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SAME-SEX MARRIAGE: A TRUE THREAT TO THE FREE EXERCISE OF RELIGION

*Doug Christensen**

Today, a hot controversy across the United States is whether the Federal Defense Of Marriage Act (DOMA)¹ should be repealed and same-sex marriage legalized nationally. Arguments between liberals and conservatives have raged back and forth perhaps leaving many who are undecided or uneducated upon the subject wondering which side to take.

Investigation of the legal articles concerning same-sex marriage reveals that the majority of legal academics argue that marriage is a universal civil right and there is no valid reason to deny homosexuals the ability to be married.² On the other hand, a few legal scholars argue that legalizing same-sex marriage would essentially open a proverbial can of social worms, resulting in devastating effects to our nation.³ Unfortunately, this point of view seems largely ignored or perhaps just prematurely dismissed as incorrect. Although this topic is certainly sensitive for many, and rightfully so, there is merit to openly discussing and evaluating all sides of the debate before concluding which side is right. It seems that too often the arguments

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¹ H.R. Res. 3396, 104th Cong. (1996) (enacted), available at <http://www.govtrack.us/congress/bills/104/hr3396/text> [hereinafter Defense of Marriage Act]

² See Christy M. Glass, *Toward a "European Model" of Same-Sex Marriage Rights: A Viable Pathway for the U.S.*, 29 BERKELEY J. INT'L L. 132 (2011); Anjuli Willis McReynolds, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073 (2006); Jason Parish & Joy Haynes, *Same-Sex Marriage and Domestic Partnerships*, 5 GEO. J. GENDER & L. 545 (2004); Edward H. Sadtler, *A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?*, 40 VA. J. INT'L L. 405 (1999); Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007).

³ See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); WHAT'S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES, OR SOCIETY? (Lynn D. Wardle ed., 2008); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007); Lynn Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N. DAK. L. REV. 1365 (2007).

against same-sex marriage are not given any credibility because the homosexual movement is advancing so rapidly.⁴

Not only is this debate raging within the United States, it is occurring on a world-wide scale. To date, the United Nations (U.N.) has not officially recognized the legality of same-sex marriage. In fact, official U.N. documents recognize marriage only as between a man and a woman. For example, the Universal Declaration of Human Rights proclaims protection for families based upon marriages between "men and women."⁵ The U.N. does recognize the legality of same-sex marriages that are performed in countries where the practice is legal, but it ultimately leaves deciding whether or not to legalize same-sex marriage up to each nation.⁶

The debate on whether to nationally legalize same-sex marriage, or at least the intensity of the debate, is fairly new within the United States. Since the morality and legality of same-sex marriage has already been thoroughly argued, this note will focus on the harmful effects that legalizing same-sex marriage will eventually have on the First Amendment of the U.S. Constitution, particularly the free exercise of religion within our nation.

More specifically, this note will argue how other nations, that have already legalized same-sex marriage, exemplify the restrictions that will be placed on the free exercise of religion within the United States if DOMA is repealed and same-sex marriage is nationalized. Additionally, it will show how this will be the case regardless of the protections provided by the First Amendment of the Constitution.

For those who do not believe that the national legalization of same-sex marriage would actually curb any fundamental American liberty, there are numerous examples, globally, to rebut that position. Such restraints to personal religious liberty have already occurred internationally. This note will focus specifically on such incidents that have occurred in Western Europe and Canada.

Part I of this note will discuss flaws inherent in the arguments advocates of same-sex marriage commonly make against those who for religious purposes believe that marriage is only to be performed between a man and a woman. Part II will evaluate specific instances of religious persecution in Western Europe that have arisen because of legalization of same-sex marriage. Part III will then discuss Canada's evolution of legalization of same-sex marriage: first, sweeping social change, followed by evolution of

⁴ ALAN SEARS & CRAIG OSTEN, *THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY* 14 (2003).

⁵ Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, U.N. Doc. A/810 (Dec. 12, 1948).

⁶ See *Domestic partnership and same sex marriage*, UNSPECIAL.ORG (March 2004), http://www.unspecial.org/UNS627/UNS627_T06.html.

legal doctrines, and finally the specific harms that have occurred as a direct result of those changes. Part IV will compare the evidence that this article has presented up to that point to the current controversy within the United States and the negative effects that repealing DOMA and legalizing same-sex marriage nationally will have on the free exercise of religion within the U.S.

INTRODUCTION

Before diving into this note's main argument, it will be helpful to briefly explain the background of the legalization of same-sex marriage both internationally and within the United States. The tides of this so-called cultural progression are rapidly washing over the continents of the globe. To date, seven countries in Western Europe have legalized same-sex marriage. Additionally, one in North America, one in South America, and one in Africa have also chosen to legalize same-sex marriage. The Netherlands led the way in 2001. Since then, others have followed at an accelerating pace: Belgium in 2003; Spain and Canada in 2005; South Africa in 2006; Norway and Sweden in 2009; and Portugal, Iceland, and Argentina in 2010.⁷ Although the number of nations that have legalized same-sex marriage is a small percentage of the total nations throughout the world, the fact that ten nations have made it legal is quite disturbing when one considers that in 2000, just thirteen years ago, no nation had yet legalized same-sex marriage.⁸

Aside from a national legalization, certain countries that have not legalized same-sex marriage nation-wide, such as Mexico and Israel, still recognize the legitimacy of same-gender marriages performed in other countries where that practice is legal.⁹ Also, some countries allow legal differences between different jurisdictions within the country. Mexico is an example of this; same-sex marriage is legal within the limits of Mexico City but nowhere else in the country.¹⁰ The United States currently falls in this category as each of the 50 states are individually allowed to decide whether to legalize same-sex marriage, but it is not yet federally mandated.¹¹

⁷ Steve Williams, *Which Countries Have Legalized Gay Marriage?*, CARE2.COM (Jan. 31, 2010, 1:00 PM), <http://www.care2.com/causes/which-countries-have-legalized-gay-marriage.html>.

⁸ Wardle, *Attack on Marriage*, *supra* note 3, at 1367.

⁹ Williams, *supra* note 7.

¹⁰ *Id.*

¹¹ *See* Defense of Marriage Act, *supra* note 1, at § 2(a) (Presently, the Defense of Marriage Act is an assertive protection for states that do not wish to accept same-sex marriages as part of their codified law. The Act explicitly states, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

Though legalizing marriage between persons of the same sex appears harmless, even progressive, it is in reality harmful to the freedom of religious ideas and practices.¹² These blights have festered in many forms; some as prosecutions of citizens who, for religious reasons, have refused to accept same-sex marriage, some as cultural shifts that have led to social antagonism toward any who oppose same-sex marriage, and others falling somewhere between the two. The current status quo, both domestic and abroad, suggests that harm to true religious freedom will increase unless the public is educated regarding these harms and decides to actively oppose these 'progressive' cultural tides.¹³

The United States is currently experiencing these cultural and legal patterns. Though DOMA is still in place, thereby preventing the federal government from legalizing same-sex marriage nationally, seven states and the District of Columbia have legalized same-sex marriage within their respective jurisdictions.¹⁴ This trend has continued to gain momentum ever since Massachusetts legalized it in 2004.¹⁵ Since then, the following states have legalized same-sex marriage: Connecticut in 2008; Iowa and Vermont in 2009; New Hampshire and the District of Columbia in 2010; New York in 2011; and, most recently, Washington on February 13th of 2012.¹⁶ Additionally, on November 6th, the general voting ballot in Maine is set to contain an initiative that if approved, which is likely to be the case, will legalize same-sex marriage.¹⁷ This would be the first voter legalization of same-sex marriage within the United States, demonstrating the rapidly growing public support for same-sex marriage in the nation.¹⁸

¹² See Wardle, *supra* note 3.

