THE HEART OF THE CONSTITUTIONAL ENTERPRISE: AFFIRMING EQUALITY AND FREEDOM IN PUBLIC EDUCATION
By
William E. Thro*

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.—Justice Albie Sachs, Constitutional Court of South Africa

Justice Sachs wrote those words to describe his approach when writing the opinion establishing a constitutional right to same-sex marriage in South Africa. 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.” Rather, he wanted both sides to feel that their “convictions, values, and perspectives are being taken seriously and treated thoughtfully and with respect.” While South Africa’s Constitution mandated a particular result, it was imperative that no individual feel isolated from the constitutional community. Affirmation of one

---

* University Counsel & Assistant Professor of Government, Christopher Newport University. B.A., Hanover College (1986); M.A., University of Melbourne (1988); J.D., University of Virginia (1990). Mr. Thro writes in his personal capacity and his views do not represent the views of the Attorney General of Virginia.


2 See Minister of Home Affairs v. Fourie, 2006 9(1) SA 524 (CC).

3 Sachs, supra note 1, at 239.

4 Id.
value—no sexual orientation discrimination—could not eviscerate another constitutional value—freedom of religion.\(^5\)

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

\(^5\) *Id.* at 240.


\(^7\) See Mark S. Kende, *Constitutional Rights In Two Worlds: South Africa And The United States* 8-10 (2009) (describing 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 is unique. See William E. Thro, *American Exceptionalism: Some Thoughts on Sanchez-llamas v. Oregon*, 11 Texas Review of Law & Politics 219 (2007).

possible to have a vigorous and energetic President while respecting the clear prerogatives of both Congress and the judiciary.\textsuperscript{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.”

As our Nation confronts demands for state recognition of same-sex marriage,\textsuperscript{11} our jurists and policymakers must heed Justice Sachs’ warning—do not divide the constitutional community.\textsuperscript{12} Regardless of whether government recognizes same-sex relationships and regardless of whether government describes that recognition as “marriage,”\textsuperscript{13} the State must treat gays and lesbians as full and equal members of society.\textsuperscript{14} Our Constitution does not tolerate classes among its


\textsuperscript{11} 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, Jew, or Muslim—will continue to reject the idea that a same sex union is equivalent to their faith’s definition of marriage.

\textsuperscript{12} Sachs, \textit{supra} note 1, at 239.

\textsuperscript{13} 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.

citizens.\textsuperscript{15} Statutes that criminalize certain sexual acts\textsuperscript{16} must apply with equal force to both homosexuals and heterosexuals.\textsuperscript{17} Similarly, even if every State eventually recognizes same-sex marriage, government may not prescribe what is orthodox in politics\textsuperscript{18} or punish religious belief.\textsuperscript{19} Government must not persecute People of Faith\textsuperscript{20} or undermine private charities.\textsuperscript{21} The affirmation of equality must

\textsuperscript{15} Id. at 623. See also \textit{Plessy v. Ferguson}, 163 U.S. 537, 559, (1896) (Harlan, J. dissenting).

\textsuperscript{16} At first blush, the \textit{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 \textit{Lawrence} is actually" a narrow as-applied holding. \textit{Utah v. Holm}, 137 P.3d 736, 742-43 (Utah 2006). Properly understood, \textit{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." \textit{Martin v. Zihel}, 607 S.E.2d 367, 370 (Va. 2005) (emphasis added). In particular, \textit{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." \textit{Id.} at 369 (emphasis added) (citation omitted). While \textit{Lawrence} established "a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct," \textit{Lofton v. Sec'y of Dep't of Children & Family Servs.}, 358 F.3d 804, 815-16 (11th Cir. 2004) (emphasis added). It has no impact on the ability of the States to prosecute sexual conduct between an adult and a minor, \textit{McDonald v. Virginia}, 645 S.E.2d 918, 922 (Va. 2007); \textit{United States v. Bach}, 400 F.3d 622, 628-29 (8th Cir. 2005) or sexual conduct that occurs in public. \textit{Singson v. Virginia}, 621 S.E.2d 682, 688-93 (Va. App. 2005), \textit{Tjan v. Virginia}, 621 S.E.2d 669, 672-76 (Va. App. 2005) (both holding that the Commonwealth may criminalize sexual conduct that occurs in public).

\textsuperscript{17} \textit{Lawrence}, 539 U.S. at 579-83 (O'Connor, J. concurring).


