Free Exercise for Whom? -- Could the Religious Liberty Principle that Catholics Established in Perez v. Sharp Also Protect Same-Sex Couples' Right To Marry?

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ERIC ALAN ISAACSON

INTRODUCTION

Worries abound that recognizing same-sex couples’ right to marry may threaten the religious liberty of Americans, including Catholics, whose churches frown upon same-sex unions. When marriage-equality cases...
reached the United States Supreme Court in 2013 in Hollingsworth v. Perry and United States v. Windsor, a Becket Fund for Religious Liberty amicus curiae brief insisted that upholding same-sex couples’ right to marry would produce “widespread and intractable church-state conflicts,” raising a grave “threat[] to religious liberty.”

Endorsing the Becket Fund’s assertions in its own amicus curiae brief, the U.S. Conference of Catholic Bishops declared that were same-sex couples’ right to marry honored, all who express religiously grounded moral disapproval “of such relationships would find themselves increasingly marginalized and denied equal participation in American public life and benefits.”

That same-sex couples’ ability to wed seriously threatens anyone’s religious liberty, let alone marginalizes America’s 68 million Catholics, is questionable. Roman Catholic doctrine teaches that remarriage by a divorced person (whose spouse still lives) amounts to “public and permanent adultery” that “objectively contravenes God’s law,” so that the Church “cannot recognize the union of people who are civilly divorced and remarried,” much as it cannot recognize marriages between two people of the same sex. Yet no one imagines that the legal right of divorced persons to marry seriously threatens Roman Catholics’ religious liberty.


2. 133 S. Ct. 2652 (2013) (involving California Proposition 8’s withdrawal of the right to marry).


9. Id. ¶ 1650, at 411–12.


However that may be, anyone genuinely concerned about religious freedom should not stop at the liberty interests of those who object to same-sex relationships, but should also ask: what religious-liberty interest might same-sex couples themselves have in enjoying the right to marry? How do legal bans on their marriages affect free exercise in religious communities that bless same-sex unions? And what of clergy called to serve their congregations by solemnizing such marriages in religious movements and faith communities that honor them? Don’t they have religious-liberty interests too?

These are substantial questions, for while opponents of legal equality for gay and lesbian citizens’ relationships often purport to speak on behalf of “Judeo-Christian” tradition and values,12 they typically overlook the fact that major religious movements bless same-sex couples’ committed relationships, offering religious nuptial rites for those who can lawfully marry. Speak of Judeo-Christian values? Mainstream American Judaism views a committed gay or lesbian couple’s right to marry as a basic civil right.13 Many Reform and Reconstructionist Rabbis are pleased to solemnize same-sex couples’ marriages with religious rites.14 Talk about

12. The House Judiciary Committee Report recommending passage of the Defense of Marriage Act (“DOMA”), for example, declared:

Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexual better comports with traditional (especially Judeo-Christian) morality.


13. Rebecca T. Alpert with a Foreword by Elaine Pagels, Whose Torah? A Concise Guide to Progressive Judaism 41 (2008) (“All the major non-Orthodox groups are on record supporting civil marriage for same-sex couples.”); see also Shoshana Bricklin, Legislative Approaches to Support Family Diversity, 7 Temple Pol. & Civ. RTS. L. REV. 379, 388 n.80 (1997) (quoting Rabbi Alpert’s testimony before the Philadelphia City Council: “In the non-Orthodox Jewish community that includes reformed[,] reconstructionist[,] and conservative Jews[,] . . . sexual minorities are welcomed and our relationships are considered not only acceptable but holy.”).

America’s Christian traditions? The two denominations comprising most of New England’s oldest Protestant churches, the United Church of Christ and the Unitarian Universalist Association, both enthusiastically affirm same-sex couples’ right to marry, and their own clergy’s right to officiate and to solemnize the marriages with religious rites. So, of course, does the Universal Fellowship of Metropolitan Community Churches, which has offered same-sex couples religious rites of marriage since its founding in the 1960s. And these movements are only the beginning.

The resulting free-exercise implications have to date received relatively little judicial attention. That may change now that a mainline


18. See, e.g., Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc), reh’g denied, 120 F.3d 211 (11th Cir. 1997) (upholding Georgia Attorney General’s denial of employment to a liberal Jew who planned to marry another woman in a purely religious
Protestant denomination has brought religious liberty to the fore—with a lawsuit filed by the General Synod of the United Church of Christ in April 2014, challenging North Carolina’s laws that prohibit same-sex couples’ marriages and threaten criminal prosecution of clergy who officiate.\textsuperscript{19}

With the free-exercise issue brought into focus by the United Church of Christ’s case, I hope with this article to highlight the position that Roman Catholic litigants and bishops have advanced in past cases concerning marriage and the free exercise of religion. For Roman Catholics have argued quite eloquently that restrictions on the right to marry impinge directly upon the free exercise of religion—just as the General Synod of the United Church of Christ currently contends.

It is, I think, worth noting at the article’s outset that although civil marriage is, in American law, a secular institution, that “does not require any religious ceremony for its solemnization,”\textsuperscript{20} freedom to marry also clearly implicates interests protected by the First Amendment’s Free Exercise Clause. The United States Supreme Court recognized this in its 1987 decision in \textit{Turner v. Safley},\textsuperscript{21} which sustained the right even of incarcerated felons to marry—as “an exercise of religious faith.”\textsuperscript{22} But \textit{Turner v. Safley} was by no means the first decision recognizing the free-exercise interest in marriage.

Nearly four decades before, in \textit{Perez v. Sharp},\textsuperscript{23} a Roman Catholic couple, represented by a religiously motivated lawyer, persuaded

\begin{footnotes}
\footnotetext{19}{Complaint, General Synod of The United Church of Christ v. Cooper, No. 3:14-cv-00213-RJC-DCK (W.D. N.C. Apr. 28, 2014). Joining the General Synod as plaintiffs are same-sex couples who desire to marry in their own churches and synagogues, and their clergy—from the United Church of Christ, the Unitarian Universalist Association, the Evangelical Lutheran Church in America, and from Judaism’s Reform and Reconstructionist movements—who understandably desire to officiate, but face potential criminal charges if they do. \textit{See id.} ¶¶ 15–22 (clergy plaintiffs); \textit{id.} ¶¶ 23–53 (couples). With the filing of an amended complaint, the Central Conference of American Rabbis, Alliance of Baptists, Inc., and Welcoming and Affirming Baptists also joined the case as plaintiffs. \textit{See Amended Complaint, General Synod of the United Church of Christ, No. 3:14-cv-00213-JC-DCK (W.D. N.C. June 6, 2014).}}
\footnotetext{20}{Maynard v. Hill, 125 U.S. 190, 210 (1888).}
\footnotetext{21}{482 U.S. 78 (1987).}
\footnotetext{22}{\textit{id.} at 96; \textit{see infra} text accompanying notes 43–53.}
\footnotetext{23}{198 P.2d 17 (Cal. 1948). The decision is reported as \textit{Perez v. Sharp}, 32 Cal. 2d 711, in California’s official reports, and as \textit{Perez v. Lippold}, 198 P.2d 17 (1948), by the West Publishing Company’s regional reporter. The different captions apparently resulted from a succession in the Office of the Los Angeles County Clerk (named in his official capacity), which was reflected in one reporter, but not the other. \textit{See R.A. Lenhardt, Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp, in RACE LAW STORIES 343, 344 n.6 (Rachel F. Moran & Devon W. Carbado eds., 2008).} Both California
\end{footnotes}
California’s Supreme Court to overturn California’s law against mixed-race marriages— as a violation of their religious freedom. Roman Catholics’ arguments concerning free-exercise of religion thus produced, in 1948, the first post-Reconstruction decision striking down a state law barring interracial marriage.