¹³ *Id.*

¹⁴ Jamie Reese, *Washington legalizes same-sex marriage*, JURIST.ORG (Feb. 13, 2012, 6:15 PM), <http://jurist.org/paperchase/2012/02/washington-governor-signs-same-sex-marriage-bill.php>; Christine Vestal, *Gay marriage legal in six states*, STATELINE.ORG, <http://www.stateline.org/live/details/story?contentId=347390> (last updated, Jun. 4, 2009).

¹⁵ Vestal, *supra* note 14.

¹⁶ Reese, *supra* note 14; Vestal, *supra* note 14.

¹⁷ *Same-Sex Marriage and Domestic Partnerships on the Ballot*, NCSL.ORG, <http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx> (last updated Jul. 31, 2012) (Other states that will have same-sex marriage related issues on their ballots include Minnesota, Maryland, and Washington. In Minnesota, the legislature referred a question on the constitutional definition of marriage to the ballot. On the other hand, the ballot measures in both Maryland and Washington are attempts to overturn the legalization of same-sex marriage within these respective states, instigated by the legislature and signed by the governor.).

¹⁸ *Id.*

I. THE MAJOR FLAW IN THE HOMOSEXUAL ARGUMENT AND WHY SOME RELIGIOUS FAITHS WILL NEVER BE ABLE TO ACCEPT SAME-SEX MARRIAGES

Despite the arguments in favor of same-sex marriage, several religious faiths within the United States will never acknowledge same-sex marriage as a valid practice, let alone as morally right, because of the deeply seeded doctrines of their respective faiths. The Catholic Church holds the status of the family to be sacred and a valid marriage between a man and a woman is central to that belief.¹⁹ Within the Catholic Church, it is believed that the jurisdiction of the church over marriage provides "an authentic protection for family values," and thus, performing a marriage between persons of the same-sex can never be acceptable within the church.²⁰

Likewise, the Church of Jesus Christ of Latter-day Saints (LDS Church or LDS), another forerunner among the religious sects opposed to same-sex marriage, holds a similar view regarding marriage and the family. In a formal proclamation issued by its First Presidency and Council of Twelve Apostles, the LDS Church declared that "marriage between a man and woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children."²¹ Additionally, this proclamation affirmed the LDS belief that sexual relations are only to be performed within the bounds of a lawful marriage between a man and woman.²² In other words, the LDS Church has explicitly declared that one of its foundational doctrines prevents its members from ever supporting or accepting the performance of same-sex marriages.

Critics argue that churches will inevitably change their individual policies regarding same-sex marriage when the level of antagonistic social pressure rises high enough.²³ This argument lacks a true understanding of many religious faiths throughout the U.S., including the two mentioned above. In both the Catholic and LDS churches, the definition of marriage has always been a sacred and fundamental doctrine, and, as such, the

¹⁹ PONTIFICAL COUNCIL FOR THE FAMILY, *Family, Marriage, and DeFacto Unions*, VATICAN.VA (July 26, 2000), http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001109_de-facto-unions_en.html.

²⁰ *Id.*

²¹ CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *THE FAMILY: A PROCLAMATION TO THE WORLD* (Sept. 23, 1995), available at <http://www.lds.org/family/proclamation?lang=eng> (This proclamation was originally read by Gordon B. Hinckley, Church president at that time, as part of his sermon at the LDS General Relief Society Meeting held that same day.).

²² *Id.*

²³ Austin Cline, *Gay Rights & Marriage vs. Religious Liberty*, ABOUT.COM, <http://atheism.about.com/od/gaymarriage/a/GaysReligion.htm> (last visited Oct. 14, 2012).

definition of marriage cannot be altered to include marriages between those of the same sex. Fairly recently, the Human Rights Campaign group (HRC) accused the LDS Church of altering its official policy by accepting homosexual relationships as normal and no longer recognizing them as sinful. Scott Trotter, spokesperson for the LDS Church, responded that the HRC's representations "are simply absurd," and further elaborated that such a stance would be contradictory to the fundamental beliefs held by the LDS Church.²⁴ Trotter's response clearly indicates the LDS Church's resolve: that no matter what opposition it faces it simply cannot change its religious doctrine concerning same-sex marriage.²⁵

This is not to say that persecution of individuals who advance or accept same-sex marriage should ever be tolerated. However, by the same token, those who are morally and religiously opposed to same-sex marriage should never be forced—through legislation, popular opinion, or otherwise—to accept it, even if it is legalized. To do so would be a direct violation of the Free Exercise Clause contained within the First Amendment of the United States Constitution.²⁶

Understandably, most advocates of same-sex marriage argue that same-sex marriage is an equal protection issue and label persons opposed to it as bigots or homophobes.²⁷ This is not true. This argument fails to take into account that persons opposed to same-sex marriage have a significant list of reasonable concerns. Admittedly, it is axiomatic that there are some who do oppose homosexual activists only because they are in some way prejudiced against homosexuals. Nonetheless, the actions and opinions of that handful of people should not speak for those who do have legitimate concerns.

One major concern among many who oppose same-sex marriage is the potential for infringement upon their personal religious beliefs and the freedom to openly oppose same-sex marriage as immoral, or for any other legitimate personal reason.²⁸ The following sections of this article will illustrate the ways in which the freedom of religion guaranteed by the First

²⁴ *LDS Church responds to claims of changes in church policy regarding homosexuality*, L.A. TIMES (Nov. 16, 2010, 9:17 PM), <http://www.latimes.com/kstu-news-release-new-lds-church-policy-removes-same-sex,0,361434.story> (The HRC claimed that it achieved a victory on behalf of the homosexual community because of recent changes the LDS church made to its official *Handbook of Instructions 2*. The newest edition no longer advises church leaders to counsel members who experience same-sex attraction to seek "reparative" therapy. HRC proponents claimed this implied the LDS church's acceptance of homosexual behavior.).

²⁵ *See id.*

²⁶ U.S. CONST. amend. I ("[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

²⁷ Wardle, *supra* note 3, at 1378; Cline, *supra* note 23.

²⁸ *See* Wardle, *supra* note 3, at 1378.

Amendment²⁹ will be harmed if DOMA is repealed and same-sex marriage is adopted nation-wide.

II. SOCIAL CHANGE, LEGALIZATION OF SAME-SEX MARRIAGE, AND THE SUPPRESSION OF RELIGIOUS FREEDOM IN WESTERN EUROPE

A. *Pastor Ake Green: An Early Example of Religious Suppression*

Obvious disruptions to the free exercise of religion surfaced early on in Sweden. The prosecution of Swedish Pastor Ake Green in 2004 is an extremely disturbing example of how restraints to the freedom of religion develop.³⁰ While serving as a Pentecostal pastor in Kalmar, Sweden, Green was found guilty of "hate speech against homosexuals" and sentenced to one month in prison.³¹ What did Green say that was so egregious that it qualified as hate speech under the new Swedish law? According to reports, while preaching he condemned homosexuality as a "deep cancerous tumor in the entire society."³² It is important to keep in mind that he expressed this point of view in his capacity as a religious leader relying on the Bible as the main source for his sermon.³³ Moreover, Pastor Green's remarks reveal that his sermon was not an attack on homosexuals. Rather, it was, in his belief, a sincere gesture of help to them in the form of a call to repentance:

Jesus is saying that you have to repent. Jesus' view of homosexuality is a call to repentance. They have washed their robes and made them white, therefore they stand before the throne of God. There is a purifier. *Nobody has to be defeated by sexual immorality.* Nobody has to say: "I have such a losing battle in this area," *Everybody can be set free and delivered.* You can receive it if you want it.³⁴

²⁹ See U.S. CONST. amend. I.

