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A "Bare ... Desire to Harm?" Marriage and Catholic Conscience Post - Windsor

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A “BARE... PURPOSE TO HARM”? 
MARRIAGE AND CATHOLIC CONSCIENCE POST-WINDSOR 
By 
Helen M. Alvaré

Introduction:

*United States v. Windsor* did not treat the question of religious exemptions from state laws recognizing same-sex marriage, but could nevertheless affect the success of future efforts to attain religious exemptions. For *Windsor* strongly suggested that any view of marriage which excludes the possibility of same-sex unions is irrational and even hateful. Religious institutions and individuals, however, particularly the Catholic Church, are leading proponents of the view that opposite-sex marriage is uniquely valuable. Also for Catholics, this view forms a central and nonseverable part of a theological world view encompassing teachings about matters such as the identity of God, and the meaning and purpose of life as servant love. Refusing a religious exemption -- refusing, that is, to allow Catholics to avoid cooperating with laws implicating recognizing same-sex marriage -- is tantamount to denying them the right to practice their faith, or even insisting that they practice a different faith. This situation is more dramatic than even many supporters of Free Exercise are aware.

The *Windsor* Court did not articulate a constitutional right to same-sex marriage, and require religious citizens to cooperate with it. But it did articulate a meaning of marriage strikingly at odds with both centuries of American law and Christian theology, in the course of striking down that portion of the Defense of Marriage Act (“DOMA”) which required the federal government to interpret the words “marriage” and “spouse” in federal laws, to refer to opposite-sex unions. To wit, the Court concluded that state marriage recognition is directed to affirming couples’ wishes for committed emotional and sexual attachments, as well as acknowledging their dignity,

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1 Professor of Law, George Mason University School of Law, Arlington VA (USA). The author would like to thank the George Mason Law School’s summer research grant program, the able research assistance of Brian Miller; and the comments offered by members of the symposium Freedom of Religion and Non-Discrimination: The Collision of Identities, held at Central European University, Budapest, Hungary, co-sponsored by the Department of Legal Studies (CEU), the International Center for Law and Religion Studies (Brigham Young University). All errors are mine alone.

2 133 S. Ct. 2675 (2013).

3 1 U.S.C. §7 (1996). (In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”)

personhood, and liberty. Concerning same-sex couples in particular, the Court added that state marriage recognition connotes their equality with opposite-sex couples and families. Once Windsor had so defined the meaning of marriage, the Court found it easy to conclude that there was no rational reason for lawmakers to withhold marriage recognition from a same-sex couple, given that they, too, might wish to express emotional and sexual intimacy, and commitment to one another. Not only did lawmakers have no reasoned basis for withholding such recognition, said the Court, but they were motivated by hateful animus.

Both of the Windsor’s findings presage serious and substantial difficulties for religious individuals and groups seeking exemptions from duties to cooperate with same-sex marriage. Already, religious actors may be pressured to cooperate with same-sex partnerships via some states’ laws treating public accommodations, licensing, housing, education, employment, government grants, and tax exemptions. For example, religious citizens in some states, with “sexual orientation nondiscrimination laws” or “domestic partnership” laws, are required to provide lodging for same-sex pairs, or to insure the same-sex partner of an employee on the same basis as the opposite-sex spouse of a married employee. Should a state recognize same-sex marriage, however, and dismiss religious objections as animus, the legal obligations facing religious actors will be amplified. Even in states without sexual orientation nondiscrimination statutes, same-sex marriage laws will incite conflicts in arenas stretching from the marriage license office, to the offices of wedding suppliers, to adoption agencies, church schools, the church halls, and so on.

A variety of religions and religious actors have sought to avoid cooperating with same-sex marriage, including, inter alia, members of the Orthodox, Catholic, Muslim, Jewish and Protestant faiths. This article, however, will focus upon the Roman Catholic situation, although much of what it says -- because of shared scriptural and/or natural law teachings -- would apply to other denominations.

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6 See, e.g., the statement of Orthodox, Catholic and Protestant leaders regarding same-sex marriage and other challenges to religious liberty at http://manhattandeclaration.org/#0. See also, Joe Winkler, Responses to Same-sex Marriage Decisions, June 26, 2013, at http://www.jta.org/2013/06/26/news-opinion/the-telegraph/responses-to-same-sex-marriage-decisions.
The Catholic situation post-\textit{Windsor} merits attention because the Catholic Church has spoken regularly about the meaning of marriage in the face of proposals to legalize same-sex marriage. Roman Catholic dioceses and other institutions have also frequently sought exemptions from such laws. Both Christian scriptures and Catholic teaching documents, often speak directly about marriage. Furthermore, the Catholic Church claims that its teachings about marriage are closely linked with the flourishing of all individuals and of society, given that many of its teachings on marriage are grounded in “natural law.” This link has been widely and tacitly accepted in the past as Christian teachings on marriage have importantly shaped Western marriage law for 2000 years, including in the United States.\footnote{See John Witte, Jr., \textit{From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition}, 2nd Ed. (2012).} There is also a growing chorus of sociological and other literature supporting ideas and practices about marriage which happen to overlap significantly with Catholic teachings and practices.\footnote{See infra Part III. \_, and nn \_.} The dampening or silencing of Catholic witness on marriage, therefore, is a matter of more than parochial interest.

Allowing Catholic witness also matters profoundly to Catholic believers, but not for the limited reasons most observers believe. Of course it matters for Catholics’ ability to live out and effectively transmit the meaning of marriage to their children; but it also matters because marriage is an irreplaceable archetype within Christian cosmology. It shapes the meaning of the universe and of their own lives in the world. This is not intuitive for non-believers, but it is also not inexplicable. A preliminary summary is as follows: for Catholics, understanding “marriage” is essential for comprehending: the identity of God; God’s way of loving; norms for human interactions; the meaning of the embodied human person; and the meaning of life, as (servant?) love. As such, the Catholic conception of marriage is at one and the same time directly at odds with the meaning of marriage articulated by \textit{Windsor} – with its excising of procreation and its focus upon adults’ sexual and emotional desires --\textit{and} indispensable to Catholics’ ability to understand, to live, and to transmit, an authentically Catholic life.

The centrality of “marriage” to Catholic cosmology will therefore lead Catholics strenuously to seek a religious exemption from cooperation with same-sex marriage laws. Yet post-\textit{Windsor}, legislatures could easily be less inclined to allow such an exemption. How could it be otherwise if the \textit{Windsor} Court means what it says: that an “opposite-sex-only” marriage norm is both irrational and intentionally hateful. Further, the \textit{Windsor} majority took specific offense at some DOMA supporters’ references to moral and religious values, DOMA’s use of the language of “defense” in its title, and DOMA’s
practical operation: *i.e.* marriages solemnized by sovereign states would not be recognized in a separate (federal) domain. A religious exemption to a same-sex marriage law features each of these qualities.

*Post-Employment Division v. Smith*, religious actors usually have to win exemptions at the legislative level. Courts will allow “neutral laws of general applicability” to stand, even if they burden religion, so long as the state can show that the law is rationally related to a legitimate state interest -- the simplest constitutional test. A law defining marriage for all citizens of a state, as well as laws affecting employment benefits or public accommodations, will ordinarily be formally drafted as a neutral law of general applicability. Yet *Windsor’s* findings that opposite-sex-only laws are driven by animus could well dispose legislators to refuse religious exemptions; lawmakers do not want to be perceived as willing to license some citizens to wound others.

*Windsor* exacerbates the pressure on religious freedom even in states possessing more free exercise-protective laws, *e.g.* states possession state-level Religious Freedom Restoration Acts, or states possessing judicial decisions interpreting their state constitutions to require burdens on religion to be justified by “compelling state interests.” It does so by defining marriage in a way that makes excluding same-sex couples appear the equivalent of denying their personhood before the state and society.

This article will set forth in detail those Roman Catholic teachings on marriage relevant to the existence and shape of a religious exemption from same-sex marriage recognition. It will also indicate how these teachings are at odds with *Windsor’s* claims about the meaning of state marriage recognition. It will show how Catholic teachings on marriage ground a “cosmology” -- an understanding of the “order of the universe” -- by which Catholics are required to live. This material is directly related to the degree of importance Catholics attach to freedom from coercion to recognize, support, facilitate, or cooperate with an opposing view of marriage.

It should be noted here that there are several existing proposals to protect religious freedom in the context of same-sex marriage recognition laws.

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9 *Windsor*, 133 S. Ct. at 2693, treated infra at ____.
11 494 U.S. at 878-80.
13 See, supra note __ Fretwell, et al., Letter to the Governor of Illinois; and Professors Douglas Laycock, Thomas C. Berg, Bruce S. Ledewitz, Christopher C. Lund, and Michael
While these perform several important functions, they do not attend to the scope, the cosmological implications, of Catholic teachings about marriage. Further, because they were written pre- *Windsor*, they were not forced to take into account the Supreme Court’s new antipathy toward the act of disagreeing with the concept of same-sex marriage. Nor did they have the benefit of the Supreme Court’s assertions about the meaning of state marriage recognition. They proceeded rather, from the true but limited perspective that a number of religious actors hold that marriage is an opposite-sex institution, and will require legislative protection to preserve their religious liberty if same-sex marriage laws are passed. Finally, these proposals did not consider the related matter of how religions’ teachings about marriage might substantively contribute to the common good. Due at least in part to their timing (pre-*Windsor*) and to their limited theological contents, these proposals are less demanding on behalf of religious freedom -- less demanding to protect believers from disturbing charges of hateful animus, and less bold to insist that even a pluralistic society might benefit from religious witness to the meaning of marriage.