Although their “argument about free exercise has been traditionally overlooked by scholars,” Perez is a religious-liberty precedent—as two amicus curiae briefs recognized in Hollingsworth. One brief, filed by Catholics for the Common Good with the Marriage Law Project of the Catholic University of America’s Columbus School of Law, suggested that because Perez recognized the religious-liberty interest of a Catholic couple to marry, its precedential significance is circumscribed by Roman Catholic doctrine permitting mixed-race couples to marry but not same-sex couples. Another brief, that I filed for the California Council of Churches and other religious organizations whose members were then subject to California’s Proposition 8, argued the contrary—that the First Amendment’s Free Exercise Clause protects same-sex couples’ right to marry in their own churches and synagogues just as it did the mixed-race Roman Catholic couple in Perez.

courts and the United States Supreme Court have preferred the official reporter’s designation, Perez v. Sharp. See, e.g., Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967); In re Marriage Cases, 183 P.3d 384, 399 (Cal. 2008); Lockyer v. San Francisco, 95 P.3d 459, 485 (Cal. 2004); Hi-Voltage Wire Works, Inc. v. San Jose, 12 P.3d 1068, 1079 (Cal. 2000); Dribin v. Superior Court, 231 P.2d 808, 811 (Cal. 1951).

24. See infra text accompanying notes 54–91.

25. See infra text accompanying notes 54–91.


27. See infra notes 28–30, 56.


29. See Brief for California Council of Churches et al. as Amici Curiae Supporting Respondents at 7, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-144_resp_amcu_ccc-etal.pdf (last visited April 3, 2015) (arguing that same-sex couples have a religious-liberty interest in the right to marry). I was counsel of record on this brief, representing: the California Council of Churches; California Faith for Equality; Unitarian Universalist Legislative Ministry California (since renamed Unitarian Universalist Justice Ministry); Northern California Nevada Conference, United Church of Christ; Southern California Nevada Conference, United Church of Christ; Pacific Association of Reform Rabbis; California Network of Metropolitan Community Churches.

30. See id. at 12–19. On one point both briefs agreed: “The hero of Perez is Daniel Marshall, the President of the Catholic Interracial Council of Los Angeles, and the attorney who represented Sylvester Davis, an African-American male, and Andrea Perez, a woman of Mexican descent,” in asserting their right, as Catholics, to marry one another. Brief for Catholics for the Common Good and the Marriage Law Project Supporting Petitioners at 21,
From *Perez* I turn to *Loving v. Virginia*, where nearly two decades after *Perez* sixteen Catholic bishops and apostolic administrators, represented by Notre Dame law professor Father William M. Lewers (Congregatio a Sancta Cruce), filed an amicus curiae brief supporting a Baptist couple’s case against Virginia’s law barring racial mixing in marriage. Father Lewers’ and the Catholic bishops urged the Court to hold that “marriage is an exercise of religion protected by the First and Fourteenth Amendments” and thus “can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect.”

When Catholic Bishops and Catholic lay organizations more recently filed amicus briefs supporting California’s Proposition 8 in *Hollingsworth* and the federal Defense of Marriage Act (“DOMA”) in *Windsor*, on the other hand, they failed to acknowledge the free-exercise principle’s potential universality. I submit that if a Catholic couple in *Perez* and a Baptist couple in *Loving* both had a religious-liberty interest in being able to lawfully marry, then Reform and Reconstructionist Jews, Unitarian Universalists, members of the United Church of Christ and the Metropolitan Community Churches, and countless others whose faith communities welcome same-sex couples to marry, all must have a similar religious-liberty interest in legal recognition of same-sex couples’ marriages blessed and solemnized in their own churches and synagogues.

One can imagine objections. Doesn’t the religious-liberty holding of *Perez*, so eloquently advocated by Catholic bishops in *Loving*, conflict with the Supreme Court’s nineteenth-century decisions rejecting Mormon polygamists’ religious-liberty arguments? And what of the Supreme Court’s 1990 decision in *Employment Division v. Smith*, holding that states may proscribe—indeed criminalize—sacramental activities provided the laws doing so are “neutral” and of “general application”?

I think neither objection survives close scrutiny. Same-sex marriages entail none of the evils that the Supreme Court thought sufficient to justify criminal punishment of Mormon polygamy. Indeed, as nothing about consensual same-sex relationships could warrant their criminalization in

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33. See infra notes 112–114 and accompanying text.

34. See infra text accompanying notes 112–120.

35. 494 U.S. 872 (1990), reh’g denied.

36. See infra text accompanying notes 121–171.
Lawrence v. Texas,\textsuperscript{37} or justify withdrawal of federal recognition of otherwise lawful marriages in Windsor,\textsuperscript{38} the Mormon polygamy decisions are decidedly irrelevant.\textsuperscript{39}

Neither is Employment Division v. Smith a significant barrier to recognizing same-sex couple’s free-exercise interest in the right to marry.\textsuperscript{40} For it is by no means clear that laws limiting marriage to mixed-sex couples—in line with one view of Judeo-Christian tradition—are genuinely neutral when they target the marriages that equally honorable streams in our Judeo-Christian tradition deem sacred.\textsuperscript{41} In addition, Smith itself recognizes that free-exercise claims may require strict scrutiny where they also implicate matters of family relations or expressive association—as the right to marry clearly does.\textsuperscript{42}

The United Church of Christ is on firm ground when it advances a religious-liberty claim for same-sex couples’ right to marry. And the strength of that claim owes much to the Catholics who, in Perez, established that laws restricting the right to marry implicate the free exercise of religion.