³⁰ See *Freedom of Religion on Trial in Sweden*, AKEGREEN.ORG, <http://akegreen.org/index.htm> (last visited Oct. 15, 2012).

³¹ R. Albert Mohler, Jr., *Criminalizing Christianity: Sweden's Hate Speech Law*, PRISONPLANET.COM (Aug. 6, 2004), <http://www.prisonplanet.com/articles/august2004/060804criminalizingchristianity.htm>.

³² *Pastor Ake Green's Sermon*, AKEGREEN.ORG, <http://akegreen.org/en-2-left/en-2-9.htm> (last visited Oct. 15, 2012) (This is a copy of the actual sermon Pastor Green gave on Jul. 20, 2003. It has been translated into contemporary American English from the original Swedish transcript.); Mohler, *supra* note 31.

³³ See *Pastor Ake Green's Sermon*, *supra* note 32 (Inspection of the transcript shows that Green referenced the Bible throughout his entire sermon, and that it was the main source from which he drew his conclusions).

³⁴ *Id.* (emphasis added).

Additionally, Pastor Green concluded his sermon by clearly declaring that his message was one that was meant to help others, not as an attack:

We must never think that some people, because of their sinful lives, would end up outside of grace. Paul says about himself that he was the foremost of all sinners, but he encountered an abundance of grace and mercy. He also states in First Corinthians 6:9-11, when he lists sexual immorality with other sins, that you can be saved from all the listed sins, including sexual immorality. What these people need, who live under the slavery of sexual immorality, is an abundant grace. It exists. It is valid also for them. Therefore we will encourage those who live in this manner to look at the grace of Jesus Christ. *We cannot condemn these people* -- Jesus never did that either. . . Jesus never belittled anyone. He offered them grace. We must never belittle anyone who lives in sin. The sin we cannot bear -- but the human being [we must hold up]. It is by showing all people grace and mercy that we can win them for Christ.³⁵

Though it is easy to understand why a homosexual person would likely be offended by Green's sermon, the point at issue here is different. Regardless of how others may feel, Pastor Green should be able to practice his religion as he sees fit; in fact, Pastor Green's statement, as an expression of his religious belief, should have been protected as a fundamental right enumerated in Sweden's Constitution.³⁶ Specifically, the Swedish Constitution guarantees its citizens "the freedom to practice one's religion alone or in the company of others."³⁷ Green did not encourage the abuse or maltreatment of homosexuals. He was not out in public taunting or verbally abusing homosexuals. Rather, Pastor Green made these statements in the context of a religious sermon inside his church.³⁸

Thus, Sweden's hate speech law effectively denied Pastor Green one of his fundamental rights supposedly guaranteed by the Swedish Constitution, that of exercising his religious beliefs, even among his own congregation. Critics might argue that in the United States the First Amendment would bar this type of hate speech law from being passed, however this argument would not be valid. This will be discussed in further detail later in this note.³⁹ For the time being, it is important to understand that Sweden's hate speech law has caused its citizens to be deprived of their constitutionally

³⁵ *Id.* (emphasis added).

³⁶ See REGERINGSFORMEN [RF] [CONSTITUTION] 2:1(6), available at http://www.servat.unibe.ch/icl/sw00000_.html.

³⁷ *Id.*

³⁸ *Freedom of Religion on Trial in Sweden*, *supra* note 30; Mohler, *supra* note 31.

³⁹ See *infra* Part IV.

guaranteed right to worship freely,⁴⁰ which is akin to the U.S. Constitution's guarantee of the right to freely exercise one's religion.⁴¹

Critics that are unconcerned about American law evolving into something similar to Sweden should closely evaluate Pastor Green's story. Sweden's culture changed very quickly. Sweden's Constitution guarantees, at least in text, its citizens the right to freely exercise their individual religion and that right is said to be an absolute right in that it cannot be restricted without a change to the fundamental law enumerated in its constitution.⁴² However, that is exactly what happened with the free exercise of religion in Sweden. In 2002, The Riksdag, Sweden's parliament, passed a hate speech law favoring the protection of homosexual orientation which was subsequently codified as an official part of the Swedish code of statutes known as the "Svensk författningssamling" (SFS). This law declares that any person may be punished if his or her statement "threatens or expresses contempt for a national, ethnic or other such group with allusion to race, color, national or ethnic origin, religious belief or sexual orientation."⁴³ Moreover, if the offense is found to be "aggravated," the prison sentence imposed may be up to four years.⁴⁴ The statute also instructs courts that, when determining if the speech was aggravated, it should consider factors such as whether the message had "particularly threatening and abusive content" and whether it was "spread to a large number of people in a way that was likely to cause significant attention."⁴⁵ Church sermons were explicitly included within the reach of the statute.⁴⁶ Cecilia Julin, the Swedish ambassador to Slovakia at the time, explained that the law was enacted to silence public addresses that might "instigate hatred towards a certain group."⁴⁷ During the debate over the legislation before it was passed the Swedish chancellor of justice admitted that after the laws were passed, church sermons that simply declared homosexual behaviors as sinful, and

⁴⁰ REGERINGSFORMEN [RF] [CONSTITUTION] 2:1(6).

⁴¹ U.S. CONST. amend. I.

⁴² *The Constitution of Sweden: Fundamental Laws and the Riksdag Act*, 35 (Ray Bradfield trans., Sveriges Riksdag, 2012), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&sqi=2&ved=0CCUQFjAB&url=http%3A%2F%2Fwww.riksdagen.se%2FPageFiles%2FDokument%2Fbestall%2Fsvenska%2Fthe-constitution-of-sweden.pdf&ei=nsVhUIraOoT89gTcP4CgBw&usg=AFQjCNHbEplOxmZSKZtZHMw4Tj6R_raxEw&sig2=v5_jDJFIqTTVflfnNocWfA (last visited, October 15, 2012).

⁴³ 16 ch. 8 § BROTTSBALKEN (Svensk författningssamling [SFS] 2002:800), available at <https://lagen.nu/1962:700> (Website is in Swedish. Quotations have been translated into English).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Mohler, *supra* note 31; See also 16 ch. 8 § BROTTSBALKEN (SFS 2002:800).

⁴⁷ Mohler, *supra* note 31.

nothing more, "might" be considered a criminal offense.⁴⁸ While the debate exposed the potential for the limitation on the free exercise of religion, by way of criminalization, it is important to note that that "fear" has actually come to fruition.⁴⁹

Though Pastor Green's prosecution is not current news, this incident should be alarming to any who consider the freedom to worship essential, or at least appreciate the importance of fundamental human rights in general. While discussing this incident involving Pastor Green, Reverend Albert Mohler, Jr. pointed out that "Evangelical Christians—and all those who cherish civil liberties—should observe this case with great interest and concern."⁵⁰ Vladimir Palko, Slovakia's Interior Minister to Sweden at the time of this incident, suggested that the incident foreshadowed a bigger problem brewing in Europe: "In Europe people are starting to be jailed for saying what they think."⁵¹

The most disturbing thing about Green's prosecution was the response from advocates for the homosexual movement. Kjell Yngvesson, the prosecutor in the Green case, justified Green's conviction by saying, "[o]ne may have whatever religion one wishes, but this is an attack on all fronts against homosexuals. Collecting Bible citations on this topic as he does makes this hate speech."⁵² It is quite disturbing that a prosecutor, appointed by society to be responsible for making sure criminals are punished, believes that a pastor's research of the Bible is punishable by imprisonment. Mohler referred to Yngvesson's statement as one of the "most shocking and revealing statements uttered by any legal official in recent times."⁵³ From that point onward, quoting from the Bible, a form of religious expression, was effectively outlawed in Sweden, at least in that context. This is clearly religious discrimination.