\textsuperscript{20} See Douglas W. Kmiec, \textit{Same Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion} in \textit{SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY} 103 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008).
not result in the subordination of freedom and vice versa. Rather, the Constitution must affirm both equality and freedom. 22

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 school-house gate. 23

---


22 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, Christian Legal Soc’y v. Martinez, 130 S. Ct 2971 (2010), at 58.

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.\textsuperscript{24} 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 general principles.\textsuperscript{25} Those general principles will guide jurists, policy-makers, and educational administrators.

This Article has three parts. Part I discusses the constitutional value of equality in the context of same sex marriage. Part II examines the constitutional value of freedom and its significance for those who have political or theological objections to state recognition of same-sex unions. Part III explains how public education may affirm both the equality of homosexuals and the freedom of those who oppose same-sex marriage.

\textsuperscript{24} Sachs, \textit{supra} note 1, at 239.

\textsuperscript{25} Constitutional problems in public education—like constitutional problems in other areas—are always context specific. A subtle change in a policy or circumstances may create or alleviate constitutional problems.
I. EQUALITY

The Equal Protection Clause, which applies to “persons, not groups,” is “essentially a direction that all persons similarly situated ... be treated alike.” If a program treats everyone equally, there is no equal protection violation. 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.” 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. Because racial classifications “are by their very nature odious to a free people whose institutions are founded on the doctrine of equality” and “call for the most exacting judicial examination,” they are,

26 U.S. Const. amend. XIV, § 1.


29 Romer, 517 U.S. at 623.


33 Bakke v. Bd. of Regents of the Univ. of Cal., 438 U.S. 265, 291 (1978) (Powell, J., joined by White, J., announcing the judgment of the Court).
regardless of their purpose, “constitutional only if they are narrowly tailored to further compelling governmental interests.” 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. In contrast, classifications based upon age, disability, income, or sexual orientation receive rational basis scrutiny. The law or policy is constitutional unless it “lacks a rational relationship to legitimate state interests.”

While the Constitution prohibits irrational sexual orientation discrimination,

---

34 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. California, 543 U.S. 499, 505 (2005) (citations omitted).

35 Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted). “Absent searching judicial inquiry into the justification for such race-based measures,” we have no way to determine what “classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” Id.


38 Cleburne, 473 U.S. at 439-40.


40 Romer, 517 U.S. at 623.

41 Id. at 632.
this does not mean that the Constitution requires same sex marriage.\textsuperscript{42} If the State chooses to recognize marriage—and there is no constitutional obligation for the State to do so\textsuperscript{43}—then the State may restrict marriage to opposite couples.\textsuperscript{44} Quite simply, it is rational for the State to adopt the definition of marriage that has dominated human culture for the past four millennia.\textsuperscript{45} 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

\textsuperscript{42} But see \textit{Perry v. Schwarzenegger}, 704 F. Supp. 2d 921, 991-1004 (N.D. Cal.), \textit{stay denied}, 702 F. Supp.2d 1132 (N.D. Cal), \textit{stay granted}, ___ F.3d ___ (9\textsuperscript{th} Cir. 2010) (holding that, if the States recognize traditional marriage, the National Constitution requires the States to recognize same-sex marriage). 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 \textit{Perry} will survive appellate review \textit{See Brief of Defendant-Intervenor-Appellees, Perry v. Schwarzenegger}, No. 10-16966 (9\textsuperscript{th} Cir.) at 43-113.

\textsuperscript{43} 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.” \textit{Pennoyer v. Neff}, 95 U.S. 714, 734-35 (1878). \textit{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.” \textit{Zablocki v. Redhail}, 434 U.S. 374, 392 (1978) (Stewart, J., concurring).

\textsuperscript{44} \textit{See Citizens for Equal Prot. v. Bruning}, 455 F.3d 859, 867-68 (8\textsuperscript{th} Cir. 2006). Moreover, in \textit{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. \textit{See Mandel v. Bradley}, 432 U.S. 173, 176 (1977) (per curiam).

\textsuperscript{45} \textit{Bruning}, 455 F.3d at 867-68. \textit{See also} Brief of Defendant-Intervenor-Appellees, \textit{Perry v. Schwarzenegger}, No. 10-16966 (9\textsuperscript{th} Cir.) at 75-113.
exist if they were sacrificed,” then the fundamental right to marry does not encompass same-sex marriage.