I. \textsc{Although Civil Marriage Is a Secular Institution, the Supreme Court Has Recognized That Its Restriction Implicates the Free Exercise of Religion}

Marriage in the United States has long been a secular civil institution, free from the various liturgical limitations that particular faith traditions apply to decide what marriages they will choose to recognize and to solemnize with their own religious rites. A civil marriage, the United States Supreme Court declared in 1888, “must be founded upon the agreement of the parties” but “does not require any religious ceremony for its solemnization.”\textsuperscript{43}

This tradition of removing civil marriage from the realm of ecclesiastical authority and of religious limitations has deep roots in our history. The Pilgrims who sailed in on the Mayflower in 1620 and framed the Mayflower Compact as a model for American democracy also began the American tradition of treating legal marriage as “a civil thing” when, on May 12, 1621, they celebrated the “first marriage in this place,” between

\begin{itemize}
\item \textsuperscript{37} 539 U.S. 558 (2003).
\item \textsuperscript{38} 133 S. Ct. 2675 (2013).
\item \textsuperscript{39} See infra text accompanying notes 124–141.
\item \textsuperscript{40} See infra text accompanying notes 142–171.
\item \textsuperscript{41} See infra text accompanying notes 147–150.
\item \textsuperscript{42} See infra text accompanying notes 151–171.
\item \textsuperscript{43} Maynard v. Hill, 125 U.S. 190, 210 (1888); accord, e.g., Maryland v. Baldwin, 112 U.S. 490, 494–95 (1884) (“a marriage is a civil contract and may be made . . . without attending ceremonies, religious or civil”); Meister v. Moore, 96 U.S. 77, 78 (1877) (“Marriage is everywhere regarded as a civil contract.”).
\end{itemize}
Edward Winslow and the recently widowed Susanna White. Governor William Bradford explained “[t]hat those of any religion, after lawfull [sic] and open publication, coming before the magistrates, in the Town or Stat[e]-house, were to be orderly (by them) married one to another,” without oversight or interference from ecclesiastical authority. The principle that, whatever its religious significance may be, marriage entails an essentially secular civil right was widely followed in New England and, ultimately, throughout the United States.

Yet it would be a serious mistake to think that access to the civil right of marriage has nothing to do with the constitutional right to free exercise of religion. For in addition to being a secular civil right, marriage holds important religious significance for most Americans, and in virtually all communities of faith.

The Supreme Court has recognized this. After observing in *Meyer v. Nebraska* that the liberty protected by the Fourteenth Amendment includes each American’s freedom “to marry, establish a home and bring up children,” and “to worship God according to the dictates of his own conscience,” and holding in *Loving* that freedom to marry is among “the vital personal rights essential to the orderly pursuit of happiness,” the Supreme Court in 1987 squarely recognized a religious-liberty interest in the right to marry with its decision in *Turner v. Safley* that even

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44. 1 WILLIAM BRADFORD, HISTORY OF THE PLYMOUTH PLANTATION 1620-1647, at 216–18 (1912) (recounting the “first marriage in this place, which, according to the laudable custome [sic] of the Low–cuntries [sic] . . . was thought most requisite to be performed by the magistrate, as being a civill [sic] thing.”); see JEREMY DUPERTUIS BANGS, PILGRIM EDWARD WINSLOW: NEW ENGLAND’S FIRST INTERNATIONAL DIPLOMAT 25–26 & n.15 (2004); see also ISAACSON, supra note 7, at 138–39; Eric Alan Isaacson, Goodridge Lights A Nation’s Way to Civic Equality, BOSTON B.J., Nov. 15, 2013.

45. BRADFORD, supra note 44, at 218; see BANGS, supra note 44, at 26 & n.15. The Pilgrims thus embraced what Jeremy Dupertius Bangs aptly describes as “a doctrinal principle separating the responsibility of the church to minister to its members from the civil obligation of the magistrate to regulate and protect the rights of all.” JEREMY DUPERTUIS BANGS, STRANGERS AND PILGRIMS, TRAVELLERS AND SOJOURNERS: LEIDEN AND THE FOUNDATIONS OF THE PLYMOUTH PLANTATION 640 (2009).

46. See 2 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 134 (1904) (“[M]arriage was regarded as a civil contract and the celebration was performed by a civil magistrate.”); see also, e.g., Cal. Fam. Code § 420(c) (“No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.”); In re Marriage Cases, 183 P.3d 384, 407 n.11 (Cal. 2008) (“From the state’s inception, California law has treated the legal institution of civil marriage as distinct from religious marriage.”) (citation omitted), superseded by California Marriage Protection Act, a.k.a. “Proposition 8,” enacting CAL. CONST. art. I, § 7.5.

47. 262 U.S. 390 (1923).

48. Id. at 399.


incarcerated felons whose wrongs have placed them behind bars retain a right to marry.

Holding that “the decision to marry is a fundamental right” that prison inmates, although incarcerated, still possess,51 the Court explained that “the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication,” and that “the religious and personal aspects of the marriage commitment” remain “unaffected by the fact of confinement or the pursuit of legitimate corrections goals.”52 These elements of free exercise and free expression are, the Supreme Court held, “sufficient to form a constitutionally protected marital relationship in the prison context.”53

If incarcerated felons have a constitutionally protected religious-liberty interest in the right to marry, it is hard to fathom why free citizens, whether gay or straight, should not enjoy the same free-exercise interest in marriages that their own churches and synagogues seek to bless.

II. PROTECTING A CATHOLIC COUPLE’S RIGHT TO FREE EXERCISE, THE 1948 DECISION IN PEREZ V. SHARP, STRIKING DOWN CALIFORNIA’S LAWS AGAINST MIXED-RACE MARRIAGES DID SO ON RELIGIOUS-LIBERTY GROUNDS

_Turner v. Safley_ was not the first decision to recognize the religious element in the right to marry. The California Supreme Court’s seminal 1948 decision sustaining a mixed-race couple’s right to obtain a civil marriage license is, at its core, a religious-liberty precedent. For in _Perez v. Sharp_,54 a Roman Catholic couple, represented by a committed Roman Catholic lawyer, successfully argued that California’s ban on mixed-race marriage violated their religious freedom.55

51. _Id._ at 95.
53. _Turner_, 482 U.S. at 96.
54. 198 P.2d 17 (Cal. 1948).
As an amicus curiae brief filed by Catholics for the Common Good and the Marriage Law Project of the Catholic University of America’s Columbus School of Law told the Supreme Court in Hollingsworth v. Perry: “The hero of Perez is Daniel Marshall, the President of the Catholic Interracial Council of Los Angeles, and the attorney who represented Sylvester Davis, an African-American male, and Andrea Perez, a woman of Mexican descent.” That much the brief clearly got right.

Pérez, a hispanic woman, was deemed “white” under California law, which barred her marriage to Davis, a black man. Both were members of Saint Patrick’s Catholic Church in Los Angeles, where Marshall led “a small but very determined Catholic Interracial Council” that he formed in 1944 to advance the cause of racial equality. When the Los Angeles County Clerk refused to issue Pérez and Davis a marriage license—because California statutes barred their mixed-race marriage—Marshall took their case straight to California’s Supreme Court, demanding a writ directing the County Clerk to issue a license. Marshall did so even though his Church’s Diocesan officials apparently disapproved of the tactic.