Following Green's arrest, same-sex marriage activists openly pledged to monitor church sermons in Sweden, vowing to report violations to the authorities.⁵⁴ As Soren Anderson President of the Swedish Federation for Gay, Lesbian, and Transgender Rights declared, his organization would "report hate speech regardless of where it occurs,"⁵⁵ adding that religious liberty is not a valid reason to allow speech that is offensive to

⁴⁸ *Id.*; See also 16 ch. 8 § BROTTSBALKEN (SFS 2002:800).

⁴⁹ *Freedom of Religion on Trial in Sweden*, *supra* note 30.

⁵⁰ Mohler, *supra* note 31.

⁵¹ *Id.*

⁵² *Id.* (emphasis added); See *Freedom of Religion on Trial in Sweden*, *supra* note 30.

⁵³ Mohler, *supra* note 31.

⁵⁴ *Id.*

⁵⁵ *Id.*

homosexuals.⁵⁶ If Anderson's logic were applied it could prevent any religious expression because someone will disagree with any given religious doctrine and could be offended by it. Such flawed logic is not even worth consideration. Its application would be absurd. By the same logic, one would argue that there cannot be anymore disagreement between people on any subject because someone could always be offended.

No matter how supporters of the hate speech view it, in reality its implementation led to the conviction of Pastor Green. This in turn transformed the rule of law in Sweden from preventing "hate speech" to actually prohibiting speech that is purely part of religious expression, such as citing the Bible from a church pulpit.⁵⁷ That is why this disturbing event, leaving its inimical mark on Sweden, is a prime example of the resulting religious discrimination when society accepts, embraces, and finally legalizes same-sex marriage.

U. S. citizens should be concerned because seven states have already completed this transition, and repealing DOMA would accelerate the process. If nothing changes, we are bound to end up in the same disastrous situation as Sweden.

B. Great Britain: An Alarming Example of how Social Change Leads to the Legalization of Same-Sex Marriage and the Subsequent Suppression of True Religious Freedom

Recent legal changes in Great Britain exemplify how fast political and societal influences can alter a country's existing legal protections. The British Parliament has not yet legalized same-sex marriage, but it is only a matter of time before that happens. Currently, only civil unions, affording the same rights as marriages, are legal for same-sex couples in Britain.⁵⁸ Beginning in 2010, Parliament began to implement drastic changes to the legal status of same-sex partnerships.⁵⁹ Traditionalist British bishops became concerned that vicars would be taken to court and accused of discrimination if they turned down requests to officiate civil unions on religious premises, such as churches.⁶⁰ These concerns were raised after a parliamentary vote

⁵⁶ *Id.*

⁵⁷ *Freedom of Religion on Trial in Sweden, supra* note 30.

⁵⁸ Civil Partnership Act, 2004, c. 33, available at <http://www.legislation.gov.uk/ukpga/2004/33/contents>.

⁵⁹ Martin Beckford & Heidi Blake, *Clergy could be sued if they refuse to carry out 'gay marriages'*, THE TELEGRAPH (Mar. 3, 2010, 10:00 PM), <http://www.telegraph.co.uk/news/religion/7361378/Clergy-could-be-sued-if-they-refuse-to-carry-out-gay-marriages-traditionalists-fear.html>.

⁶⁰ *Id.*

that allowed for civil unions to be performed in places of worship in Britain for the first time ever.⁶¹

Originally, the Civil Partnerships Act, as enacted by Parliament in 2004, limited the location for civil union ceremonies strictly to secular venues such as register offices.⁶² But in 2010, the Equality Act adopted by Parliament amended the Civil Partnerships Act to allow for civil unions to be performed in places of worship for the first time ever.⁶³ While the amendment contains a provision stating that religious organizations will not be forced to host civil unions if they choose not to,⁶⁴ clergy remained gravely concerned.⁶⁵ They worried not only about the bill itself, but also about the cultural developments in Britain that would likely follow, restricting their freedom of religious belief by imposing sanctions on them for refusing to perform civil unions at their parishes.⁶⁶ Research shows that laws are likely to be amended to follow evolution of national social culture, so British clerics had good reason to be nervous.⁶⁷

Reverend Michael Scott, the former Joint Bishop of Winchester, proclaimed, "I believe that [the amendment] will open, not the Church of England, but individual clergy, to charges of discrimination if they solemnize marriages as they all do, but refuse to host civil partnership signings in their churches. Unless the Government does something explicit about this, I believe that is the next step."⁶⁸ Retired Reverend David James, Bishop of Bradford, also expressed similar concern when he warned of the "unintended consequences" of the proposed change.⁶⁹ He contended that although the amendment was presented as "an available option" to religious groups who agree with homosexual relations, he was "not so confident" that the status quo would stay that way.⁷⁰

It was not just clergy who were worried about this proposed amendment though. Several legal and governmental professionals also expressed their concerns. Lord Waddington, former Home Secretary explained, "If this amendment were carried, it would only be a matter of time before it was argued that it was discriminatory for a church incumbent to refuse to allow a civil partnership ceremony to take place when the law allowed it."⁷¹ He also

⁶¹ *Id.*

⁶² Civil Partnership Act, 2004, c. 33, §6.1(b).

⁶³ Equality Act, 2010, c. 15, pt. 16 § 202.

⁶⁴ Equality Act, 2010, c. 15, pt. 16 § 202(4).

⁶⁵ Beckford, *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *See* Wardle, *supra* note 3.

⁶⁸ Beckford, *supra* note 59.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

opined that any clergyman “prepared to register marriages but not to register civil partnerships would be accused of discrimination on grounds of sexual orientation in the provision of services and pressure would be brought to bear on him to pocket his principles and do what he believed to be wrong.”⁷² Waddington concluded his remarks by predicting that if the proposed amendment passed, such ministers would “without doubt” be the subjects of much costly litigation.⁷³ Later, in 2011, Waddington supported his earlier postulations by listing before parliament some of the injustices that had already occurred as a result of the Equality Act.⁷⁴

Also adding credibility to this view, Andrea Williams, director of the Christian Legal Centre, identified some practical concerns to such an amendment: “We have seen countless cases where, as a result of similar sorts of legislation, religious adoption agencies have been forced to close and Christians have been forced out of their jobs for acting according to their beliefs.”⁷⁵ She also commented on the inevitable liberal cultural shift that would follow in Britain if such an amendment were to remain unopposed:

There is no doubt that the homosexual lobby will now test it: they will apply for ceremonies in churches and when the minister refuses they will challenge him under the law. . . . This is a further blurring of the definition of civil partnerships, which are becoming equivalent to marriage and churches are being forced to treat them as such.⁷⁶

Mike Judge of the Christian Institute added to the discussion by explaining the inevitable cultural change in Britain that would surely follow such an amendment. In part, he commented, “[w]e are very concerned about this and it’s a very alarming proposal,” and “[e]ven if this amendment says on the face of it that it only applies to those who choose to perform civil partnerships, that will not end up being the case and clergy will end up facing very costly legal bills in order to defend themselves against law suits.”⁷⁷ Having experience in this area of law, Mr. Judge understands that a legal landscape evolves after this type of amendment is passed, creating a high risk of the deprivation of personal religious freedom.