To be sure, the States, in the exercise of their sovereignty, may choose to

---


48 See Brief of Defendant-Intervenor-Appellees, Perry v. Schwarzenegger, No. 10-16966 (9th Cir.) at 47-69 (explaining why the right to marry a person of the same sex is not firmly rooted in the Nation’s history).

49 Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. See Declaration of Independence (“these United colonies are and of right ought to be free and independent states”). Each individual State retained the “Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” Id. Indeed, the Articles of Confederation explicitly recognized that each State “retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled.” Articles of Confederation, art. II In sum, before the ratification of the United States Constitution, the States were sovereign entities. See Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

recognize same-sex marriage\(^{50}\) or may decline to do so.\(^{51}\) “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.”\(^{52}\) However, the Constitution’s Full

\(^{50}\) Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire have recognized same-sex marriage.


\(^{52}\) In re Burrus, 136 U.S. 586, 593-94 (1890).
Faith and Credit Clause does not require a State that has rejected same-sex marriage to recognize a valid same-sex marriage from another State. Thus, same-sex marriage is, and will remain, a matter for each individual State.

While the recognition of same-sex marriage is entirely within the States’ sphere of sovereignty, the States vary in how they exercise that sovereign choice. In

53 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.” Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). The Framers designed the Clause “to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states.” Pacific Employers Ins. Co. v. Indus. Accident Comm’n, 306 U.S. 493, 501 (1939). “The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.” Sherrer v. Sherrer, 334 U.S. 343, 355 (1948). “To vest the power of determining the extraterritorial effect of a State’s own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.” Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 (1980).

54 Quite simply, “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.” Nevada v. Hall, 440 U.S. 410, 422 (1979). “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.” Williams v. North Carolina, 317 U.S. 287, 296 (1942). 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.” Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488, 493-94 (2003) Hyatt, 538 U.S. at 493-94. “Neither the Due Process Clause nor Full Faith and Credit Clause requires [a State] ‘to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state.’” Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822-23 (1985). If the Public Policy Exception allows a State to refuse to recognize the sovereign immunity of another State, see Hyatt, 538 U.S. at 496-98., then surely a State may refuse to a marriage performed in another State that is contrary to the State’s fundamental law.
most States, the People themselves have declared that the legislature and judicial branches may not recognize same-sex marriage. Although it has not happened yet, it is conceivable that the People of a State might amend the State Constitution to guarantee a right of same-sex marriage. Of the five States that recognize same-sex marriage, only New Hampshire did so without judicial intervention. In Vermont, the judiciary mandated recognition of same sex unions, and the legislature later decided to recognize same-sex marriage. In Connecticut, Iowa, and Massachusetts, the judiciary interpreted the State Constitution as requiring same-sex marriage.

The result is the same, but there is an important constitutional distinction between the legislature choosing to enact a statute recognizing same-sex marriage

55 See the constitutional provisions cited supra note 51.
and the judiciary discovering that the State Constitution requires same-sex marriage.\textsuperscript{63} The People may correct the legislative choice by electing different legislatures, but the judicial interpretation endures until overruled by the State’s highest court or the People amend State Constitution.\textsuperscript{64} Because of the enduring nature of a constitutional ruling, courts “must never forget that it is a constitution we are expounding.”\textsuperscript{65} Constitutions are “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”\textsuperscript{66} 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.”\textsuperscript{67} When confronting a challenge, judges must recognize

\textsuperscript{63} 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. \textit{Hornbeck v. Somerset County Board of Education}, 458 A.2d 758, 785 (Md. 1983); \textit{Board 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, \textit{United States v. Morrison}, 529 U.S. 598, 607 (2000) but the State Legislature may act unless there is an explicit restriction. \textit{Almond v. Rhode Island Lottery Comm’n}, 756 A.2d 186, 196 (R.I. 2000).

\textsuperscript{64} This is exactly what happened in California. The Supreme Court of California held that the California Constitution required same-sex marriage. \textit{See In re Marriage Cases}, 183 P.3d 384 (Cal. 2008). The People then amended their Constitution to prohibit same-sex marriage. \textit{See Cal. Const. Art. I, § 7.5}. Of course, a federal judge subsequently held that the constitutional amendment violated the federal constitution. \textit{See Perry v. Schwarzenegger}, 704 F. Supp. 2d at 991-1004.

\textsuperscript{65} \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 407 (1819).

\textsuperscript{66} \textit{Id.} at 415.