In order to address these matters, this article will proceed as follows: Part I. will set forth *Windsor*’s treatment of the nature of marriage and its characterization – as “animus” -- of refusals to recognize a marital union between two persons of the same sex. Part II. will set forth the elements shaping the cosmological significance of Catholic teachings about marriage. Part III will discuss the benefits that a pluralistic society might reap by continuing to allow a visibly Catholic to witness in the public square. It will also acknowledge practical hurdles to such a resolution.


Two aspects of *Windsor* have implications for religious liberty: the Court’s definition of the legal meaning of marriage; and the Court’s conclusion that DOMA’s section three was motivated by a “bare desire to harm.” These aspects are closely intertwined.

*Windsor* appears to turn upon the majority’s conclusion that DOMA’s section three violated the Equal Protection and Due Process guarantees of the U.S. Constitution because the legislation was motivated solely by a desire to harm persons; as a matter of law, in other words, the statute has no

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rational basis. The majority’s finding about the meaning of state marriage recognition formed a crucial part of its constitutional analysis. The Court found that state marriage recognition is the state’s acknowledging that two people with an emotionally and sexually intimate partnership wish to make a public commitment to one another. As such, marriage can be formed by two people of the same-sex or of opposite sexes. This is the foundation for Windsor’s finding about animus. In other words, once marriage means what Windsor says it means, it is per se irrational to refuse to recognize as “marriage” a committed, emotionally and sexually intimate partnership of any two persons, same-sexed or opposite sexed. Opposition to such recognition, or to cooperation with a same-sex marriage, is easily interpreted as the product of irrational and harmful animus, based upon sexual orientation.

I will treat the Court's findings on animus in subpart B. below. Here in subpart A., I will describe the Court’s conclusions about the meaning of state-recognized marriage.

A. The Meaning of State Marriage Recognition

Plaintiff Edith Windsor married Thea Spyer in Canada; the pair then moved to New York, which recognized the marriage. When Spyer died – because DOMA prevented federal estate tax law from recognizing Windsor as Spyer’s “spouse,” so as to award her the spousal deduction -- Windsor owed $365,000 in federal estate taxes. Ms. Windsor sued to recover these, asserting that section three of DOMA violated the Constitution such that the federal government should comply with New York’s definition of “marriage” and “spouses.”15

After writing at length about the federal government’s pre-DOMA practice of recognizing states’ authority to define marriage for purposes of interpreting and applying federal laws, the Windsor majority declared, unexpectedly, that it would not rest its holding on federalism grounds. Rather, it proposed that its discussion of state authority over marriage served the purpose of highlighting the unusual quality of DOMA’s refusing to accept states’ marriage determinations. DOMA’s break from a pattern of federal reliance on state marriage law also contributed to the majority’s suspicion that something else was afoot in DOMA – perhaps animus against lesbian or gay individuals or couples.

Woven throughout the majority’s discussion – both of states’ traditional marriage-recognition function, and of the alleged animus undergirding DOMA -- were numerous statements about the meaning and purpose of state

14 133 S. Ct. at 2693.
15 133 S. Ct. at 2682.
marriage recognition, respecting both couples in general and same-sex couples in particular. It is to these numerous characterizations we now turn.

Windsor’s opening line about states’ marriage laws and the situation of the plaintiffs suggests, first, that marriage is a “right” the state confers. (“When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right.”) There is also, and by distinction, a small suggestion that marriage is a pre-existing reality that the state simply acknowledges – when the majority calls New York’s decision to recognize same-sex marriage “a new insight” – as if the state had a preexisting notion of marriage in its head and then realized that same-sex pairs conformed to it.

The Court also called marriage a way of defining oneself individually and as a partnership: two people “define themselves by their commitment to each other.” It is also a public affirmation of commitment between two people: “New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”

The Court appears to conclude that over and above the meaning that state marriage recognition possesses generally, there are additional meanings applicable to same-sex couples: here, the focus was upon equality with opposite-sex pairs. The Court writes, for example, that marriage is an elevated status and a marker of dignity: “two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.” “It is a path to pride in oneself individually and to pride in one’s partnership with one other person, and toward living in and being seen to live in a partnership equal to that between opposite-sex persons.” “New York, … decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”

It appears that the majority was also addressing only same-sex marriages when it wrote that marriage is a right that offers “protection”; the Court referred to a “class of persons that the laws of New York, and of 11 other States, have sought to protect.” Further addressing same-sex couples, it opined that marriage is a vehicle for conferring “dignity” and a “status of

16 133 S. Ct. at 2689.
17 Ibid.
18 Ibid.
19 Ibid.
20 133 S. Ct. at 2689.
21 Ibid.
22 133 S. Ct. at 2689.
23 133 S. Ct. at 2690.
immense import.”

Moving to even more profound concepts, it said that recognizing marriage between same-sex partners protects “personhood and dignity,” although the attributes of personhood were not specified. Finally, the Court called marriage a means for same-sex couples to “enhance their own liberty.” Again, the attributes of liberty were not specified, but this could refer again to same-sex couples having a right to a status formerly enjoyed only by opposite-sex couples.

While the majority weaves the above-described attributes of state marriage-recognition throughout its opinion, at one point it strings together several observations about the significance of marriage recognition in every state. This paragraph therefore may have special significance for the Court. It begins by observing: “States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.”

Immediately after this, the Court says the following:

Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’

This is a citation to the (also Justice Kennedy-authored) opinion in Lawrence v. Texas, the case striking down Texas’ ban on homosexual sodomy. The Court’s choice to highlight sexual intimacy and Lawrence here -- coming right on the heels of its statement that there is “more” to states’ “understanding of marriage,” than benefits availability—seem to indicate that private consensual sexual intimacy is, in the Court’s mind, the first important aspect of a state’s interest in defining and regulating marriage. It is also worthy of note that in a paragraph devoted to “[s]tates’ interest in defining and regulating the marital relation,” the first interest comes from a federal source. (I will comment further on the dearth of state sources, infra.) Furthermore it is a portion of a federal source expressing the personal opinion of five federal justices – the idea that sexual intimacy only accompanies enduring personal relationships -- not a legal conclusion.

In the second sentence in this paragraph devoted to states’ interests in marriage recognition, the Court moves away from a discussion of the meaning of state marriage recognition generally, to the meaning of same-sex marriage recognition specifically. Immediately following the Lawrence reference, the majority asserts that New York’s same-sex marriage law was

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24 133 S. Ct. at 2691.
25 133 S. Ct. at 2696.
26 133 S. Ct. at 2695.
27 133 S. Ct. at 2692.
“[seeking] to give further protection and dignity to that bond.”

Its next sentence is susceptible to too many meanings to construe definitively: “For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status.” By “lawful conduct,” it is not clear whether the Court intended to refer to their sexual intimacy, thus continuing to spotlight the importance of sexual intercourse to marriage. The Court might also have been referring to their marriage ceremony or their living “as if” married even before they were legally able to achieve a state-recognized marriage. Or perhaps the Court was simply reminding readers that same-sex couples’ cohabiting, and their sexual intimacies, are legal everywhere, post- *Lawrence.*

Next in the Court’s description of what state marriage recognition is (beyond a classification for purposes of distributing benefits) comes another reference to the same-sex couple’s “intimate” relationship and to its equality with marriages between opposite-sex couples. The Court wrote: “[t]his status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.” Again, no state sources are cited.

Finally, the majority opined – and again without citing any supporting state sources -- that New York decided to recognize same-sex marriages on the basis of reflections about “both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”

Speaking further about the meaning of state marriage recognition respecting same-sex couples, the *Windsor* majority claimed that states intend marriage recognition to affirm the “integrity and closeness” of the household of children living with two adults of the same sex, as well as their “concord with other families in their community” and “concord with other families....in their daily lives.” It is not perfectly clear from the context whether the Court is using “concord” to indicate “peace” or “equality” or perhaps “similarity” with other families in a community -- presumably families headed by two adults of opposite sexes. Again, no supporting state sources, or sources of any kind, are cited here.

The material in the *Windsor* opinion concerning the meaning of marriage recognition at state law is both extensive, and scattered. Yet a few of its

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29 133 S. Ct. at 2692.
32 133 S. Ct. at 2692-93.
33 133 S. Ct. at 2694.
notable characteristics can be summarized. First, it is an account which owes nothing to state law sources or even to the myriad prior Supreme Court decisions cases dependent upon the meaning of marriage at state law - all of which feature procreation as an automatic and important state interest. 34 This is obviously curious considering the majority’s lengthy treatment of the importance of states’ sovereignty respecting marriage recognition.