Neil Addison, a barrister who specializes in religious discrimination, agreed with Judge’s prediction. Addison remarked, “[a]s the Law now stands

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Tory Peers send ‘equality law’ warning*, THE CHRISTIAN INSTITUTE (Sept. 8, 2011), <http://www.christian.org.uk/news/video-tory-peers-send-equality-law-warning/>.

⁷⁵ Beckford, *supra* note 59.

⁷⁶ *Id.*

⁷⁷ *Id.*

Churches and Synagogues that are registered to conduct Marriages could easily find themselves being sued for discrimination if they do not register to conduct Civil Partnerships.⁷⁸ Additionally, "[l]ocal Authorities could also refuse to grant or renew marriage authorisation to Churches and Synagogues that do not also apply for Civil Partnership authorisation."⁷⁹ Such overwhelming concern from both experienced government and legal professionals should arouse suspicions, if not alarm, any responsible citizen. The freedom of religion is a fundamental human right that responsible citizens must actively protect.⁸⁰

Luckily, clergyman and legal activists raised enough of an outcry that ministers in parliament subsequently altered Lord Alli's proposed amendment. By the end of the month the amendment was proposed, Baroness Royall, the Leader of the House of Lords, insisted that the amendment contain an exculpatory provision allowing vicars to opt-out of hosting civil-union ceremonies on their respective properties.⁸¹ Though this relieved those opposed to Alli's amendment the threat of homosexual activism had not been quenched by any means. As it turned out, the advocates for same-sex marriage could not be kept at bay for long. Unfortunately, these advocates had gained enough social momentum to sway Britain's culture in favor of accepting the homosexual agenda.

As planned, by November 2010 Parliament legalized the performance of civil-unions in religious settings.⁸² The amendment freeing vicars from liability for refusing to perform civil-unions was included.⁸³ However, it is alarming to note the cultural landslide that occurred in Britain allowing passage of that amendment. By December 2010, less than a year after the strenuous battle over allowing civil unions on religious premises, Parliament was already discussing legalizing same-sex marriage.⁸⁴ By September 2011, Lynn Featherstone, Equalities Minister in Parliament, announced plans to begin official consultations by March of 2012 to seriously consider

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See generally Wardle, *supra* note 3, pt. V.

⁸¹ Martin Beckford, *Government insists vicars will not be sued for refusal to perform 'gay marriages' in churches*, THE TELEGRAPH (Mar. 24, 2010, 8:00 AM), <http://www.telegraph.co.uk/news/religion/7506916/Government-insists-vicars-will-not-be-sued-for-refusing-gay-marriages-in-churches.html>.

⁸² Andrew Porter & Martin Beckford, *Gay couples to be allowed civil ceremonies in church*, THE TELEGRAPH (Nov. 1, 2011, 10:18 PM), <http://www.telegraph.co.uk/news/religion/8863802/Gay-couples-to-be-allowed-civil-ceremonies-in-church.html>.

⁸³ *Id.*

⁸⁴ Tim Ross, *Coalition ministers consider gay marriage plans*, THE TELEGRAPH (Dec. 24, 2010, 7:00 AM), <http://www.telegraph.co.uk/news/religion/8221964/Coalition-ministers-consider-gay-marriage-plans.html>.

legalizing same-sex marriage in Britain.⁸⁵ With the momentum advocates for same-sex marriage have gained, it is predicted that Great Britain could legalize same-sex marriage by 2013.⁸⁶

Harriet Harman, Equality Minister in Great Britain, predicted such an outcome back in 2010. During the initial debate over where civil-unions could be performed she said, "I look forward to [the Equality Bill] taking its place on the statute books following further scrutiny by the House of Commons, *but that will not be the end of the story*. After the Bill is passed we will set to work implementing and enforcing it, putting equality firmly at the centre of Government."⁸⁷ Harman's statement exhibits the subtle cultural changes that homosexual advocates create.⁸⁸ More specifically, Britain's battle leading up to the enactment of same-sex marriage exemplifies the pattern homosexual activists follow to alter the social culture in order to successfully legalize same-sex marriage.⁸⁹ First, they influence the culture's social philosophy and level of acceptance, and then the inevitable legal amendments follow. All of this is done in the face of obvious threats to the free exercise of religion.

Often these social changes are implemented by degrees;⁹⁰ here this happened with civil-union law.⁹¹ Once this type of change gains a stronghold in society, a cultural-philosophical landslide takes place resulting in the gradual restriction of the religious rights within that nation. Comparing the current cultural-philosophical status in the U.S. with Britain should be a wake-up call for those in our nation concerned with keeping our freedom to worship free.

III. JUDICIAL ACTIVISM RESULTING IN THE ADOPTION OF SAME-SEX MARRIAGE AND RESTRICTION OF RELIGIOUS FREEDOM IN CANADA

An inspection of Canada's evolving law and social climate also supports the theory that legalizing same-sex marriage leads to restrictions on religion. To better understand this it is necessary to understand the changes in Canada's law and social culture that led to a national legalization of same-sex marriage.

⁸⁵ William Dunbar, *A brief history of equal marriage*, THE INDEPENDENT (Sept. 18, 2012), <http://www.independent.co.uk/voices/comment/a-brief-history-of-equal-marriage-8153118.html>.

⁸⁶ Christopher Hope, *Gays to be given right to marry*, THE TELEGRAPH (Sept. 17, 2011, 7:00 AM), <http://www.telegraph.co.uk/news/politics/8769845/Gays-to-be-given-right-to-marry.html>.

⁸⁷ Beckford, *supra* note 59 (emphasis added).

⁸⁸ See SEARS, *supra* note 4, at ch. 1 & 8.

⁸⁹ *Id.*

⁹⁰ *Id.* at 17-18; SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3, at 104 (Quoting: Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1178 (2005)).

⁹¹ Beckford, *supra* note 59.

In 1982, the Canadian Legislature adopted the Charter of Rights and Freedoms (Charter) as an addition to the Canadian Constitution.⁹² Its central premise is the equal treatment of all people under the law.⁹³ Adhering to the Charter, in 1995 the Canadian Supreme Court decided that discrimination on the basis of sexual orientation was prohibited, and one year later the Canadian Human Rights Act was amended to include sexual orientation as discrimination to bring it into conformity with the Supreme Court's decision.⁹⁴

Intriguingly, Canada's legalization of same-sex marriage began with provincial courts first declaring its legality.⁹⁵ This step-by-step process created a domino effect that eventually culminated in 2005 when the Canadian legislature finally legalized same-sex marriage nationally through the Civil Marriage Act (the Act).⁹⁶ Collectively, the Provincial courts' rulings led to the Supreme Court's decision. They also paved the way for the discrimination of any who religiously opposed same-sex marriage. Late in 2004, when the debate over same-sex marriage had reached a boiling point, the Canadian Supreme Court finally considered the matter and ultimately ruled for same-sex marriage.⁹⁷ At the same time, it reassured religious groups that they would not have to perform same-sex marriages if doing so would be contrary to their beliefs.⁹⁸ In reality, when the Act was later implemented based on the decision of the Supreme Court it provided, in relevant part:

. . . no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under

⁹² See generally Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (U.K.), available at <http://lois.justice.gc.ca/eng/const/page-11.html#sc:7> (last modified Sept. 27, 2012) (The Canadian Constitution is made up of a series of constitutional enactments, unlike the U.S. Constitution which is a single document. Canada's constitution is mainly comprised of two enactments, the *Constitution Act of 1867*, and the *Constitution Act of 1982*. The *Canadian Charter of Rights and Freedoms* was included as Part I of the 1982 Act).