56. Brief for Catholics for the Common Good and the Marriage Law Project as Amici Curiae Supporting Petitioners at 21, 23–24, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (quoted in Brief for California Council of Churches et al. as Amici Curiae Supporting Respondents at 13, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144)). Although Andrea Pérez wrote her name with an accent mark, I will omit it both when quoting sources that do not use it, and when referring to her case’s name as the official reports omitted it. See BRILLIANT, supra note 55, at 306 n.97.

57. PASCOE, WHAT COMES NATURALLY, supra note 55, at 206.


59. Historian Peggy Pascoe explains: At the Los Angeles Diocese, Catholic officials were appalled . . . [w]hen Marshall wrote to ask Auxiliary Bishop Joseph McGucken, a onetime [Catholic Interracial Council] supporter, to testify in the Perez case, he received an immediate, and
The court papers in Perez starkly framed the mixed-race couple’s right to marry in terms of religious liberty. “There is no rule, regulation or law of the Roman Catholic Church which forbids a white person and a Negro person from receiving conjointly the sacrament of matrimony and thus to intermarry,” the couple’s writ petition averred.50 The County Clerk’s refusal of a “license to intermarry” thus had denied Pérez and Davis “the right to participate fully in the sacramental life of the religion in which they believe,” thereby impinging upon “the free exercise and enjoyment . . . of their religious profession and worship.”61 An accompanying brief argued that, thanks to many other states’ laws then proscribing mixed-race marriages, “petitioners are prohibited from participating in the full sacramental life of the religion of their choice in over 60 per cent of the states of the Union.”62

The County of Los Angeles countered that while the couple’s Roman Catholic Church might permit mixed-race marriages, no religious-liberty interest could be at stake as the Catholic faith did not demand that adherents marry outside their own race: “Marrying a person of another race, even insofar as the Church tolerates or permits it, is certainly not required.”63 “It is true that the Catholic religion forbids illicit intercourse,” the County acknowledged, “but it is not necessary to marry one of another race to avoid such illicit intercourse. A good Catholic could just as well live up to his religion by avoiding the intercourse. The petitioners will not be violating their religion by failing to get married.”64

visceral, refusal. “I cannot think of any point in existing race relationships that will stir up more passion and prejudice,” McGucken fumed. “I want to make very clear that I am not at all willing to be pulled into a controversy of this kind.” PASCOE, WHAT COMES NATURALLY, supra note 55, at 214 (citation omitted); see LEON, AN IMAGE OF GOD, supra note 55, at 155, 160; BRILLIANT, supra note 55, at 108–09 (quoting the same letter); Orenstein, supra note 55, at 391 (quoting same letter); see also STARR, supra note 55, at 462 (“The Archdiocese of Los Angeles . . . fearing the negative reaction of the general public, refused to assist Marshall in any way whatsoever.”).

60. Petition for Writ of Mandamus at 3, ¶¶ 5, 6 (filed Aug. 8, 1947), Perez v. Sharp, 198 P.2d 17 (Cal. 1948) (L.A. No. 20305). I thank Shannon Price Minter, Legal Director of the National Center for Lesbian Rights, for kindly affording me access to copies of the Perez v. Sharp court records.

61. Id. at 4, ¶ 15.


64. Id. at 51–52. County counsel began his oral argument: “In the present case, the petitioners do not show that it is religion that compels them to marry, but that it is their own
Three of the California Supreme Court’s seven justices found the County’s arguments thoroughly persuasive. Justice B. Rey Schauer and Justice Homer R. Spence both joined Justice John W. Shenk’s opinion declaring that because “petitioners’ alleged right to marry is not a part of their religion in the broad sense that it is a duty enjoined by the church,” their claims were weaker even than those of Mormon polygamists in Reynolds v. United States, whose faith had affirmatively required them to take more than one wife. In contrast with the Mormon polygamists, Pérez and Davis could argue only “that their marriage is permissive under the dogma, beliefs and teaching of the church to which they claim membership and that the sacrament of matrimony will be administered to them by a priest of the church if and when a license issues.”

Yet the Catholic couple’s religious-liberty argument carried the day. For though no opinion was joined by a majority of the court, Justice Shenk’s three-justice opinion was but a dissent.

Justice Roger J. Traynor, himself Catholic, filed a three-justice plurality opinion, which was joined by Chief Justice Phil S. Gibson and Justice Jesse W. Carter. Justice Traynor set out the mixed-race couple’s argument that the statutes in question are unconstitutional on the grounds that they prohibit the free exercise of their religion and deny to them the right to participate fully in the sacraments of that religion. They are members of the Roman Catholic Church. They maintain that since the church has no rule forbidding marriages between Negroes and Caucasians, they are entitled to receive the sacrament of matrimony. Writing for his three-justice plurality, Justice Traynor declared that if “the law is discriminatory and irrational, it unconstitutionally restricts not only worldly choice.”


66. Pérez, 198 P.2d at 36 (citing Reynolds v. United States, 98 U.S. 145, 161 (1878)).
67. Pérez, 198 P.2d at 36 (Shenk, J., dissenting).
68. Id.
religious liberty but the liberty to marry as well." In response to the County’s assertion that the law sought to protect children from the social consequences of mixed-race households, Justice Traynor declared: “[i]f miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground.”

Justice Traynor also elaborated at length on marriage as a fundamental right of free people, on the invidious character of racial discrimination under the fourteenth amendment’s equal-protection clause, and on the difficulty of drawing the racial distinctions called for by California law—all in what many commentators have mistaken for a majority opinion.

73. Id. Thus, writes Professor Sharon M. Leon, “Justice Roger Traynor’s opinion shows clear signs that he had absorbed some of Daniel Marshall’s reasoning.” Leon, An Image of God, supra note 55, at 158. Ben Field clearly misreads Traynor’s opinion when he asserts the contrary, that “Traynor rejected Marshall’s religious freedom argument.” Field, supra note 55, at 36.


75. Perez, 198 P.2d at 18–19.

76. See Perez, 198 P.2d at 18–27 (Traynor, J., plurality opinion).


was not. Only Chief Justice Gibson and Justice Carter joined Justice Traynor’s opinion.79

The fourth vote, needed for a four-justice majority on the seven-justice court, came from Justice Douglas Edmonds, who “generally voted with the socially conservative justices on the Court, Shenk, Shauer [sic], and Spence; and so Court watchers expected him to vote with them in Perez.”80 Edmonds was, however, a devoted Christian Scientist who felt strongly about religious liberty.81 He surprised many when he thus provided the critical fourth vote needed to strike down California’s laws against mixed-race marriages.82

Rather than joining Justice Traynor’s plurality opinion, however, Justice Edmonds filed a separate concurring opinion, unequivocally holding that the right to marry “is protected by the constitutional guarantee of religious freedom.”83 Justice Edmonds declared, “I agree with the


79. See Perez, 198 P.2d at 29 (“GIBSON, C.J. and CARTER, J., concur.”); see BRILLIANT, supra note 55, at 110 (“Justice Roger Traynor wrote the lead opinion, which Chief Justice Phil Gibson and Justice Jesse Carter signed.”). Justice Carter, who with Chief Justice Gibson signed (and thus joined) Justice Traynor’s plurality opinion, filed his own concurring opinion, asserting that California’s laws against mixed race marriages offended the Declaration of Independence and the United Nations Charter, as well as the constitutional principles “that all human beings have equal rights regardless of race, color or creed, and that the right to liberty and the pursuit of happiness is inalienable and may not be infringed because of race, color or creed.” Perez, 198 P.2d at 29 (Carter, J., concurring).