Second, Windsor ignores completely the most hotly debated subject matter in the same-sex marriage debate: state marriage recognition as a vehicle for promoting children’s well-being, by linking children with the parents who gave them life. Perhaps the Supreme Court ignored this material on the understanding that it was speaking strictly about the meaning of marriage in those states which had chosen to recognize same-sex marriages -- in which case perhaps the Court could assume that the state claimed no interest in linking children with their biological parents via marriage. But the Windsor Court did not indicate that its consideration of the meaning of state marriage recognition was thus limited; rather, it spoke generally about “The States’ interest in defining and regulating the marital relation.” 35 If the latter is true, then it is stunning that the Court left out children’s interests in being reared by their natural parents, not only because the subject figures so largely in the same-sex marriage debate, but also because the Court has repeatedly and robustly, and over the course of more than 120 years, highlighted and strongly affirmed states’ interests in linking marriage with both procreation and childrearing. 36

Windsor’s treatment of state marriage recognition focuses instead upon a range of adult interests in marriage. The Court concludes that adults benefit from marriage recognition because it helps them define themselves, specifically as a person committed in a special emotional and sexual way to one other person. Adult same-sex pairs – the focus of the lion’s share of the Court’s discussion about state marriage recognition – benefit from marriage because it affirms their sexual relationship as well as their dignity and personhood, thus also affirming their equality with couples who are opposite-sexed. 37 This adult- and emotion-centric vision of marriage is a relatively recent development in culture and law. As described by a leading sociologist of marriage, Andrew Cherlin, marriage is increasingly understood as a

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34 For a summary of the Court’s extensive record of approving states’ interests in the procreative aspects of opposite-sex marriage, see Brief of Amicus Curiae Helen M. Alvaré in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal, In the Supreme Court of the United States, Nos. 12-144, 12-307, Hollingsworth v. Perry, and United States v. Windsor. [hereafter “Alvare Amicus, Hollingsworth”]
35 133 S. Ct. at 2392.
37 133 S. Ct. at 2694.
“soulmate” relationship, an “intensely private, spiritualized union, combining sexual fidelity, romantic love, emotional intimacy, and togetherness.” 38 This notion divorces marriage from any intrinsic link with children. While this consciousness has arguably been evolving for decades – and has been chronicled in a cause-and-effect relationship with legal changes affecting divorce, abortion, collaborative reproduction, adultery and cohabitation39– its merits are hotly contested, particularly as it interrelates with marriage stability, the welfare of the less-privileged, and children’s welfare.40

To the extent that the Windsor Court considered children at all, it was only the subset of children living with two adults of the same sex, i.e. those children presently living with two adults of the same sex who are also their parents (as distinguished from the majority of children (about 86%) living with two adults of the same sex: these children have a legal mother who is female and a legal father who is male, because they were conceived when one of the same-sex partners was previously involved in a heterosexual relationship) 41. The Court opines, without citing any sources, that this subset of children, will have difficulty gaining a sense of family unity and equality with other families who do not have same-sex parents, if state and federal law treat their parents’ marriages differently.42

The next section considers those portions of the Court’s opinion claiming that lawmakers enacted DOMA section three with a “bare desire to harm” same-sex attracted couples. It relies significantly upon the material just concluded.

B. “A Bare … Desire to Harm”

Ultimately, Windsor turned on the majority’s holding that section three of DOMA reflected a “bare… desire to harm,”43 same-sex couples, a legislative purpose which could never form the basis of a valid law given the Constitution’s guarantee of equality. The Court offered several grounds for its conclusion.

40 See infra Part III. B.
41 Mark Regnerus, How different are the adult children of parents who have same-sex relationships? Findings from the new family structures study, 41 Soc. Sci. Research 752 (2012);
42 133 S. Ct. 2694.
43 133 S. Ct. at 2693 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973)).
First, the majority observed that DOMA’s refusal to grant federal marriage recognition was an “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage.” It called this choice a “[d]iscrimination[] of an unusual character,” requiring “careful consideration.” Eventually the majority held that DOMA’s “unusual” character constituted “strong evidence of a law having the purpose and effect of disapproval” of the class of same-sex couples married in the eyes of their state’s law. The Court further commented here that because marriage law is state law, federal lawmakers passing marriage-related laws are charged with knowing that they are affecting people’s “daily lives and customs.”

The Court then took three paths from its observations about DOMA’s novelty and personal impacts, to its conclusion that DOMA springs from a “bare congressional desire to harm a politically unpopular group.”

The first path is indicated by the Court’s frequently intertwining in this part of the opinion, material identifying the meaning of state marriage recognition, with material about congressional purpose. To wit, given what the Court finds proposes marriage recognition to mean (e.g. recognition of emotional and sexual commitment; identity enhancement; and a marker of “dignity,” “equality,” and “personhood”) then federal lawmakers’ “no” in response to a state’s “yes” is a no to the dignity, equality and personhood of same-sex attracted persons and couples. This conclusion is strengthened by the irrationality of refusing “marriage” to a type of couple (same-sex) whose behaviors and desires and natures (e.g. dignified, persons, equal) are included within the meaning of state marriage recognition.

The second path to the Court’s conclusion that Congress enacted DOMA with a bare desire to harm, is through the Court’s interpretation of DOMA’s legislative history. The Court’s legislative history analysis is brief, and reprinted below in its entirety:

The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage . . . . CHECK H. R. 3396 is appropriately entitled the ‘Defense of Marriage Act.’ The effort to

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44 Id. at 2693.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid.
Redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” H. R. Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” Id., at 16 (footnote deleted). The stated purpose of the law was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” Ibid. Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.49

Following this paragraph, the Court writes that the “arguments put forward by BLAG [the Bipartisan Legal Advisory Group, the Congressional group which intervened in the case after the Executive branch refused to defend DOMA] are “just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married.”50 Yet none of BLAG’s arguments about congressional purpose are actually articulated here or elsewhere in the Windsor opinion. Rather, one sentence after referring to BLAG’s arguments on congressional purpose, the Court wrote simply that “The congressional goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.’”51 But BLAG never so characterized Congress’ goal in enacting DOMA. Rather, the quoted language in the Windsor opinion about congressional purpose is a conclusory sentence taken from a First Circuit DOMA decision. Furthermore, a look at the only piece of legislative history actually cited by the Windsor majority-- the House Judiciary Report -- reveals numerous statements claiming otherwise, as will be considered below.

In one part of its legislative history analysis, the Court considered the significance of DOMA’s defining marriage for every federal law referencing marriage or spouses, without “identified connection to any particular area of federal law.”52 It interpreted this choice as a further indication of Congress’ purpose to make a “subset of state-sanctioned marriages...unequal.”53 In other words, it indicated that its animus analysis might have ended differently had federal lawmakers considered the wisdom of retaining or changing the traditional, opposite-sexed understanding of marriage, for each of the approximately 1000 affected federal laws.

The third path to the majority’s conclusion about DOMA’s purpose was its

49 Ibid.
50 Ibid.
51 Ibid. (citing Massachusetts v. U.S. Dept. of Health and Human Services, 682 F. 3d. 1, 12–13 (2012)).
52 133 S. Ct. at 2694.
53 Ibid.
description of the personal harms it claimed that DOMA visited on same-sex couples and the children in their households. There were no cites to any sources in this part of the Court’s opinion save a reference to Lawrence’s protection of same-sex couple’s “moral and sexual choices”54; it appears therefore that the majority may have conflated its intuitions about personal harms with a congressional purpose to harm. The language is highly emotional, and definitive. The Court claimed, for example, that DOMA communicates to same-sex couples that their otherwise valid marriages are “second-tier,” and “unworthy”; it renders their situations “unstable” and “humiliates tens of thousands of children now being raised by same-sex couples.”55

More than a few aspects of Windsor’s animus analysis suggest that Court has paved the way for judges in the future to find a purpose to harm in the simple fact of disagreement with a state’s legally recognizing same-sex marriage. As noted above, this dynamic threatens the potential success of religious freedom exemptions to same-sex marriage laws. Treatment of these aspects follows.

First, as treated above, are the Court’s findings about the meaning and significance of marriage recognition at state law. If these findings are sound – although they eschew over a century of prior Supreme Court decisions and myriad state law determinations linking marriage with states’ interests in children -- then refusals to recognize marriage between any two emotionally-committed, sexually-intimate persons is irrational, and points strongly toward a harmful discriminatory intent.