⁹³ See *id.*; *Submission of the Canadian Human Rights Commission to the Standing Committee on Justice and Human Rights: Same Sex Marriages*, CANADIAN HUMAN RIGHTS COMMISSION, available at http://www.chrc-ccdp.ca/legislation_policies/submission_marriage-eng.aspx (last updated Oct. 13, 2010).

⁹⁴ *Submission of the Canadian Human Rights Commission*, *supra* note 93.

⁹⁵ Civil Marriage Act, S.C. 2005, c. 33, pmbl. para. 2 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-31.5/page-1.html#preamble>; See also, *Halpern et al. v. Canada* (2002), 95 O.R. 3d 1 (Can. Ont. Sup. Ct.); *Hendricks v. Quebec*, (2002) R.J.Q. 2506 (Can. Que.); *Barbeau v. British Columbia*, 2003 BCCA 251 (Can.).

⁹⁶ See Civil Marriage Act, S.C. 2005, c. 33 (Can.).

⁹⁷ *Same-Sex Rights: The Supreme Court Decision*, CBC NEWS (Dec 9, 2004), <http://www.cbc.ca/news/background/samesexrights/beforethecourt.html>.

⁹⁸ *Id.*; See Civil Marriage Act, S.C. 2005, c. 33 §§ 3, 3.1.

the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.⁹⁹

Still, civil servants opposed to the performance of same-sex marriages for religious reasons were not protected by the court's ruling; "Religious Officials" were the only persons the Court officially granted immunity to.¹⁰⁰ The supposed protection the Act provided for the free exercise of religion was just a façade. In reality, no adequate protections were afforded for individuals who are religiously opposed to same-sex marriage. The sanctions civil servants endured in Manitoba is a poignant example of the harm that befalls private individuals when there is a lack of statutory protection combined with judicial activism.

In September 2004, Manitoba's Supreme Court legalized same-sex marriage in *Vogel v. Canada*. Justice Douglas Yard declared that defining marriage as exclusive to heterosexual couples was "no longer constitutionally valid in view of the provisions of the Charter of Rights and Freedoms."¹⁰¹ Though Justice Yard decided this case under the guise of equality, he effectively denied those religiously opposed to same-sex marriage the right to freely exercise their individual religious beliefs. Shortly after *Vogel*, Manitoba's Vital Statistics Office mailed a notice to the province's 600 marriage commissioners ordering them to return their Certificates of Registration if they had a problem performing same-sex marriages.¹⁰² This forced marriage commissioners opposed to same-sex marriage to choose between adhering to their religious convictions and staying employed.¹⁰³ At least eleven of those marriage commissioners resigned by responding that authorizing same-sex marriages would contravene their religious beliefs.¹⁰⁴

In response, Vic Toews, a Canadian federal justice critic, filed a formal complaint stating that making provincial commissioners choose between faith and employment is discriminatory.¹⁰⁵ His claim failed. Still, forcing

⁹⁹ Civil Marriage Act, S.C. 2005, c. 33 § 3.1 (emphasis added).

¹⁰⁰ Civil Marriage Act, S.C. 2005, c. 33 § 3; *Same-Sex Rights: The Supreme Court Decision*, *supra* note 97.

¹⁰¹ *Manitoba recognizes same-sex marriages*, CBC NEWS, <http://www.cbc.ca/news/canada/story/2004/09/16/manitobasamesex040916.html> (last updated Sept. 16, 2004, 10:35 PM); *See also Manitoba becomes 4th province with legalized 'gay marriage'*, BP NEWS (Sept. 16, 2004), <http://bpnews.net/bpnews.asp?ID=19114>.

¹⁰² *Commissioners have right to refuse to wed gay couples*, CBC NEWS, http://www.cbc.ca/news/canada/story/2004/11/11/samesex_041111.html (last updated Nov. 11, 2004, 1:29 PM).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

government employees to choose between their jobs and their personal beliefs is hardly a preservation of religious freedom. Rather, it gives the gay rights equal protection agenda priority over religious freedom.

The acceptance of same-sex marriage in Canada was sparked by a social acceptance of it and engrained in society by judicial activism. Now it is considered a "cultural norm" throughout the country.¹⁰⁶ It seems that few have any concern that there will be immediate harm to clergy who refuse to marry same-sex couples.¹⁰⁷ But some are concerned that the cultural acceptance of same-sex marriage will develop to where legal suits may be filed against clergymen who refuse to perform same-sex marriages.¹⁰⁸ Even some advocates of same-sex marriage admit that worries over the eventual denial of religious freedoms may be valid.¹⁰⁹ One theory is that the social attitude of the public will eventually evolve to the point that refusing to perform same-sex marriages is considered socially unacceptable, like the evolution of U.S. society regarding racism and sexism during the civil rights era.¹¹⁰ The comparison poses that a widespread acceptance of same-sex marriage would eventually lead to lawsuits against clergy for refusing to marry a homosexual couple. Once that door is opened, social pressure would eventually cause the Supreme Court to conform its decisions to the public will. Finally, the legislature would be more likely pass hate speech laws similar to Sweden's.¹¹¹

The domino effect, created by provincial courts legalizing same-sex marriage combined with the drastic moral-cultural shift throughout Canada regarding same-sex marriage and the problems created thereby, should not be disregarded by U.S. citizens. Many similar events are presently taking place within our country implicating that we are on the same path as Canada. This will be the case unless people take a firm stance against the social acceptance and legalization of same-sex marriage within our country.

¹⁰⁶ B. A. Robinson, *Concerning the Freedom of Religious Groups to Discriminate Against SSM*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/hom_marb20.htm (last updated Feb. 28, 2009).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Cline, *supra* note 23 (The author's argument is essentially that historically mistreatment of African-Americans and women was common to American society, specifically within its Christian religions. Ultimately, society changed and eventually religions could no longer hold blacks or women as second class citizens without being wrong by society's standards. To do so today would result in one being labeled a racist and outcast from mainstream society. The author concludes by predicting that the "same will eventually happen with gays in America."); *See also* Robinson, *supra* note 106.

¹¹¹ Robinson, *supra* note 106.

IV: THE UNITED STATES AND THE CONTROVERSY OVER DOMA

A. *The Current Status Quo in the United States*

The social-political landscape within our own country has changed drastically in the past few years. For the first time since DOMA was instituted, the President's administration has not actively supported it.¹¹² In fact, President Obama has called for the repeal of DOMA, declaring it an "unwarranted congressional interference with state sovereignty."¹¹³ This is not the only problem that supporters of the free exercise of religion in the U.S. face. Like the other countries previously mentioned, the United States has already seen its fair share of gay-rights activists interfering with the fundamental rights of others.