80. FIELD, supra note 55, at 36.

81. FIELD, supra note 55, at 36 & n.98; see also BOTHAM, ALMIGHTY GOD, supra note 55, at 42 (“A Christian Scientist for whom religious freedom mattered deeply, Justice Douglas Edmonds was the only judge fully persuaded by Marshall’s First Amendment argument.”); Orenstein, supra note 55, at 390 (“[T]he swing vote, Justice Douglas Edmonds, was a conservative Christian Scientist who cared deeply about religious freedom.”); Robin A. Lenthadt, Perez v. Sharp and the Limits of Loving, in LOVING V. VIRGINIA IN A POST RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE 73, 77 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (noting that the fourth vote came from “Justice Edmonds, a Christian Scientist”).

82. Perez, 198 P.2d at 34–35 (Edmonds, J., concurring); see BOTHAM, ALMIGHTY GOD, supra note 55, at 42 (“Justice Edmonds cast the deciding vote that granted victory to Andrea Perez and Sylvester Davis . . . . [W]hat is clear is that Edmonds’s opinion shifted the entire outcome of the case.”).

83. Perez, 198 P.2d at 34–35 (Edmonds, J., concurring). Professor Mark Brilliant explains:

The fourth and final justice in the majority—the swing vote—wrote a separate concurring opinion. Justice Douglas Edmonds confined himself to the fundamental “right to marry” which was “protected by the constitutional guarantee of religious freedom,” as Marshall had argued from the outset. For Edmonds, the First Amendment alone disposed of the matter.
conclusion that marriage is ‘something more than a civil contract subject to regulation by the state; it is a fundamental right of free men.’\textsuperscript{84} But he grounded this conclusion about the right to marry wholly in its religious significance, and in “the constitutional guarantee of religious freedom.”\textsuperscript{85} By denying legal standing to the marriage of two Catholics, whose Church allowed people of different races to marry, the State of California had violated their religious freedom.\textsuperscript{86}

Justice Traynor’s plurality opinion addressed religious liberty only briefly,\textsuperscript{87} focusing greater attention on equal-protection concerns\textsuperscript{88} and on

\textsuperscript{84} Perez, 198 P.2d at 34 (Edmonds, J., concurring) (quoting 198 P.2d at 17–18 (Traynor, J., plurality opinion)).

\textsuperscript{85} Id.

\textsuperscript{86} The importance of religious liberty to Justice Edmonds’ conclusion is, if anything, underscored by the fact that he apparently was untroubled by legislation discriminating on the basis of race and alienage. He had only the year before authored the California Supreme Court’s decision (joined by Perez v. Sharp\textsuperscript{87} dissenters Shenk, Schauer, and Spence) sustaining a state law denying a commercial fishing license to a man ineligible for citizenship on account of his Japanese descent: “When a legislative enactment is attacked upon the ground of discrimination, all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action.” Torao Takahashi v. Fish & Game Comm’n, 185 P.2d 805, 810 (Cal. 1947), rev’d 334 U.S. 410 (1948). The Perez dissenters, Justices Shenk, Schauer, and Spence, joined Justice Edmonds’ majority opinion in Takahashi, 185 P.2d at 816; Justice Carter filed a dissent, joined by Chief Justice Gibson and Justice Traynor. Id. at 816–21.

\textsuperscript{87} Perez, 198 P.2d at 17–18 (Traynor, J., plurality opinion).

\textsuperscript{88} See Perez, 198 P.2d at 21–27 (Traynor, J., plurality opinion); see Leon, An Image of God, supra note 55, at 158 (“Though there was a definite consideration of the free exercise of religious question, that angle was subsumed by the demands of the Fourteenth Amendment.”); cf. Theophile J. Weber, Statutory Prohibitions Against Interracial Marriages, 3 Wyo. L.J. 159, 163 (1949) (“In holding that there was a denial of equal protection, the court seems to have adequately reconciled the contention of petitioners and the decision handed down. The majority said that in view of the guarantee of religious
whether racial categories should be deemed void for vagueness. But Justice Edmonds’ separate concurrence, grounded solely in religious liberty, provided the one rationale on which a majority of the court’s justices agreed: “By a four-to-three vote, the court invalidated California’s antimiscegenation law on the basis of the constitutional right to freedom of religion.” Applying familiar rules of stare decisis, religious liberty under the federal constitution’s Free Exercise Clause provided the decision’s precedential ratio decidendi.

If Perez is correct, and I think it is, then state laws either proscribing or withholding legal recognition from the marriages of same-sex couples may be vulnerable to a free-exercise challenge, just as California’s law denying legal recognition to mixed-race unions was in Perez.

III. CATHOLIC BISHOPS INSISTED THAT PEREZ V. SHARP’S RELIGIOUS-LIBERTY RATIONALE ALSO PROTECTS NON-CATHOLICS WHEN THE SUPREME COURT CONSIDERED A BAPTIST COUPLE’S RIGHT TO MARRY IN LOVING V. VIRGINIA

When, nearly two decades after Perez, the constitutionality of state laws proscribing mixed-race marriages finally got to the United States Supreme Court in Loving v. Virginia, Catholic bishops weighed in as amici curiae—fully supporting Perez’s religious-liberty rationale and insisting that it protects non-Catholics. No Jewish or Protestant

freedom in the First Amendment, which is encompassed in the concept of liberty in the Fourteenth Amendment, state legislatures are no more competent than Congress to enact a law restricting such freedom.”)