Second, the Court could easily have characterized DOMA’s “unusual” refusal to accept one or more states’ marriage determinations as proportionate to the unprecedented nature of the precipitating event: the decision by one state (Hawaii) to redefine marriage so as to contradict the meaning nearly always and everywhere held, not only in the United States, but globally and historically.56 Such a change would affect the meaning and application of over 1000 federal laws, every one of which was drafted on the basis of a univocal understanding of marriage at every level of government as an opposite-sexed institution. It was certainly possible for the Court to have reasoned otherwise about DOMA’s broad effect. To wit: that Congress acted rationally to preserve the understanding upon which all federal laws were based, a move which did not foreclose later redefining marriage for purposes of particular federal laws, after congressional consideration of the impact of including same-sex couples within the particular law’s ambit. This process

54 Ibid.
55 Ibid.
had begun to unfold pre-

Windsor in the form of bills like S. 296 (113th Cong.) which would alter federal immigration laws to allow same-sex partners to immigrate on the same basis as opposite-sex spouses.\(^{57}\)

Also concerning the matter of DOMA’s allegedly “unusual” nature, the majority overlooked entirely the federal government’s earlier refusal to accept a state’s definition of marriage in the only other situation analogous to same-sex marriage in terms of the degree of redefinition of marriage it involved. In 1894, the U.S. government refused to allow Utah to join the union until it had agreed never to permit polygamy in its laws.\(^{58}\) Justice Scalia raised this point in his Windsor dissent.\(^{59}\)

Third – regarding the use of legislative history -- the majority consulted only a tiny fraction of the legislative material treating DOMA’s “purpose,” conclusively found an animus to harm from inconclusive material, and deemed references to moral purposes suspicious.

To begin with the last point: while it is not perfectly clear, the majority suggested that a reference in the House Report to DOMA’s moral purpose indicated unacceptable animus. Yet a great deal of legislation is explicitly supported with moral purposes. Former Speaker Pelosi, for example has famously asserted that a saint recognized by the Catholic Church (St. Joseph) should intervene in order to help assist the passage of Health Care Reform\(^{60}\), that the DREAM Act (on immigration) is “the right thing to do-- both economically for our country and morally”\(^{61}\), and that the Healthy, Hunger-Free Kids Act was “the right moral thing for us to do.”\(^{62}\) Even the opinion arguably most relevant to the majority’s scrutiny of moral purpose, Lawrence, stated only that moral purposes alone were insufficient to constitute a rational basis for a law criminalizing homosexual sodomy.\(^{63}\) And

\(^{57}\) See The Uniting American Families Act, S. 296 (113th Cong., 1st Sess.) (A Bill to “amend the Immigration and Nationality Act to ... permit[] permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents...”).


\(^{59}\) 133 S. Ct. at 2705 (Scalia, J., dissenting).


\(^{63}\) Lawrence v. Texas, 539 U. S. 558, 571 (2003) (“The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. ... The issue is whether the majority may use the power of the State to enforce these
even that conclusion is called into question by Justice Scalia’s *Lawrence* dissent pointing out that more than a few still-extant state laws are grounded solely upon moral rationales.\(^6^4\)

Furthermore, the legislative history of DOMA is replete with legislative purposes outside of morals. These included, for example: the difficulties and uncertainties of interpreting and applying federal law intended to cover opposite-sex marriages to same-sex marriages; migrating couples’ choice of law; and a desire to preserve nationally a vision of marriage intrinsically inclusive of children and preserving of children’s linkage with their parents.\(^6^5\)

On this last point, while the Windsor majority strongly implied that the language of “defense” before “marriage” in DOMA’s title was intrinsically hurtful speech, the section of the House Report from which the majority plucked its leading quotations on this point (the section entitled, “defending and nurturing the institution of traditional, heterosexual marriage”) was largely devoted to describing the important links between opposite-sex marriage and children’s interests, including their interests in maintaining connections with their birth-parents. In fact, surrounding the Majority opinion’s selected quotations from pages 12 and 13 and 16 of the House Report about “defend[ing]” marriage and “traditional …morality,” were statements on pages 13 and 14 and 15, and 33 about children as the *primary* Congressional motivation to “defend” marriage. These congressional statements included:

- “At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.”\(^6^6\)

- “Simply put, government has an interest in marriage because it has an interest in children.”\(^6^7\)

- “And from this nexus between marriage and children springs the true source of society’s interest in safeguarding the institution of marriage....”\(^6^8\)

- “Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging

\(^6^4\) *Lawrence v. Texas*, 539 U.S. 589-92 (Scalia, J., dissenting).
\(^6^5\) H.R. at 12-18.
\(^6^6\) H.R. at 13.
\(^6^7\) H.R. at 14.
\(^6^8\) H.R. at 14.
citizens to come together in a committed relationship.” 69

-“[B]ecause America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.” 70

-There are, then, significant practical reasons why government affords preferential status to the institution of heterosexual marriage. These reasons – procreation and child-rearing – are in accord with nature and hence have a moral component.” 71

-Rather, [traditional marriage laws] have been the unbroken rule and tradition in this and other countries primarily because they are conducive to the objectives of procreation and responsible childrearing.” 72

The House Report even addressed the matter of animus directly:

It would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2 [ in Romer v. Evans 73] ) motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing. 74

Fourth, part of the majority’s “animus” analysis included blaming federal lawmakers for legislating about “domestic relations” – because this area affects the “daily lives and customs” of people. 75 This argument is clearly a make-weight. Federal laws play a crucial role in various domestic relations arenas, including importantly, child-support, 76 marriage and fatherhood promotion, 77 family and medical leave, 78 and many other areas. And federal government rules in these areas not only influence local domestic relations

69 Id. at 14.
70 Id. at 14.
71 Id. at 15.
72 Id. at 33.
73 517 U.S. 620 (1996)(Court struck Colorado law banning laws sexual orientation antidiscrimination standards.)
74 H. R. at 33.
75 133 S. Ct. at 2693.
77 The Claims Resolution Act of 2010 (Pub. L. 111-291)(2010)) provides funding of $150 million in each of five years for healthy marriage promotion and responsible fatherhood. Each year, $75 million may be used for activities promoting fatherhood, such as counseling, mentoring, marriage education, enhancing relationship skills, parenting, and activities to foster economic stability.
bureaucracies and employers, and parental and children’s behavior—they are often _decisive_. Still, they have failed neither federalism nor other constitutional tests.

**C. Conclusion to Part I.**

All of the material in this section concerns the _Windsor_ majority’s conclusions about the meaning of state marriage recognition, and about the animus allegedly undergirding DOMA. As described in the Introduction, _supra_, both elements of the Court’s analysis are cause for concern among those seeking protections for religious freedom in a state recognizing same-sex marriage. Religious actors would need protection analogous to what DOMA provided the federal government: a right, in one’s own domain, to recognize marriage as opposite-sexed only. While _Windsor’s_ majority promised “[t]his opinion and its holding are confined” to “those whom the State, by its marriage laws, sought to protect in personhood and dignity,” the tone and the substance of its opinion portend otherwise. The Supreme Court rather provided a template for lower courts and for state legislators to craft marriage recognition laws encompassing both same-sex and opposite-sex pairs.

Lawmakers or lower federal courts following this template have only to: claim deference to state authority regarding marriage while defining marriage strictly by their own personal lights; ignore more than century of judicial decisions recognizing and approving states’ linking of marriage recognition to children’s welfare; use legislative history instrumentally; and employ deeply emotional and human rights language to characterize both the meaning of marriage, and the results of denying marriage to same-sex pairs and the children in their households.

The _Windsor_ majority made as strong a case for same-sex marriage recognition as it could make, short of finding a federal constitutional right to it. Catholic doctrine makes a strong case for understanding marriage as opposite-sexed, and for living in witness to that reality. Part II. reviews Catholic teaching about marriage as an intrinsically opposite-sex institution, and Catholic teaching about living in integrity with that meaning. Part III. considers why lawmakers and even LGBT citizens might favorably consider religious accommodations to same-sex marriage recognition, even at a time when, undoubtedly, advocates for same-sex marriage are in no mood to allow them.

**Part II. Marriage in the Roman Catholic Tradition**

It is quite commonplace to hear that same-sex marriage will create a legal clash with Catholics’ religious freedom. One hears little, however, about _why_ this is so, aside from summary references to the Catholic Church’s biblically-
based opposition to homosexual sexual practices.79

Yet Catholic arguments against forced cooperation with same-sex marriage are instead focused upon the meaning of marriage. Obviously, they pre-date efforts to legalize same-sex marriage by several millennia. They are thick and profound -- as must be any consideration of the meaning of such a fundamental and universal human institution. They engage the question of same-sex marriage only as a logical conclusion to their reasoning about what marriage is, intrinsically, and in light of scripture and theological tradition.