One of the most commonly cited instances was when Catholic Charities of Boston (Catholic Charities) was forced to close its doors.¹¹⁴ Catholic Charities, owned and operated by the Catholic Church, was one of the nation's oldest adoption agencies.¹¹⁵ When the Massachusetts Supreme Court ordered that gay marriage be legalized in 2003, it alleged that religions failing to provide services for same-sex couples could only be motivated by an "animus" against them.¹¹⁶ In response, the Vatican clarified that the reason Catholic Charities could not place children with same-sex couples was because doing so would be a direct violation of Catholic doctrine.¹¹⁷ Ultimately, the change in Massachusetts law led to a denial of public funds vital to the survival of Catholic Charities, and the Catholic Church had to choose between adhering to its doctrine and keeping the adoption agency open.¹¹⁸ Obviously, the Church could not diverge from one of its

¹¹² SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3, at 107.

¹¹³ *Id.*

¹¹⁴ Severino, *supra* note 3, at 975; Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD (May 15, 2006), <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>; Barbara Bradley Hagerty, *Gay Rights, Religious Liberties*, NPR (June 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=91486340>; Matt Slick, *Persecution of people who do not agree with homosexuality*, CARM.ORG, <http://carm.org/homosexual-persecution-of-christians> (last visited Apr. 09, 2012); Patricia Wen, *Catholic Charities stuns state, ends adoptions*, THE BOSTON GLOBE (Mar.11, 2006), http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/; *A Clash of Rights? Gay Marriage and the Free Exercise of Religion*, THE PEW FORUM (May 21, 2009), <http://pewforum.org/Gay-Marriage-and-Homosexuality/A-Clash-of-Rights-Gay-Marriage-and-the-Free-Exercise-of-Religion.aspx>.

¹¹⁵ Gallagher, *supra* note 114.

¹¹⁶ *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 967-70 (Mass. 2003).

¹¹⁷ Gallagher, *supra* note 114.

¹¹⁸ *Id.*

fundamental doctrines. The closure of Catholic Charities impacted many and culminated in what referred to as "a tragedy for kids."¹¹⁹

More recently, others in the U.S. who are religiously opposed to homosexuality and same-sex marriage have been persecuted. In August 2011, Jerry Buell, a teacher at Mount Dora High School, was suspended from his teaching position and threatened with termination pending an investigation regarding "homophobic" remarks he wrote on his personal Facebook account.¹²⁰ Buell's comments were his personal reaction to the legalization of gay marriage in New York.¹²¹

Mount Dora's administration suspended Buell after receiving complaints about his Facebook page and school officials claimed they were concerned that his comments might lead to intimidation of homosexual students in his classroom.¹²² Buell responded, "It was my own personal comment on my own personal time on my own personal computer in my own personal house, exercising what I believed as a social studies teacher to be my First Amendment rights."¹²³

In another incident comparable to Buell's debacle, the University of Toledo suspended Crystal Dixon, its associate vice president of human resources, for submitting an editorial note to a local newspaper.¹²⁴ Dixon disagreed with an article comparing modern-day homosexuals with African-American civil rights activists of the fifties and sixties. Dixon was subsequently fired for her disagreement.¹²⁵ Matt Barber of *Concerned Women for America* wholeheartedly supported Mrs. Dixon and stated that the University's reaction, "certainly violat[e] the spirit of the First Amendment and the spirit of free speech upon which this nation was founded."¹²⁶

Efforts to protect religious organizations from discriminatory effects legalizing same-sex marriage have in some instances already failed. In 2009, as the New Hampshire legislature crept towards legalizing same-sex marriage, Democratic Governor John Lynch demanded that a same-sex marriage bill include protection for religious institutions against same-sex

¹¹⁹ *Id.*

¹²⁰ Todd Starnes, *Florida Teacher Suspended for Anti-Gay Marriage Posts on Personal Facebook Account*, FOXNEWS.COM (Aug. 19, 2011), <http://www.foxnews.com/us/2011/08/19/florida-teacher-suspended-for-anti-gay-marriage-post-on-personal-facebook/>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Charlie Butts, *Punished for Views on Homosexuality*, ONENEWSNOW (May 8, 2008, 11:30 AM), <http://onenewsnow.com/Education/Default.aspx?id=110624>.

¹²⁵ *Id.*

¹²⁶ *Id.*

marriage.¹²⁷ However, the Governor's request was quickly snubbed by the State's House of Representatives.¹²⁸

Governor Lynch expressed his concern by explaining that without explicit protections provided in the bill, the personal and business interests of those religiously opposed to same-sex marriage could be harmed in several areas including religiously sponsored counseling, courses, retreats, and housing.¹²⁹ Unfortunately the Governor's concerns went unheeded and no such protections were afforded by the legislature.¹³⁰

Among these denials of fundamental rights within the U.S., perhaps the most concerning, is the denial of the fundamental religious right to oppose same-sex marriages. A shocking denial of this right occurred in New Jersey in 2008. The conflict began when a lesbian couple, Harriet Bernstein and Luisa Paster, asked to use a pavilion owned by the Ocean Grove Camp Meeting Association (Ocean Grove), a devout Methodist Organization, for their civil-union ceremony. Ocean Grove's administrator, Reverend Scott Hoffman, refused the couple's request because his organization's religious doctrine disagrees with homosexual relationships.¹³¹ In his own words Hoffman described his refusal saying, "[t]he principle was a strongly held religious belief that a marriage is between a man and a woman. We're not casting any aspersions or making any judgments. It's just, that's where we stand, and we've always stood that way, and that's why we said no."¹³²

The lawsuit against Ocean Grove alleged that the Methodist group unlawfully discriminated against Bernstein and Paster based on their sexual orientation.¹³³ Although Ocean Grove appealed to the New Jersey Supreme Court that they owned the pavilion and the First Amendment protected their right to practice their faith without government intrusion, the court disagreed, ruling that Ocean Grove's refusal of access to the lesbian couple amounted to unlawful discrimination. The lawsuit resulted in a revocation of Ocean Grove's tax exemption for the pavilion area and Hoffman concluded that Ocean Grove would lose around \$20,000. A result that was seriously detrimental to Ocean Grove.¹³⁴

What happened to Ocean Grove should worry anyone who understands that the Free Exercise Clause in the First Amendment to the Constitution

¹²⁷ Peter Steinfelds, *Same-Sex Marriage Laws Pose Protection Quandary*, N.Y. TIMES (May 22, 2009), <http://www.nytimes.com/2009/05/23/us/23beliefs.html>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Hagerty, *supra* note 114.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

assures citizens that the government will not interfere with their ability to act on their religious beliefs.¹³⁵ The ruling of the New Jersey supreme court blatantly denied private citizens their fundamental right to freely exercise their religion by living according to their religious beliefs, because it denied them the right to oppose same-sex marriage, or civil-unions in this case. After an evaluation of the current status quo within the United States in relation to how same-sex marriage is viewed, it is readily apparent that our society, both morally and legally, has already started to follow in the footsteps of Great Britain, Canada, and even Sweden.¹³⁶

B. *A Turbulent Future*

Unless there are significant cultural, social, and political changes within the U.S., the free exercise of religion will be impinged. The U.S. is currently on track for a future filled with difficulty, including the eventual social rejection and persecution of people that refuse to accept same-sex marriage. Truly, the push for same-sex marriage is on "a collision course" with the freedom to exercise one's religious beliefs.¹³⁷ Repealing DOMA would propel the entire country to immediately accept same-sex marriage, both politically and socially, resulting in a cultural shift similar to Canada.¹³⁸ Certain state courts have already followed Canada's example by declaring same-sex marriage must be instituted under the Equal Protection Clause of the Constitution. If this pattern continues, it is only a matter of time before the U.S. will face the enactment of hate speech laws similar to Sweden's.