89. Perez, 198 P.2d at 27–29 (Traynor, J., plurality opinion).
91. See, e.g., Panetti v. Quarterman, 551 U.S. 930, 949 (2007); Romano v. Oklahoma, 512 U.S. 1, 9 (1994); Marks v. United States, 430 U.S. 188, 193 (1977); Del Mar Water Light & Power Co. v. Eshleman, 140 P. 948, 948 (Cal. 1914) (order denying rehearing); In re Estate of Lopes, 199 Cal. Rptr. 425, 428–29 (Cal. Ct. App. 1984); People v. Harris, 139 Cal. Rptr. 778, 783 (Cal. Ct. App. 1977); see also San Mateo v. Dell J., 762 P.2d 1202, 1215 (Cal. 1984) (Broussard, J., concurring); 9 B.E. WITKIN, CALIFORNIA PROCEDURE § 809, at 879 (5th ed. 2008) (“It is possible for a concurring opinion, not the main opinion, to constitute the majority position of the court on a particular point.”); see also 9 WITKIN, § 538, at 608–10.
92. 388 U.S. 1 (1967).
93. See Catholic bishops’ Loving brief, supra note 32, at 6–19; INTERRACIALISM: BLACK-WHITE INTERRACI MARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW 201 (Werner Sollors ed., 2000) (“The bishops offered the religious freedom argument that had been the basis of the Perez case.”); PASCOE, WHAT COMES NATURALLY, supra note 55, at 279 (“The religious freedom argument was offered by a loose constellation of Catholic bishops and lay action organizations.”). Commentators taking note of the Catholic bishops’ Loving brief include: Pamela S. Karlan, Introduction: Same-Sex Marriage as a Moving Story, 16 STAN. L. & POL’Y REV. 1, 6–7 (2005) (noting the Catholic Bishops’ argument “that Virginia’s statute was unconstitutional because it denied the free exercise of religion: some religions
organizations or faith leaders filed briefs supporting the mixed-race couple’s right to marry in *Loving.* But sixteen Catholic bishops and apostolic administrators did so, telling the Supreme Court that Virginia’s laws denying recognition to—indeed criminalizing—a Baptist couple’s mixed-raced marriage had violated the couple’s religious liberty.

The amicus curiae effort was organized by Bishop John J. Russell of the Diocese of Richmond, Virginia, who recruited his fellow bishops to join a brief that would be authored by Father William M. Lewers (Congregatio a Sancta Cruce), a Holy Cross priest and law professor at the University of Notre Dame Law School. Bishop Russell’s letter to the prelates explained that “the issue involved is an important concern for all religious leaders” and that “it is Father Lewers’ intent” to focus on “the violation of the liberty or freedom of religion” inherent in denial of the right to marry.

Rejecting the couple’s contention that statutes proscribing interracial marriage were unconstitutional, a Virginia trial court had invoked what many Americans once took as divine law—that “Almighty God created the

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believed that their adherents should be permitted to choose spouses of other races and were prepared to solemnize such unions); Amelia A. Miller, *Letting Go of a National Religion: Why the State Should Relinquish All Control over Marriage,* 38 Loy. U. A. L. Rev. 2185, 2202–03 (2005) (recounting the Catholic Bishops’ religious-liberty argument); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy,* 12 BYU J. Pub. L. 201, 234 (1998) (noting the Catholic Bishops’ argument that a state’s restriction of marriage should not “take precedence over the free exercise of religion”).

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94. See *Loving,* 388 U.S. at 1–2 (listing the three amicus briefs filed); Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of Loving v. Virginia,* in *FAMILY LAW STORIES* 7, 18 (Carol Sanger ed., 2008) (noting that amicus curiae briefs were filed only by “[t]he NAACP, the NAACP Legal Defense and Education Fund, the Japanese American Citizens League, and a coalition of Catholic bishops”); *Botham, Almighty God,* supra note 55, at 174 (“[F]ifteen ordinaries joined the brief with Bishop Russell while no Protestant denominations submitted a similar brief on behalf of the Baptist Lovings . . . the ordinaries’ amicus curiae brief was the only response elicited by any religious group in support of the Lovings.”).

95. See Catholic bishops’ *Loving* brief, supra note 32, at 6–19; *Botham, Almighty God,* supra note 55, at 170–74.


races” and “that [H]e did not intend for the races to mix.” Virginia’s Supreme Court affirmed, following its own 1955 decision in Naim v. Naim, which had sustained Virginia’s laws against racial mixing in marriage as a matter of “divine” law in “a public institution established by God himself.”

The Catholic bishops objected that the state’s limitation of the right to marry violated the Baptist couple’s religious liberty. “Marriage is a fundamental act of religion,” their brief explained, “and, because of this, marriage comes within the Constitutionally-protected ‘free exercise of religion.’” They emphasized “the importance of marriage as a religious act to the individual person who is committed to one or [an]other of the major religious faiths in the United States.”

Although many churches in the Protestant Christian tradition may not adhere to a strictly sacramental view of marriage,” the bishops stressed, “it is clear that

98. Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the Circuit Court of Caroline County’s opinion). The trial court had declared:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.


101. Naim v. Naim, 87 S.E.2d 749, 752 (Va. 1955) (quoting State v. Gibson, 36 Ind. 389, 402–03 (1871)). Following State v. Gibson, 36 Ind. at 404, Naim sustained Virginia law barring marriage between members of different races, declaring “that the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures.” Naim, 87 S.E.2d at 752. God’s law was a common refrain in the precedents sustaining such statutes. See, e.g., Gibson, 36 Ind. at 404; Green v. State, 58 Ala. 190, 195 (1877) (“[S]urely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.”); Scott v. Georgia, 39 Ga. 321, 326 (1869) (holding that members of different races may not intermarry because the “God of nature made it otherwise”).


103. Id. at 7.

104. Id. at 8.
marriage does have deep religious significance in such churches.”

For “marriage, whether regarded technically as a sacrament or not, is held by the major religious faiths in the United States to be an important act of religion.” Thus, even with respect to marriages outside their own Church, the bishops concluded, courts ought not permit the “views of third persons to determine one of the most personal and sensitive of human decisions.”

The Catholic bishops’ Loving brief accordingly urged the Supreme Court to follow the lead of Perez, where Justice Traynor’s three-justice plurality opinion had found that California’s anti-miscegenation statute “unconstitutionally restricted both religious freedom and the liberty to marry.” The critical fourth vote in Perez, the Catholic bishops stressed, was provided by Justice Edmonds’ “separate concurring opinion,” clearly holding the right to marry “is protected by the constitutional guarantee of religious freedom.”

The Catholic bishops concluded by asserting that “marriage is an exercise of religion protected by the First and Fourteenth Amendments” and that, “as such, marriage can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect.” “Putting their argument in terms of contemporary doctrine,” writes Professor Pamela Karlan, “the bishops thought restrictions on marriage that conflicted with the ability of individuals to marry within the tenets of their faith should be subjected to heightened scrutiny.”