An immediate indication of the gist of the Catholic position is this: the Catholic Catechism of the Catholic Church (“the Catechism”) -- the “statement of the Church’s faith and of Catholic doctrine, attested to or illumined by Sacred Scripture, the Apostolic Tradition , and the church’s Magisterium,” “declare[d] ... to be a sure norm for teaching the faith”80 -- devotes 65 (1601-1666) paragraphs to the meaning of marriage and only three (2357-59) to the question of the morality of homosexual sexual intercourse. One of these three paragraphs on homosexual behavior primarily concerns the requirement to treat homosexual persons with “respect, compassion and sensitivity,”81 avoiding “every sign of unjust discrimination.”82 None of the paragraphs on homosexuality appear under the banner of teachings about “marriage.” The only practical point of overlap between the “marriage” and the “homosexuality” portions of the Catechism is its observation in paragraph 2357 that homosexual sex is intrinsically closed to life.83 Paragraphs 1652 and 1653 on marriage clearly state that marriage must be open to life. The official statements on same-sex marriage by Catholic bishops conferences not only in the United States, but also in Europe, for example, reveal these twin characteristics: respect for homosexual persons, and lengthy attention to the full meaning of marriage.84

79 See Gen. 19:5-8; Lev. 18:22-23; Lev. 20:13; 1 Tim. 1:9-10; Rom. 1:26-27.
81 See Catechism of the Catholic Church ¶ 2357-59.
82 Catechism at 2358.
83 Catechism at 2357.
This Part II will briefly summarize the most important points of Catholic doctrine relevant to the demand for an exemption from laws coercing cooperation with same-sex marriage. Most are about the meaning of marriage: a few treat the matter of cooperation with laws. Three preliminarily points are in order.

First, it should be noted that Catholic teaching about marriage is not simply about how Catholics are to live their own marriages, but is very much also about how Catholics are to understand, communicate about and witness to marriage generally. It is not an exaggeration to say that for Catholics, marriage is an essential component of an entire “cosmology” and “anthropology.” Asking Catholics to facilitate or recognize or otherwise cooperate with a meaning of marriage which excises sexual differentiation and complementarity and procreation is, in short, asking them to adopt another cosmology and human anthropology, another faith. Second, and preliminarily: while Catholic teaching about the relationship between marriage and cosmology is increasingly well-known among particularly well-formed Catholics, it is likely invisible outside of these circles. This would, of course, have to change if Catholics were to hope for success either in legislative or judicial arenas. Additionally, Catholics would have to improve their ability to communicate such a teaching in more ordinary language in order to dialogue with those for whom marriage is mostly or completely about adult happiness, or – for same-sex attracted persons – about recognizing their dignity or equality. Catholics would further have to communicate effectively in the language of human freedom and flourishing so prominent and so moving in the Windsor majority opinion, which opinion hews closely to the language and tone used so effectively by same-sex marriage advocacy organizations.

Third, some will be confused at the presence of so much material considering the structure and functions of the human body in the below presentation of Catholic doctrine. In Catholicism, it is foundational that the human person is “an incarnate spirit,” whereby the spirit expresses itself in the body and the “body is informed by the immortal spirit.”85 “Sexuality... is not something simply biological but concerns the innermost being of the human person as such.”86 For Catholics, therefore, how human beings direct their bodies is both revealing and constitutive of their persons, which are integrated body/soul entities. Consequently male female bodily complementarity with its ability to give existence to another is laden with meaning. In the words of John Paul II’s masterwork on human love (written

86 Catechism at 2361.
before he became Pope), *Love and Responsibility*[^87] “[t]he human spirit here on earth forms a unity of substance with the body, such that the spiritual life cannot develop correctly if the elementary lines of human existence are hopelessly tangled in a context where the body is immediately involved.”[^88]

**A. Marriage as Glimpse of the Person of God**

Catholics believe that marriage is intended to offer a glimpse of God’s self as Trinity -- Father, Son and Holy Spirit -- where in three persons are united in an interpenetrating unity of endless love, and the Father and the Son send forth the Holy Spirit. This is reflected in the marital union of the man and the woman—body and soul – and the fact that this union is the unique locus of new human life. In the words of the highest doctrinal body of the universal Catholic Church, the Congregation for the Doctrine of the Faith (“CDF”), the “complementarity of the sexes... reflect? the inner unity of the Creator.”[^89] The CDF has also opined that “‘the image and likeness’ of God constitutes the immutable basis of all Christian anthropology.”[^90] By “Christian anthropology” the Church means a Christian’s understanding of the human person in light of God, i.e. humans’ origins, divine likeness, structure, purpose, destiny, and relations with God and with other persons.

Catholics, then, are called to live in loving communion, like God. John Paul II’s Apostolic Letter on Women (Mulieris Dignitatem) teaches that marriage is the first and fundamental dimension of this call.[^91] His *Love and Responsibility*, explains this further. He writes that men’s and women’s complementarity “on all levels,” “body, character, heart, intellect, will,” result in their forming a “communion rooted in natural bonds of flesh and blood...”[^92] which communion images the Trinitarian God.

God’s creative power is also “imaged” in the man and the woman together. The Catechism states that: “the union of male and female imitates God’s fecundity.”[^93] Children are the “living testimony of the full, reciprocal self-giving of the spouses.”[^94]

[^88]: *Love and Responsibility*, supra note ___ at 66.
[^92]: *Familiaris Consortio*, ¶¶19, 21.
[^93]: Catechism at 2335.
[^94]: *Familiaris Consortio* ¶ 28.
An excellent summary of the material on the relationship between opposite-sexed marriage and parenting, and the image of God, is found in Pope John Paul II’s 1994 Letter to Families, Gratissimam Sane. There he wrote: “In the light of the New Testament it is possible to discern how \textit{the primordial model of the family is to be sought in God himself}, in the Trinitarian mystery of his life. The divine ‘We’ is the eternal pattern of the human "we", especially of that "we" formed by the man and the woman created in the divine image and likeness. According to the CDF, married couples’ inner unity is carried out in fact by the “striking” means of the “transmission of life by a mutual donation of the self to the other.”

A second aspect of this first doctrinal point – about human marriage imaging the person of God – is Catholic teaching about how human marriage images in particular the identity and message of Jesus Christ, the Son of God, in his act of his handing himself over for the other. In his first encyclical letter, Deus Caritas Est (God is Love), Pope Benedict XVI speaks of the “pierced side of Christ” as the place “from [where] … our definition of love must begin. In this contemplation the Christian discovers the path along which his life and love must move.” Jesus’ “act of self-oblation” “realize[s] the “imagery of marriage between God and Israel” in a way previously inconceivable.” Now “marriage” also images union with God in the form of sharing in Jesus’ mode of self-gift. Expounding upon this, in his address to the canon lawyers who handle, among other work, Roman Catholic annulment petitions, Pope John Paul II stated that “the most important dimension of the civilization of love…. [t]he pattern of salvation is Jesus Christ’s act of making a “sincere gift of himself.” “Human consent to complete and indissoluble human communion” in marriage, is therefore “based on a foundation” which, if removed, “would make incomprehensible the very work of salvation.” In Love and Responsibility, citing the Gospel of Matthew, (10:39: “He who would save his soul shall lose it; and he would lose his soul for my sake shall find it again”) John Paul II wrote further that spouses’ “surrender to one another in

\begin{footnotes}
\item[96] Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons, ¶ 6 (1986).
\item[97] Pope Benedict XVI, Deus Caritas Est (God is Love) (2005), at 12.
\item[98] Deus Caritas Est, supra note __ at ¶ 13.
\item[99] Ibid.
\item[101] Id. at ¶ 3.
\end{footnotes}
the one-flesh sexual union, is a form of imitation of the love of Christ: losing oneself to find oneself.”¹⁰²

**B. Marriage as Humanity’s Glimpse of God’s Relationship with Human Beings**

Immediately above, I described Catholic teaching about marriage as an insight into the identity of the Trinitarian God, and relatedly, an insight into the meaning of life as imitation of Jesus Christ. In this subsection, I will describe Catholic teaching about marriage as an irreplaceable way of understanding how God loves us and we are to love God.

The Catechism and an apostolic exhortation of John Paul II, *Familiaris Consortio*, hold marriage to be indispensable for understanding the way in which God loves his people. The Catechism states that opposite-sex marriage “becomes an image of the absolute and unfailing love with which God loves man”,¹⁰³ the “image and sign of the covenant which unites God and His people.”¹⁰⁴ Both point to the marital analogies and language which feature prominently in both the Old Testament descriptions of the covenant between God and Israel, and in New Testament passages about God and the Church. God’s relationship with Israel is captured in the language of fidelity, adultery, love and betrayal.¹⁰⁵ In the New Testament, reflecting on the unity of man and woman at the moment of the world’s creation, the Apostle Paul exclaims: “this mystery is a profound one, and I am saying that it refers to Christ and the Church” (*Eph* 5:32). The very last book of the New Testament, the Book of Revelation, refers often to the “bride” of God, the “new Jerusalem,” (3:12; 21:2, 9-10) and the “marriage” of the Lamb (19:7), referring to the relationship between God and his people.

**C. Marriage, as instructions for how to love one another**

Thus far we have considered marriage from a Catholic perspective as providing a glimpse of the image of God, of the mission and message of Jesus Christ, and as a path toward understanding God’s love for human beings. In this section, we will consider Catholic teaching on marriage insofar as marriage is the template for the command that Catholics’ love one another.