\textsuperscript{67} \textit{Weems v. United States}, 217 U.S. 349, 373 (1910).
that they are not “‘a bevy of Platonic Guardians’”\textsuperscript{68} as the “myth of the legal profession's omnicompetence . . . was exploded long ago.”\textsuperscript{69} “There was a time when [the judiciary] presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy[.]”\textsuperscript{70} Absent a clear violation of the constitutional text and structure, jurists should uphold even “uncommonly silly” laws and policies.\textsuperscript{71}

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.”\textsuperscript{72}

\textbf{II. 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


\textsuperscript{69} \textit{People Who Care v. Rockford Bd. of Educ. School District No. 205}, 111 F.3d 528, 536 (7th Cir. 1997).

\textsuperscript{70} \textit{United Haulers v. Oneida Harkimer Solid Waste Management Authority}, 127 S. Ct. 1786, 1798 (2007) (Roberts, C.J., joined by Souter, Ginsburg, & Breyer, JJ., announcing the judgment of the Court) (citation omitted).

\textsuperscript{71} \textit{Lawrence}, 539 U.S. at 605 (Thomas, J., dissenting).

\textsuperscript{72} 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.
respect to same-sex marriage, those who agree or disagree with that decision retain certain freedoms.

First, individuals who disagree with the State on same-sex marriage have the right to express their disagreement.73 “The proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”74 “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,”75 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.”76 “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 promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”77 “[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the

---

73 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 United States v. Playboy Entertainment Group, 529 U.S. 803, 814-816 (2000); R.A.V. v. St. Paul, 505 U.S. at 382,; Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871-872, (1982) (plurality opinion); Tinker, 393 U.S. at 508-09.


77 Hurley, 515 U.S. at 579.
ground that they view a particular expression as unwise or irrational.”

Indeed, “it is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive.”

Second, the Constitution protects “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”

“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.”

Since “the custody, care and nurture of the child reside first in the parents,” parents may send their children to private schools, or educate the children at home.

---


83 Pierce, 268 U.S. at 534-35

84 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 States, home schooling is legal pursuant to a variety of types of regulations.
Third, to the extent that one’s religious belief compels one to favor or oppose same sex-marriage, the Constitution absolutely protects that belief.85 “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.”86 “The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such.”87 The Constitution “requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people.”88 “Government may neither compel affirmation of a repugnant belief, nor penalize or

85 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).

86 Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968). As the Supreme Court observed:

Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance.


88 Cutter, 544 U.S. at 719.
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 views.”

Indeed, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” Thus, religious groups may profess any beliefs they wish and may exclude those who disagree with their beliefs. 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,” the government may treat religious organizations more favorably than non-religious groups without violating the Establishment Clause.

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

89 Sherbert, 374 U.S. at 403.


93 See Cutter, 544 U.S. at 719-24(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) (“we 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).
religion prescribes (or proscribes).”  

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.” 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" and if the law “in a selective manner impose burdens only on conduct motivated by religious belief." “Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.”

Finally, there is a freedom of association. “An 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.” “This right is crucial in preventing the majority from imposing its views on groups that would

---


96 Lukumi, 508 U.S. at 533.

97 Id. at 543.

98 Id. at 531.

rather express other, perhaps unpopular, ideas.”100 “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.”101 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.”102

III. AFFIRMING BOTH EQUALITY AND FREEDOM IN PUBLIC EDUCATION

Although all controversial political issues are problematic for public education, the issue of same-sex marriage goes far beyond objections to the curricular treatment of the issue.103 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.”104 As Volokh observed, one goal of the gay rights movement is “delegitimizing and legally punishing private behavior that


102 Dale, 530 U.S. at 650.


discriminates against or condemns homosexuals.”\textsuperscript{105} Kmiec believes, “apparently one of the main aspirations of the homosexual movement is retaliation against the defenders of traditional marriage.”\textsuperscript{106} As the Constitution allows the government to punish private religious organizations that advocate racist views,\textsuperscript{107} government logically could punish those who oppose same-sex marriage or regard homosexual conduct as sinful.\textsuperscript{108} In an environment where some want not only to affirm equality, but also to deny freedom to those who disagree, the potential for explosive confrontation is at its highest. Despite the volatile nature of the situation, the Constitution requires that public education affirm both equality and freedom.