IV. Free Exercise for Whom? Does the First Amendment Also Protect Same-Sex Couples?

Despite the precedent established by Catholic litigants in Perez, and advocated by Roman Catholic bishops in Loving, from recent amicus curiae briefs in Hollingsworth and Windsor it appears that the U.S. Conference of Catholic Bishops has lately concluded either that free exercise no longer

105. Id. at 9.
106. Id. at 10.
107. BOTHAM, ALMIGHTY GOD, supra note 55, at 174; Catholic bishops’ Loving brief, supra note 32, at 17.
108. Catholic bishops’ Loving brief, supra note 32, at 18. The Catholic bishop’s Loving brief thus “reiterated California Supreme Court justice [sic] Roger Traynor’s assertion that if California’s antimiscegenation statutes were unconstitutional and discriminatory, then they restricted two fundamental human liberties: religious freedom and the freedom to marry.” BOTHAM, ALMIGHTY GOD, supra note 55, at 172.
109. Catholic bishops’ Loving brief at 18 (quoting Perez v. Sharp, 198 P.2d 17, 34 (Edmonds, J., concurring)).
110. Catholic bishops’ Loving brief, supra note 32, at 19.
112. See supra note 5.
undergirds the right to marry—or else that religious liberty protects only marriages of which their own Church approves. That apparently is the view of two lay organizations, Catholics for the Common Good and the Marriage Law Project of the Catholic University of America’s Columbus School of Law, whose amicus curiae brief in Hollingsworth acknowledged that in Perez “Marshall built his case . . . on religious liberty,” only to suggest that Perez’s precedential significance is circumscribed to exclude same-sex couples from the First Amendment’s protections because “Catholic teachings about the complementarity of the sexes provide[d] the philosophical foundation on which the California Supreme Court built its decision to invalidate California’s anti-miscegenation law.”113 In other words, the free-exercise principle of Perez protects marriages recognized by the theological doctrines of the Roman Catholic Church, but not marriages recognized by the United Church of Christ and the Universal Fellowship of Metropolitan Community Churches, or by Unitarian Universalist churches and by Judaism’s Reform and Reconstructionist movements.114

That is not a fair understanding of religious liberty. The Constitution does not prefer Roman Catholic doctrine over that of Unitarian Universalists or Reform and Reconstructionist Jews. For at the First Amendment Religion Clauses’ very heart is the principle “that government should not prefer one religion to another.”115 “A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”116 If the First Amendment protects the religious liberty of Catholics to marry, then it also must protect the right to marry of liberal Jews, Unitarian Universalists, and members of the United Church of Christ and Metropolitan Community churches.

I accordingly submit that Perez’s religious-liberty rationale should apply as fully to a same-sex couple seeking to marry in a Reform or Reconstructionist synagogue, or in a Unitarian Universalist, United Church of Christ, or Metropolitan Community church, as it did in Perez to a mixed-race couple seeking to marry in a Catholic church. Though Loving cited—and implicitly rejected—the Virginia courts’ religious rationale for outlawing mixed-race marriages,117 and though it cited Perez with

114. See id.
approval, it did not clearly endorse Perez’s religious-liberty rationale. Yet the Supreme Court’s subsequent holding in Turner v. Safley clearly indicates that marriage often involves a constitutionally protected “exercise of religious faith.” That is basically what Perez holds. And it is a holding for all people, of all faiths, not just for Catholics.

V. OF THE MORMON POLYGAMY DECISIONS AND EMPLOYMENT DIVISION V. SMITH

Two objections are readily answered. One is that the religious-liberty rationales of Perez and Turner conflict with the Supreme Court’s nineteenth-century decisions sustaining criminal penalties for Mormon polygamy, just as the Perez dissenters insisted. Another is that both Perez and Turner were perhaps impliedly overruled by the Supreme Court’s 1990 decision in Employment Division v. Smith, which held that states may criminalize sacramental religious activity provided the statute that does so is “religion-neutral” and “generally applicable.”

The Perez dissenters certainly thought the Supreme Court’s decisions sustaining federal criminal prosecutions of Mormon polygamists barred contentions that state regulations of marriage might violate free-exercise interests. Writing of same-sex marriages as recently as 2008, moreover, as distinguished a scholar as Martha Nussbaum found it “difficult to imagine any Free Exercise claim in this area,” given the Supreme Court’s nineteenth-century rejection of Mormon polygamists’ claims. “No denomination I know of,” she wrote, “requires same-sex marriage or holds it to be a necessary part of good religious life,” very nearly repeating Los Angeles County’s argument in Perez, which Justice Shenk’s dissent adopted, insisting that religious liberty could not be implicated if the Roman Catholic Church did not require its adherents to marry outside their race.

118. Id. at 6 n.5.
120. See supra text accompanying notes 69–91.
121. See Perez, 198 P.2d at 36 (Shenk, J., dissenting).
124. 198 P.2d at 36–37 (Shenk, J., dissenting).
125. Nussbaum, supra note 14, at 338.
126. Id.
127. See supra notes 63–68 and accompanying text; see also Kennedy, supra note 55, at 260–61 (dismissing religious liberty as a “weak claim” even in Perez, and agreeing with the dissenting opinion: “As Justice John W. Shenk noted in dissent, ‘The petitioners’ alleged right to marry is not a part of their religion in the broad sense that it is a duty enjoined by the
Yet as both Justice Edmonds’ separate concurrence in *Perez* and the Catholic bishops’ *Loving* brief noted, the Mormon polygamy decisions were firmly grounded in what the Supreme Court perceived as compelling justifications—ones that simply find no parallel when it comes to either mixed-race or same-sex relationships.

In *Reynolds v. United States*, the Supreme Court embraced the view of Professor Francis Lieber, that polygamy posed a grave threat to the very existence of America’s democratic institutions: “In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.” The Court grounded *Reynolds*’ holding on the assumption that “polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.” Congress could criminalize polygamy “because of the evil consequences that were supposed to flow from plural marriages,” as harbingers of despotism threatening the very foundations of democratic order.

To the same effect is the Supreme Court’s 1890 decision in *Davis v. Beason*, which reaffirmed *Reynolds*’ holding and rationale for criminalizing polygamy. *Davis* added that a system of plural marriage will tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from

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128. See *Perez*, 198 P.2d at 35 (Edmonds, J., concurring); Catholic bishops’ *Loving* brief, supra note 32, at 13–14, 19.
129. 98 U.S. 145 (1878).
132. *Id*. at 166.
134. 133 U.S. 333 (1890).
135. *Id*. at 343–44.
punishment for such crimes would be to shock the moral judgment of
the community. 136

Same-sex relationships are entirely different from the patriarchal
polygamous systems condemned by Reynolds and Davis. Where Mormon
polygamy was grounded in patriarchal inequality and the subjection of
women as a class, today’s same-sex marriages are grounded in recognizing
the full humanity, dignity, and equality of all our citizens. Thus, same-sex
couples’ marriages pose none of the threats to our democratic institutions
that were said to flow from polygamy. 137

Though nineteenth-century Mormons’ social system of patriarchal
polygamy might be characterized as “a defiant stand against the West’s
most basic political and personal values,” it should be clear that the
movement toward same-sex marriage honors egalitarian personal autonomy
and full human dignity for all. 138 No credible argument can be made that
recognizing same-sex couples’ full citizenship and right to marry might
produce the kind of social problems the Court imagined would flow from
the Mormons’ system of polygamy.