The CDF wrote in 1986 that “[men and women’s] capacity to love a person other than themselves – a reflection and image of God who is Love, an indication of the meaning and purpose of human life not just in marriage, but

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¹⁰² *Love and Responsibility*, supra note _ at 97.
¹⁰³ *Catechism* at ¶ 1604.
¹⁰⁴ *Familiaris Consortio* ¶ 12.
¹⁰⁵ *Catechism* at ¶¶ 1611 – 12.
in all human interactions… is disclosed in the spousal character of the body, in which the masculinity or femininity of the person is expressed.”\textsuperscript{106} In 2004, the CDF continued: “The human dimension of sexuality is inseparable from the theological dimension. The human creature, in its unity of soul and body, is characterized therefore, from the very beginning, by the relationship with the other—beyond—the-self”\textsuperscript{107} Benedict XVI’s first encyclical, \textit{Deus Caritas Est} (God is Love) articulates in definitive language the relationship between the meaning of marriage and the norm of love: “Marriage based on exclusive and definitive love becomes the icon of the relationship between God and his people and vice versa. God’s way of loving becomes the measure of human love.”\textsuperscript{108} In other words, Catholics understand sexual difference, and sexual complementarity, as pointing toward the meaning and purpose of life itself. This meaning is to love one another. Phrased differently, sexually differentiated, complementary marriage is not only a sign of human persons’ essentially relational nature, the norm of all relationships, which is love. Marriage is simply the “primordial” expression,\textsuperscript{109} the symbolically and physically and temporally complete (e.g. “one-flesh,” and “until death do us part”) expression, and the most evidently fruitful expression, of the norm of love. It embodies the “ethos” which must characterize the life of Christians.”\textsuperscript{110}

D. Marriage is Ordained Both for the Good of Spouses and for Procreation

The above descriptions indicate already the fact and the imperative that, for Catholics, marriage images God in part because it is fruitful, as God’s love is fruitful, and brings life, and as the Holy Spirit issues forth from the Father and the Son. Closely related to this is Catholic teaching that marriage is “by nature ordained [both] to … the good of spouses and the procreation and education of offspring.”\textsuperscript{111} Catholic doctrinal sources often trace the procreative aspect of marriage back to the \textit{Genesis} passage wherein God commands the couple to “[b]e fruitful and multiply.” (Gen1:28) Furthermore, the Catechism states that in the “procreation and education of offspring …

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\textsuperscript{106} \textit{On the Collaboration of Men and Women}, supra note \_ at ¶8.
\textsuperscript{107} \textit{Deus Caritas Est}, supra note \_ at 11.
\textsuperscript{108} John Paul II, General Audience of Oct 20, 1982, \url{http://www.ewtn.com/library/papaldoc/jp2tb98.htm} (“Marriage was also a part of this integral heritage—as can be deduced from the Letter to the Ephesians 5:21-33—marriage, that is, as a primordial sacrament instituted from the beginning and linked with the sacrament of creation in its globality. The sacramentality of marriage is not merely a model and figure of the sacrament of the Church (of Christ and of the Church). It also constitutes an essential part of the new heritage, that of the sacrament of redemption, with which the Church is endowed in Christ.”)
\textsuperscript{109} \textit{Ibid}.
\textsuperscript{110} \textit{Ibid}.
\textsuperscript{111} Catechism at 1601.
\end{flushleft}
[marriage] finds its crowning glory.”

Spousal happiness and procreation are regularly articulated together in a Catholic theology of marriage. Yet it is also true that, in the face of the modern phenomena of denying a link between marriage and procreation, and denying that any physical reality can point to a moral “ought,” Catholics now regularly highlight the procreative good of marriage, while not isolating it or vaulting it over the good of spouses. Hence, the Catechism states: “true married love … without diminishment of the other ends of marriage, is “directed to disposing the spouses to cooperate valiantly with the love of the Creator…” In “this sense, the fundamental task of marriage and family is to be at the service of human life.” The Catechism also cautions that the two goods of marriage cannot be separated “without altering the couple’s spiritual life and compromising the goods of marriage and the future of the family.”

In is important to maintain the procreative aspect of marriage in Catholic teaching, not simply because, as the Catechism states: “all human generations come from this union.” Rather, as John Paul II logically argues in Love and Responsibility, it seems important in order to help human beings avoid “using” one another sexually -- even if they possess every intention of avoiding this -- due to the strength of the sexual urge. For the married couple to live the commandment of love: “to love one another as I have loved you” (Jn 13: 34) -- what John Paul II calls the “personalistic norm” of love -- they must never use another as a means to an end, including the end of sexual pleasure. Because, however, sex is the source of such intense emotional and physical pleasure it is extraordinarily “easy to go from the experience of pleasure, to the quest of pleasure for its own sake, to accepting it as the superlative value and proper basis for a norm of behavior.” This is exacerbated, John Paul II continues, by Freudian notions that pleasure is the primary aim of the sexual urge to the point where it is “unthinkable” to overcome the tendency to use another sexually, “without a common good to which both are inclined...a common good which can bind them, internally and externally. A good to which they are willing to subordinate themselves to, and one to the other, for its sake.” This good is children. Children are uniquely able to help couples avoid mutual use. Of course, this is not a

112 Catechism at 1652.
113 Catechism at 1652 (citing Gaudium et Spes (Constitution on the Church in the Modern World (1965)), 48, secs. 1 and 50.
114 Catechism at1653 (citing Familiaris Consortio, ¶28).
115 Catechism at 2363.
116 Catechism at 2335.
117 Love and Responsibility, supra note __ at 41.
118 Id. at 43.
119 Id. at 28.
doctrinal point, but a matter of insightful theological and philosophical observation, adding depth to Catholic teaching about the relationship between children and marriage.

Another “face” of the procreative nature of marriage concerns the rights of children. The Catechism states that God’s instituting of marriage in Genesis (“This is why a man leaves his father and mother and clings to his wife, and the two of them become one body” (Gen. 2:24)) also indicates that children have rights respecting their origins and their family life. They have the right to be created in an act worthy of a human person -- an act of love – and to be reared by their mother and father in marriage.120 Because God’s “image and likeness” come into being in the world, practically speaking, by means of procreation, and this is done by persons we call “father” and “mother” (as God is Father and Jesus had a mother and a heavenly father) it is possible, to say that “God himself is present in human fatherhood and motherhood.” Both He and they are the “source of image and likeness” to God, that humans bear. In the rather complex formulation of Pope Joan Paul II: “the genealogy of the person [i.e. his or her actual relationship both to God, as image and likeness, and to the parents] is inscribed in the very biology of generation.”121

No adult has a “right” to a child. Children are never “owed” to any adult, but always a gift.122 They are to be understood and realized, not as something brought in from the “outside” or “added on” to the mutual love of the spouses,” but “springing from the very heart of that mutual giving, as its fruit and its fulfillment.”123 This is held to serve children best, which is a significant concern, as the “weaker and more vulnerable party, must be the paramount consideration” in every situation.124 Closely related, given the total union that marriage is and represents, spouses have a right to become a father and a mother “only through each other.”125

Same-sex unions intrinsically exclude this procreative dimension. Also, they are increasingly associated with recourse to artificial reproductive technologies,126 which will, in every case, partly or completely dissociate the child from his or her parents, and his or her origins in an act of love.

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120 Congregation For The Doctrine Of The Faith, Donum Vitae (Instruction On Respect For Human Life In Its Origin And On The Dignity Of Procreation: Replies To Certain Questions Of The Day) Introduction, 5 (1987): see also Catechism at 2376.
121 Gratissimam Sane, supra note __ at 9.
122 Catechism at 2378.
123 Catechism at 2366.
124 Gratissimam Sane, supra note __ at 7.
125 Catechism at 2376.
E. For Marriage, not Animus Against Persons

There are two elements of Catholic teaching which, while they do not directly concern the meaning of marriage, seem important to raise post-Windsor. The first concerns relationships other than same-sex marriage, which contradict Catholic teachings about marriage. The second concerns the volume of Catholic doctrine strenuously asserting the equal dignity of same-sex attracted persons.

First, more than a few types of intimate relationships contradict Catholic teachings about marriage and the family. Same-sex unions are not a particular target. Thus the Catechism states that “offenses against the dignity of marriage,” or “attempted partnerships which deny the truth of marriage” are several, including sexual union before marriage, sex closed to procreation by artificial contraception, adultery, divorce, polygamy, remarriage, or what Church documents call “free unions,” i.e. sexual liaisons, without formal entry into marriage. A substantial number of authoritative sources treat each of these situations, and explain how each violates one or more aspects of Catholic teaching about marriage, whether it be, inter alia, marriage’s procreative orientation, its indissolubility, its monogamy, or its necessity to image God, or the Jesus loves.

In short, as the CDF’s “Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons states: “Christians who are homosexual are called, as all of us are, to a chaste life.”

Second, in document after document, and decade after decade, authoritative Catholic sources repeat the imperative to respect homosexual persons and to condemn unjust discrimination. The Catechism’s summary of Church teaching in this area states unequivocally that homosexual persons “must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided.” It continues: [t]hese persons are called to fulfill God’s will in their lives.