First, 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.\textsuperscript{109} Government may not deny employment or the ability to study simply because of one’s sexual

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{105} Eugene Volokoh, \textit{Same-Sex Marriage and Slippery Slopes}, 33 \textit{Hofstra L. Rev.} 1155, 1178 (2005).
\item\textsuperscript{106} Kmiec, \textit{supra} note 20 at 104. Kmiec also notes that some gay rights advocates have openly declared their intent to discredit and marginalize traditional religious practices. \textit{Id.} (quoting Larry W. Shackle, \textit{Parading Ourselves: Freedom of Speech at the Feast of St. Patrick}, 73 \textit{B.U. L. Rev.} 791, 792 (1993)).
\item\textsuperscript{107} \textit{See Bob Jones University v. United States}, 461 U.S. 574, 593-96 (1983) (denying tax-exempt status to private religiously affiliated university that espoused racist beliefs).
\item\textsuperscript{109} \textit{See Romer}, 517 U.S. at 633-34.
\end{enumerate}
\end{footnotesize}
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, educational institutions must respond effectively to harassment against students and teachers. Refraining from discrimination and responding to harassment, which is a form of discrimination, represents an affirmation of equality.

Second, subject to restrictions that reflect the unique nature of the school environment, students may express their approval or disagreement with same-sex marriage. “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.” Teachers and students must always

---


113 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.

114 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).

115 Rodriguez, 605 F.3d at 708
remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”¹¹⁶ “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.”¹¹⁷

Third, 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.¹¹⁸ Public employees, including public school teachers and faculty members at state universities, retain broad First Amendment rights.¹¹⁹ While the Court recently held that public employees lack First Amendment rights when speaking in their official capacities,¹²⁰ the Court has “made clear that public employees do not surrender all their First Amendment rights by reason of their employment.”¹²¹ Thus, while the administration may


¹¹⁷ Rodriguez, 605 F.3d at 708. See also Gitlow v. New York, 268 U.S. 652, 667, (1925); Id. at 673 (Holmes, J., dissenting).

¹¹⁸ 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 beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.” Id. at 410.


¹²¹ Id. at 417.
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.

Fourth, public schools and universities must recognize student organization 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],”122 “the mere disagreement of the [institution] with the group’s philosophy affords no reason to deny it recognition” 123 or funding. 124 In granting recognition and/or funding, the school or university does not adopt the group’s speech as its own125 or “confer any imprimatur of state approval” on the student group.126 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.”127 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.128 Simply stated, the “avowed purpose” for granting official status to student


126 Widmar, 454 U.S. at 274.

127 Rumsfeld, 547 U.S. at 69-70.

128 Southworth, 529 U.S. at 233-34.
organizations is supposed to be “to provide a forum in which students can exchange ideas.” Therefore, groups with racist, sexist, homophobic, anti-Semitic, and/or anti-Christian views are entitled to recognition, access to facilities, and funding.

Fifth, 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, 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. Put another way, the Court declared that the government, through university officials, might force

---

129 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”).

130 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. 2 William A. Kaplin & Barbara H. Lee, THE LAW OF HIGHER EDUCATION 1051 (4th ed. 2007) (interpreting Healy). 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 campuses or in the outside community engaged in certain conduct. Healy, 408 U.S. at 185-86.


132 Christian Legal Soc’y, 130 S. Ct. at 2978.
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,” 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.” In other words, what the Constitution forbids government from doing directly, it may accomplish indirectly by restricting access to the limited-public forum.

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. In many instances, the State Constitution may protect the right of student groups to exclude those who disagree. Because State Constitutions are frequently


134 Christian Legal Soc’y, 130 S. Ct. at 3014_ (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting). See also id. at 2997 (Stevens, J., concurring)

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

136 Cf. Perry, 408 U.S. at 597.
amended or even completely revised,137 these charters often are more protective of individual liberty.138 Indeed, since the revival of state constitutional law in the early 1970’s,139 “it would be most unwise these days not also to raise the state constitutional questions.”140 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.141 Moreover, state


141 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).
religious freedom restoration acts\textsuperscript{142} 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.\textsuperscript{143} 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 forcing the inclusion of dissenters. In sum, state law may prohibit what \textit{Christian Legal Society} permits.

\section*{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.”\textsuperscript{144} 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

\begin{flushleft}
\footnotesize

\textsuperscript{143} Lund, \textit{supra} note 142, at 476 Wright, \textit{supra} note 142, at 426.

\textsuperscript{144} Declaration of Independence.
\end{flushleft}
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.