be required to "host any marriage in violation of the religious beliefs of that member of the clergy, church, religious denomination or other religious institution."⁶² Any refusal would not subject the objector to "a lawsuit or liability and does not affect the tax-exempt status of the church, religious denomination or other religious institution."⁶³

While it is difficult to know whether voters understood or gave weight to these religious liberty protections, ballot supporters certainly emphasized it in their campaign.⁶⁴ This about-face in the span of three years further confirms the value of compromise that has marked the legislative victories for same-sex marriage. In other words, one way to read Maine's experience in 2009 and 2012 is that same-sex marriage laws without meaningful religious liberty protections make the case for same-sex marriage much more difficult.

Together, these experiences suggest that exemptions take a powerful argument against same-sex marriage away from opponents by cabining the impact of same-sex marriage on religious institutions and organizations. Without these crucial religious liberty accommodations, most, if not all, of the underlying bills would have likely failed. Although religious objectors in these jurisdictions did not block recognition of same-sex marriage, the muddled legislative process nonetheless yielded greater religious liberty protections than constitutionally commanded.

http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/11/wedded_to_vitriol_backers_of_gay_marriage_stumble/.

60. See Stephanie Condon, *Ballot Initiatives to Watch This Year*, CBS NEWS (Sept. 28, 2012, 6:00 AM), http://www.cbsnews.com/8301-250_162-57521820/ballot-initiatives-to-watch-this-year/.

61. 2012 General Election Results for Maine, BANGOR DAILY NEWS, <http://maineelections.bangordailynews.com/> (last visited Jan. 17, 2013).

62. An Act to Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom, Legis. Doc. 1860, 123d Me. State Leg. (Me. 2009), available at http://www.mainelegislature.org/legis/bills/bills_125th/billtexts/IB000301.asp.

63. *Id.*

64. See, e.g., *Yes on 1: Mainers United for Marriage—Pastor Michael Gray & Robyn Gray*, MAINERS UNITED FOR MARRIAGE, <http://www.mainersunited.org/videos/entry/yes-on-1-mainers-united-for-marriage-pastor-michael-gray-robyn-gray/> (last visited Jan. 17, 2013) (Mainers United advertisement explaining the religious protections in the proposed act).

V.
CONCLUSION

While weighing the merits of the Ninth Circuit's decision in *Perry*, the Court may well recall Justice Powell's concurrence in *Frontiero v. Richardson*.⁶⁵ There Justice Powell observed:

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.⁶⁶

What the Court is likely to do with the substantive arguments for and against same-sex marriage remains to be seen. For those seeking a victory for marriage equality, recognition of same-sex marriage has simply been too long in coming. But a narrow decision offers one overlooked benefit: permitting healthy, robust debates on same-sex marriage recognition to continue in state legislatures throughout the country.

Indeed, the legislative track record across a dozen states shows that religious liberty protections turn down the temperature on a debate that too often is heated and needlessly divisive. The pivotal role that these protections have played in recent battles in both state legislatures and at the ballot box confirms that advancing the civil rights of one group need not erode the rights of others. Together, these laws make a strong case that marriage equality and religious liberty protections share a common fate.

65. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

66. *Id.* at 692 (Powell, J., concurring in the judgment).