The broader framework for this statement was constructed at Vatican II, in 1965, in the important document, Gaudium et Spes where the basis for the equality and dignity of all human persons was set forth as follows: “Since all men possess a rational soul and are created in God’s likeness, since they have the same nature and origin, have been redeemed by Christ and enjoy the

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127 Catechism at 1653.
128 See Sacred Congregation For The Doctrine Of The Faith (Prefect, Angelo Cardinal Seper), Persona Humana, Declaration On Certain Questions Concerning Sexual Ethics (1975) VIII (emphasis added).
130 Catechism, 2358
same divine calling and destiny, the basic equality of all must receive increasingly greater recognition. ... [E]very type of discrimination ... is to be overcome and eradicated as contrary to God's intent.”

Ten years later, speaking specifically about same-sex attracted persons, the CDF's *Persona Humana* (Declaration on Certain Questions Concerning Sexual Ethics) concluded: “They do not choose their homosexual condition.... They must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God’s will in their lives....”

In 1986, the CDF headed by then-Joseph Cardinal Ratzinger issued its *Letter to Bishops on the Pastoral Care of Homosexual Persons*, asserting: “It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the church’s pastors wherever it occurs. It reveals a kind of disregard for others which *endangers the most fundamental principles of a healthy society*. The intrinsic dignity of each person must always be respected in word, *in action and in law*.”

Even in the doctrinal statements banning Christians from approving homosexual acts, there appear admonitions to affirm the dignity of homosexual persons. In the 2003 CDF Document on Considerations Regarding *Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, for example, that body stated: “Moral conscience requires that, in every occasion, Christians give witness to the whole moral truth, which is contradicted both by approval of homosexual acts *and* by unjust discrimination against homosexual persons.”

**Part III. Conclusion: Living Together?**

Having considered *Windsor*’s implications for religious exemptions from same-sex marriage, and the breadth of Catholic teachings on marriage, I now turn to a few observations about the possible coexistence of state-recognized same-sex marriage, with religious freedom for Catholics.

As already noted above, *Windsor* attempted to put its thumb on the emotional and legal scales to tip the balance toward recognition of same-sex

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131 *Gaudium et Spes*, supra note ___ at 29.
marriage. No matter the next step for same-sex marriage advocates –
whether it is attempting to use Windsor to strike down section two of DOMA
(preserving states’ rights to decline to recognize marriages recognized in
other states)\textsuperscript{135} or to strike down state laws banning same-sex marriage – the
question of religious freedom remains. This concluding section does not
concern whether states have legitimate or even compelling state interests in
forcing religion to cooperate with same-sex marriage Rather, it is about why
citizens and legislatures might wish to allow exemptions for religious actors,
in a context in which same-sex marriage is legal. I will address these
possibilities from a Catholic perspective, acknowledge significant hurdles,
and consider already existing conscience proposals.

A. Practical Obstacles

Doubtless, in an era of increasing recognition of same-sex marriage, it will be
very difficult for religious actors to gain exemptions. Scholars writing about
same-sex marriage and religious liberty have frankly acknowledged as much.
In the words of a prominent and strident activist Chai Feldblum: “The most
pressing question for LGBT people probably is not ‘How can we be sure that
we are adequately considering and taking into account the beliefs of those
who believe we are immoral and sinful?’”\textsuperscript{136} This is informed by her personal
conviction that, regarding same-sex marriage, there is nothing less at stake
than allowing same-sex attracted citizens to “live lives of honesty and safety
in today’s society.”\textsuperscript{137}

Even in the words of more reflective observers, such as noted constitutional
scholar Doug Laycock: “The most likely political outcome is that if the gay-
rights movement becomes strong enough to enact general recognition of
same-sex marriage, it will simply roll over its opponents on all these
collateral questions.”\textsuperscript{138} Rabbi Marc Stern agrees: “The remaining question
is whether champions of tolerance are prepared to tolerate proponents of a
different ethical vision. I think the answer will be no.”\textsuperscript{139} Thus far, Laycock

\textsuperscript{135} 28 U.S.C.\textsuperscript{§}1738C (1996).
\textsuperscript{136} Chai Feldblum, Moral Conflict and Conflicting Liberties, in Douglas Laycock, Anthony R.
Picarello, Jr., & Robin Fretwell Wilson, Eds., Same-sex Marriage and Religious Liberty:
\textsuperscript{137} Id. at 126.
\textsuperscript{138} Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, Same-sex Marriage
\textsuperscript{139} Marc Stern, Same-Sex Marriage and the Churches, 57, in Douglas Laycock, Anthony R.
Picarello, Jr., & Robin Fretwell Wilson, Eds., Same-sex Marriage and Religious Liberty:
Emerging Conflicts (2008).
and Stern have proved correct. State laws have provided little protection for religious conscience.140

In addition to the unwillingness of same-sex marriage advocates, another obstacle from the Catholic perspective, is the difficulty of articulating its thick marriage teachings in popular language. Listeners will have real difficulty comprehending the weight of the burdens on Catholic life posed by forced cooperation with same-sex marriage. The underlying theology, while commonplace in Catholic educational and sacramental contexts, is not commonplace in the public square. This difficulty is compounded not only by widespread disagreement with Catholic marital and sexual norms, but also by the inconsistent witness of some Catholics themselves, whether in the areas of divorce, cohabitation, or same-sex marriage. In the current environment too, Catholic teaching can seem impossibly idealistic: fewer Americans understand marriage as a child-focused institution, or view sex as marked by its link with new human life.

B. Reasons to Continue

At the same time that Americans are cynical about the marriage ideals espoused by Catholics (or anyone), they continue to support religion and religious freedom.141 They are also increasingly aware of rising intolerance globally for religious freedom, according to some accounts, and susceptible to an enhanced awareness of American pride on this matter.142 Of course, United States citizens are not witness to the spectacle of physical punishment for the free exercise of religion. Still, several events have provoked a growing sense in many citizens that religious liberty is more threatened in the United States today than it has been in the recent past.143 These include the religious backlash against the federal government’s mandate requiring religious actors to provide contraception and early abortifacient insurance144; the federal government’s (unanimously rejected)

140 See Appendix A, a summary of state exemptions, in Fretwell, et al., Letter to _____, supra note __.
141 See Frank Newport, God is Alive and Well: The Future of Religion in America, 10, 11 and (2012) (The author, Gallup polling’s Editor in Chief, summarizes decades of polling about religion in the United States. He concludes that there is a very low percentage of Americans who claim there is no God (6-8%), about 40% who currently attend services approximately weekly, and about 60% who believe religion “can answer life’s problems.”).
144 See, e.g., Archbishop William E. Lori, Russell D. Moore, Ph.D., et al., Standing Together for Religious Freedom, an Open Letter to the Obama Administration and the U.S. Congress (July 2, 2013) (over100 prominent national religious leaders and scholars), at
claim in the *Hosanna Tabor Evangelical Lutheran Church and School v EEOC*\(^{145}\) litigation that the Constitution has no “ministerial exemption” to federal employment laws; federal agencies’ stripping well-performing religious charities of federal grants for anti-trafficking and health care services, following the creation of new administrative requirements to cooperate with abortion or contraception\(^{146}\); and the closing or reorganization of religious social services in response to same-sex marriage recognition laws.\(^{147}\)

This section is not intended, however to calculate the odds of achieving religious exemptions to same-sex marriage laws on the basis of citizens’ and lawmakers’ affections for religious freedom in the abstract. (Though I should add here that it should not be forgotten that over 50% of gays and lesbians describe themselves as religiously affiliated\(^{148}\) and should not be excluded *ab initio* from the class of citizens interested in preserving a space for religious freedom in the marriage arena.) Instead, it will set out some arguments for allowing religious exemptions based upon the contents of competing arguments about the meaning and significance of marriage, as captured most particularly in *Windsor*, and in Section II’s summary of Catholic doctrine about marriage. In other words, even assuming that a state legislature agrees generally with the *Windsor* majority about the meaning and significance of marriage recognition, and the potential for laws to express harmful animus toward same-sex attracted couples, what are the arguments in favor of religious freedom offered by the shape of Catholic teaching on marriage in the context of U.S. society today?

1. **Pro-marriage, not anti-person**

Catholic doctrine is insistent, even repetitive, about the radical equality and dignity of the same-sex attracted persons.\(^{149}\) It does not single out same-sex marriage for criticism, but rather finds same-sex partners as one among

\(^{145}\) 132 S. Ct. 694 (2012).

\(^{146}\) For a summary of some of these events in 2011-12, see Helen Alvaré, *No Compelling Interest, the “Birth Control” Mandate and Religious Freedom*, 58 Villanova L. Rev. 379, 388-90 (2013).


\(^{149}\) See *supra* Section __ notes __
many persons and groups who would disaggregate what Catholics must hold together: sex, procreation and marriage. Both aspects of Catholic doctrine clarify that the basis of a Catholic request for an exemption from cooperating with same-sex marriage is its understanding of marriage, not any animus against persons.

These doctrinal points answer Windsor’s finding that laws regarding same-sex marriage reflect an animus to harm homosexual persons or couples. They are also made visible and credible by the witness of Catholic practice, including the history and the size of Catholic outreach, here and abroad, to homosexuals suffering from AIDS. In the U.S. Church established the National Catholic AIDS Network, which by 2008, had 1,600 agencies providing services to AIDS sufferers, including residential and mental health.