Recognizing full civic equality for gay and lesbian citizens will not
“destroy the purity of the marriage relation,” “disturb the peace of
families,” “degrade women,” or “debase man,” as Davis put it. 139
Committed same-sex relationships cannot even remotely be characterized
as crimes “pernicious to the best interests of society,” to again quote
Davis. 140 When the Supreme Court in 2013 evaluated the federal Defense
of Marriage Act (“DOMA”), which denied federal recognition to same-sex
marriages, it could find “no legitimate purpose” for the federal statute. 141

136. Id. at 341.

137. See generally E.J. GRAFF, WHAT IS MARRIAGE FOR?: THE STRANGE SOCIAL
HISTORY OF OUR MOST INTIMATE INSTITUTION 172–77 (2004); cf. Lovell, supra note 83, at
28–29 (“If the courts had entertained any doubts as to whether religious freedom embraces
freedom of marriage, they would not have found it necessary to argue the permissible
bounds of that freedom by analyzing polygamy as a crime that tends to degrade women and
to debase men.”).

138. Graff, supra note 137, at 177. Judge Richard A. Posner has suggested that
prohibiting polygamy may further egalitarian objectives, observing that “the prohibition of
bigamy (polygamy) . . . increases the sexual and marital opportunities of younger, poorer
men.” RICHARD A. POSNER, SEX AND REASON 215 (1992). He observes that “polygamy is
anomalous in a system of companionate marriage, because a man is unlikely to have the
same reciprocal relationship of love and trust with multiple wives; as well as with the fact
already noted that it benefits a few men at the expense of the many.” Id. at 216. Nor has
patriarchal polygamy generally been associated with decent treatment of women, for as
Judge Posner observes: “It may not be an accident that the congeries of practices loosely
referred to as ‘female circumcision’—primarily, the removal of the clitoris and (until
marriage) the sewing up of the entrance to the vagina (infibulation)—are found only, as far
as I am able to determine, in polygamous societies.” Id. at 256–57.

139. 133 U.S. at 341.

140. Id.

Neither have the religious-liberty holdings of Perez and Turner been impliedly overturned by the Supreme Court’s 1990 holding in Employment Division v. Smith, that the Free Exercise Clause “permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug.”

For one thing, the Court’s 2003 decision in Lawrence v. Texas bars criminal punishment for consensual same-sex relationships. Invalidation of DOMA’s denial of federal recognition to otherwise lawful same-sex marriages, moreover, the Court observed that “[t]he differentiation devalues the couple, whose moral and sexual choices the Constitution protects.”

Nor is it even clear that laws proscribing the marriage of same-sex couples should qualify as religion-neutral laws of general applicability. Their proponents certainly appear to be motivated by their own religious traditions’ disapproval of same-sex relationships, and the idea that “Judeo-Christian tradition” limits marriage to mixed-sex unions—never mind that mainstream American Judaism and New England’s oldest Protestant churches honor same-sex couples’ right to marry. The General Synod of the United Church of Christ, in recently filed court papers, cites statements of North Carolina legislators grounded in such religious motivations. Such legislation should fall under the Supreme Court’s holding in Church of the Lukumi Babalu Aye v. City of Hialeah, that laws targeting unpopular or unorthodox religious rituals are unconstitutional.

More than that—Smith itself recognized and implicitly reaffirmed the Supreme Court’s many holdings that the first amendment “bars application” even of “a neutral, generally applicable law to religiously motivated action” when religious-liberty interests operate “in conjunction with other constitutional protections, such as freedom of speech and of the

143. Id. at 874.
144. 559 U.S. 558 (2003).
145. Id. at 578–79.
146. Windsor, 133 S. Ct. at 2694.
147. See supra notes 13–17 and accompanying text.
150. Id. at 532–33, 542.
press,“151 or “the right of parents, acknowledged in Pierce v. Society of Sisters, . . . to direct the education of their children.”152

Marriage obviously involves such additional interests.153 The Supreme Court recognizes marriage itself as a fundamental liberty interest. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”154

Indeed, marriage rests at the heart of the interests covered by the Supreme Court’s decisions protecting autonomy in matters of family life—such as Pierce v. Society of Sisters,155 Meyer v. Nebraska,156 and Wisconsin v. Yoder157—as well as by the right to privacy recognized in Griswold v. Connecticut,158 and extended in other decisions.159 Justice Traynor’s plurality opinion in Perez indicated that if California’s restriction of marriage was “discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well,”160 quoting the Supreme Court’s holding in Meyer v. Nebraska,161 that Fourteenth Amendment liberty interests include the right “to marry, establish a home and bring up children.”162 Citing Pierce v. Society of Sisters163 and


152. Smith, 494 U.S. at 881 (citing Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (sustaining parental right to send children to parochial school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)).


154. Loving v. Virginia, 388 U.S. 1, 12 (1967). See also, e.g., Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“The right to marry is of fundamental importance for all individuals.”); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).

155. 268 U.S. 510, 534–35 (1925) (recognizing the “liberty of parents and guardians to direct the upbringing and education of children”).

156. 262 U.S. 390, 399–401 (1923) (liberty protected by the fourteenth amendment includes freedom “to marry, establish a home, and bring up children”).


158. 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.”).


161. 262 U.S. at 399.

Skinner v. Oklahoma, Justice Traynor declared: “The right to marry is as fundamental as the right to send one’s child to a particular school or the right to have offspring.”

Elements of free speech and expressive association also are present—implicated by what marriage communicates. The Supreme Court held in Turner v. Safley that even prison inmates retain their fundamental right to marry, because “[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life.” These include the fact that “inmate marriages, like others, are expressions of emotional support and public commitment,” as well as the fact that “many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”

The expressive element of marriage implicates “speech in its full constitutional sense.” “When two people marry . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags.” “If the First Amendment deserves interpretations that will ‘protect a rich variety of expressive modes,’ there is no reason in logic for excluding the expression that is at the heart of [our] most intimate associations.”

In sum, the religious-liberty holdings of Perez and Turner are sound law that should apply to invalidate a state’s denial of same-sex couples’ right to marry.

CONCLUSION

The religious-liberty principle established by Catholics in Perez, and advocated by Roman Catholic bishops in Loving, ought not be restricted to marriages of which the Catholic Church approves, but should apply fully to marriages of same-sex couples in the United Church of Christ and

164. 316 U.S. 535, 536 (1942).
165. Perez, 198 P.2d at 19 (Traynor, J., plurality opinion).
166. 482 U.S. 78, 95 (1987).
167. Id.
168. Id. at 96.
171. Id. at 654 (quoting LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 579 (1978)); see also generally Cruz, supra note 169.
Metropolitan Community Church, as well as in Unitarian Universalist churches, and in Reform and Reconstructionist synagogues.

Religious liberty is honored not by laws withdrawing equal rights and imposing sectarian limitations concerning who may marry, but rather by recognizing marriage as a fundamental civil right shared by all people, of all faiths and persuasions.