Worldwide, as of 2008, the Catholic Church remains the largest private provider of AIDS care, providing “anti-retroviral treatment, home-care visits and counseling to one in four of the world’s 33.3 million AIDS patients.”

Furthermore, there is always a real possibility that a human rights movement riding high today—such as the movement to recognize the dignity and equality of LGBT persons—will need friends tomorrow, who remember and recognize the justice of its essential claims. Catholic teaching about the dignity and equality of LGBT persons is doctrinally established and unchanging.

2. A voice for preserving the weight of sex, due to its relationship with existence itself:

In the United States today, the “price” of sex has declined, in large part because of the availability of drugs and devices to disconnect sex and pregnancy.

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151 Michelle Faul, Catholic AIDS Workers, Pope Echoing Us on Condoms, USA Today, (December 1, 2010), at http://usatoday30.usatoday.com/news/religion/2010-12-01-Africacondoms01_ST_N.htm (The “Catholic Church is the biggest private provider of AIDS care in the world, providing antiretroviral treatment, home-care visits and counseling to one in four of the world’s 33.3 million AIDS patients, according to the Catholic charity Caritas International. In 2008, members of the Catholic HIV and AIDS network spent 180 million euros (about $235 million) on assistance....”)

relationships, more nonmarital and unwanted pregnancies, nonmarital births, and abortions -- have been felt largely by the most vulnerable Americans, women, minorities, the poor and the children of the poor.\textsuperscript{153} Commentators on all points of the political spectrum are raising the alarm. It seems reasonable to propose, in the midst of what can only be called a crisis for the disadvantaged, that even if some wish to elevate relationships which are intrinsically unrelated to procreation -- as a remedy for past discrimination and a means of social affirmation -- social space should be preserved for a voice advocating preserving the links between sex and marriage and children. This is an essential aspect of the marriage message of religious actors, though some nonreligious actors speak similarly. Many people, not just religious adherents, are benefitted when the links between sex and marriage and children are preserved the least-advantaged could benefit most.

3. \textit{A witness to the body/soul connection:}

Arguments for same-sex marriage assume that a lack of sexual complementarity between a couple, and the absence of procreative potential, are meaningless; only emotional intention counts. Americans generally are increasingly receptive to this message. In the words of a well-recognized sociologist, Professor Scott Stanley, they are inclined to believe about their sexual activity that “what happens in Vegas...stays in Vegas”.\textsuperscript{154} But the facts on the ground tell a different story. They tell a story of young women in particular who suffer depression due to experiencing sex outside the context of a relationship.\textsuperscript{155} They tell of psychological distress following women’s encounters with pornography and rape—each of which physical violations is also destructive of women’s emotional and spiritual equanimity.\textsuperscript{156} Citizens’


resistance to the body/soul connection is a factor even in the context of the U.S. health insurance reform debate. Lawmakers supportive of extending health insurance coverage to every American have difficulty winning over audiences to the conclusion that health care for the body and the mind is a basic human right. In short, there is room in American law and culture for a proposal at the heart of Catholic teaching about sex and marriage: that how one disposes of the human body affects the entire human person and the common good.

4. Marriage is about more than emotion:

Eminent legal thinker Richard A. Posner has opined that the growing acceptance of homosexual marriage seems “a natural consequence of the sexual revolution that began in the 1960s.” This “revolution” was constituted essentially by the separation of what was previously bound together: love, sex, marriage and children. Not surprisingly, the meaning of marriage also shifted during this period, from an enterprise importantly bound up with children, to what leading American sociologists Andrew Cherlin and W. Bradford Wilcox often call a “soulmate union.” Such a union is obviously a largely emotional enterprise. For participants, it apparently also signals personal accomplishment (gaining enforceable trust from a soulmate) and social status. The risks of adopting such a view of marriage are significant. It is linked with increasing rates of divorce, which, in addition to creating difficulties for children, appear to cause lingering harms for adults and for society too, all of which affect already disadvantaged communities the most. Recent literature, for example, is even highlighting

159 The Marriage Go-Round supra note __ at 185.
the difficulties faced by ex-spouses, unmarried parents, or former in-laws, when they become sick or elderly without an intact family.162

But same sex marriage proponents are strenuously encouraging the notion that marriage is almost strictly an emotional enterprise, a personal accomplishment, and a marker of status. Even a society eager to communicate nondiscrimination to lesbian and gay individuals and couples, may wish to maintain the uniqueness and visibility of a view of marriage which links it to others -- to children, to aging adults, and to the community. The Catholic religion and others firmly maintain that view.

C. Current proposals from religious freedom actors regarding exemptions

The most well-developed proposals regarding religious exemptions to same-sex marriage laws come from two groups of law professors, one led by Professor Robin Fretwell Wilson, (which remains officially neutral on legalizing same sex marriage) and one led by Professor Douglas Laycock, which supports same-sex marriage recognition.163

Both proposals expertly summarize the relevant laws which, when combined with same-sex marriage recognition, might burden religious actors. These include, for example laws treating public accommodations, tax exemption, the receipt of public benefits, or non-discrimination generally. They also identify the kinds of jobs, positions and services more likely to be the sources of requests for exemptions, and offer proposed language addressing specific cases.

Their solutions for the coexistence of same-sex marriage and religious liberty involve, in the case of employees whose jobs are directed to granting licenses or performing marriages, an opt out, but only to the point where there is no “inconvenience or delay,” and another official is promptly available.

With regard to others who might be implicated in cooperating or affirming same-sex marriages -- for example, counselors, employers offering benefits, businesses ordinarily supplying things used in weddings, and suppliers of housing -- these persons and groups too, could opt out so long as they too, did not cause a substantial hardship to one of the parties to the same-sex marriage. Respecting businesses, only small businesses (5 or fewer

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163 Fretwell et al., Letter to the Governor of Illinois, supra note __ ; Professors Douglas Laycock et al., Letter to Rep. Tom Cross, supra note __.
employees) would get significant conscience protection (so long as their conscientious objections did not create a substantial hardship) and even then, only if the owner of the business primarily performed the task or service in question.

I offer several reflections about these proposals from a Catholic perspective, based upon Parts I. and II. of this article. First, I would commend their depiction of the shape of current and potential struggles between same-sex marriage and religious freedom, as well as their attention to the needs of all citizens to live with a sense of dignity and normalcy in their chosen communities.

Second, I would add to their proposals material conveying the full scope of the meaning of marriage in various religious traditions, in the vein of the material, supra, about the Catholic tradition. This would communicate that the request for exemption is not motivated by harmful animus, and at the same time indicate the degree of importance religious actors attach to living out and witnessing to the fullness of the meaning of marriage. Extant proposals’ failure to include such material seems to incline them toward underestimating the weight of the burden on free exercise created by forcing a religious person to cooperate with a same-sex marriage. This seems to influence their willingness, for example, to cut off conscience protection where larger businesses are involved. It also informs their suggested limitation on the right to conscientious objection, i.e. “until” conscience causes significant hardship to the would-be customer. Respecting this last point, they appear not to see that requiring the religious person’s cooperation precisely at that point renders him or her the “but for causation” of licensing the same-sex couple, or supplying their wedding celebration, etc. In the Catholic view, this behavior would not only likely constitute “material cooperation,” but would also give scandal by helping to normalize an understanding of marriage at odds not only with Catholic teaching, but with the various social goods outlined above.

Third, I would more clearly highlight in any proposal, the line between religious opposition to redefining marriage, and religion’s insistence upon recognizing the dignity of homosexual persons. I would tie this specifically to the presence of a defined list – like the lists already suggested in the Wilson and Laycock letters -- of matters constituting “cooperation” with same-sex marriage (housing, employment benefits, etc.), as distinguished from other transactions involving persons or couples with same-sex attraction. This is helpful for overcoming fears that religious exemptions would be exploited for

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164 Material cooperation is actual assistance with another’s wrongdoing, without approving it. See Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons, supra note ___ at 5.
the purpose of refusing, for example, to interact at all professionally or commercially with same-sex attracted persons or couples. Fears of this type of exploitation are expressed by same-sex marriage advocates in a bid to dampen enthusiasm for proposals to grant any religious exemptions to same-sex marriage laws.

Fourth and finally, from a Catholic perspective, an “advance notice” requirement might be a superior modus as compared with “conscience protection until hardship.” An advance notice regime has several virtues. It prevents same-sex couples from personal encounters or confrontations with conscientious objectors. It respects the profound and “cosmological” character of Catholic teaching about marriage by preventing cooperation in more situations, while simultaneously performing a more public witness to the goods of opposite-sex marriage and the rights of objectors to speak out. Finally, it would likely ensure – because of its public visibility – that only those persons who are sincerely religiously burdened by cooperation with same-sex marriage, and sincerely committed to opposite-sex marriage as a matter of religious faith, would undertake to exercise their right of conscience so publicly.