According to Douglas Kmiec, a renowned Constitutional Law expert, the legal battle over same-sex marriage will only increase in intensity as gay rights advocates gain more social support.¹³⁹ He also predicted potential religious restrictions that will commence after advocates for same-sex marriage have gained enough ground.¹⁴⁰ Specifically, Kmiec referenced Professor Eugene Volokh's outline of the goals of the gay rights movement. Volokh is a noted libertarian scholar and advocate for same-sex marriage. In an article Volokh wrote, he outlined the three major goals of the gay rights movement as 1) freedom from government oppression, 2) equal treatment by the government, and 3) delegitimizing and legally punishing behavior that

¹³⁵ See U.S. CONST. amend. I.

¹³⁶ See *supra* Parts II & III.

¹³⁷ Severino, *supra* note 3.

¹³⁸ See *supra* Part III.

¹³⁹ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3, at 104.

¹⁴⁰ E.g., *id.* at 104-09.

discriminates against or condemns homosexuals.¹⁴¹ Other gay rights advocates seek to "discredit[] and force[] to the margin' religious practices that honor traditional marriage."¹⁴² These intentions are clearly supported by the declarations in *After the Ball*, a homosexual activist manifesto. They are included in phrases like, "[in regards to those] who feel compelled to adhere rigidly to an authoritarian belief structure, such as an orthodox religion, that condemns homosexuality, our primary objective regarding die-hard homohaters of this sort is to cow and silence them."¹⁴³ Such statements reveal that advocates of same-sex marriage will not rest until they have completely stripped the religious rights of all opposed to same-sex marriage.

The specific consequences from legalizing same-sex marriage in the U.S. would likely include not only the withdrawal of public benefits from religious institutions that refuse to accept same-sex marriage, but also governmental compulsion of religious institutions to provide financial or other support for same-sex couples.¹⁴⁴ This "punishment" will occur eventually, over a long period of time and in several steps.¹⁴⁵ The first step for gay rights activists is to get the government to add sexual discrimination to "generally applicable" nondiscrimination laws.¹⁴⁶ This has already happened on several local levels, but currently DOMA is the last major obstacle to restrictive national nondiscrimination laws.¹⁴⁷

If gay rights activists were successful here, the first consequence would likely be that any religious organization refusing to marry a same-sex couple would be denied tax exemption.¹⁴⁸ Although this might not seem to be an egregious punishment, for many churches it would be harmful, even fatal.¹⁴⁹ The most difficult part for gay rights activists would be explaining how denying tax exemptions would not violate the rights of organizational and expressive association, free exercise of religion, and free speech.¹⁵⁰ However, "[a]rguments dismissing these rights are being advanced in legal writing and *they deserve to be taken seriously*."¹⁵¹ Moreover, "it should not

¹⁴¹ *Id.* at 104 (Quoting: Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33_HOFSTRA L. REV. 1155, 1178 (2005)).

¹⁴² *Id.*

¹⁴³ SEARS, *supra* note 4 (Quoting KIRK & MADSEN, *AFTER THE BALL* 176.).

¹⁴⁴ Severino, *supra* note 3, at 943; *See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, *supra* note 3, at 104-05.

¹⁴⁵ *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, *supra* note 3, at 104.

¹⁴⁶ *Id.*

¹⁴⁷ *See Vestal*, *supra* note 14.

¹⁴⁸ *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, *supra* note 3, at 105.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (emphasis added).

be thought that a religious organization would have significant constitutional protection under the Free Exercise Clause."¹⁵²

Given the cultural change that has already occurred in the U.S. and our current Administration's position on same-sex marriage, the number of steps before it would be seen to be publicly acceptable to punish outlier churches or religious bodies is likely to be fewer than first anticipated by Kmiec in 2005.¹⁵³ Such declarations from thoughtful and accomplished legal scholars should be a sharp warning to U.S. citizens. The guarantees of free religion contained within the Constitution are under attack and must be preserved. This is true regardless of agreement with religious doctrines that oppose same-sex marriage. Everyone should be concerned with preserving the freedoms provided in the Constitution.

CONCLUSION

Contrary to arguments from proponents of same-sex marriage, the free exercise of religion in the United States will be restricted by a national legalization of same-sex marriage, even if this is an eventual effect. In fact, the full harm will not likely be realized until decades have passed.¹⁵⁴ The trend of legalizing same-sex marriage is quickly growing, both within the United States and internationally.¹⁵⁵ This will continue to happen unless people realize the restrictions on the free exercise of religion that will result and act to oppose them. It is essential that the right to freely exercise one's religious beliefs be preserved. Even those whose opposition to same-sex marriage is not based on religious beliefs, would be threatened if our Constitution is simply disregarded.

Indeed, evaluating countries that have embraced same-sex marriage reveals issues with the First Amendment that will inevitably arise if same-sex marriage is socially accepted within the U.S. and DOMA is repealed. As we have seen, Great Britain is illustrative of the detrimental effects the lack of adequate opposition to same-sex marriage will generate.¹⁵⁶ Eventually, the rights of persons religiously opposed to same-sex marriage will be restricted. As previously discussed, initially homosexual advocates in Britain were hard pressed to even pass legislation that would accomplish their agenda.¹⁵⁷ But within a year Parliament went from barely allowing the performance of

¹⁵² *Id.*

¹⁵³ *Id.* at 107.

¹⁵⁴ Wardle, *supra* note 3.

¹⁵⁵ Williams, *supra* note 7; Vestal, *supra* note 14.

¹⁵⁶ *See supra* Part II.B.

¹⁵⁷ *See* Beckford, *supra* note 59.

same-sex unions on religious premises¹⁵⁸ to deciding to legalize same-sex marriage.¹⁵⁹ Canada has long since socially accepted and legalized same-sex marriage.¹⁶⁰ This was not immediate. Like Great Britain, changes in Canada occurred gradually.¹⁶¹ However, Canada first set foot on that path by a strong, widespread advocacy for homosexuals, specifically their "right" to marry.¹⁶² Both countries are examples of the slippery slope a country slides down as it fosters the arguments of homosexual activists: first it tolerates such practices, then accepts them, and finally it embraces them to the degradation of those who stand religiously opposed to same-sex marriage.

This will be the path for any country who tolerates homosexual advocacy without adequate opposition, and the U.S. has been on that path a long time already.¹⁶³ It is only a matter of time before it experiences the same problems as Great Britain and Canada unless there is much stronger opposition against same-sex marriage. DOMA is just one of the first barriers to advocates for same-sex marriage, but their quest will not stop with its abolition. They will proceed until they have effectively stripped away all religious rights of any persons opposed to same-sex marriage or other homosexual practices.¹⁶⁴

If the U.S. persists in continuing down this path, eventually hate speech laws similar to Sweden's will be enacted.¹⁶⁵ The enactment of such laws would logically follow the course of events that other countries that have legalized same-sex marriage have already embarked on. As the social culture in the U.S. continues to embrace same-sex marriage, the courts will bend to meet popular demand as they did in Canada. If courts continue to promote same-sex marriage through the ranks of constitutional rights, then eventually opposition to same-sex marriage will be treated as "invidious discrimination," "irrational," or "motivated by animus."¹⁶⁶ It is true that the Free Exercise Clause of the First Amendment to the Constitution should protect the rights of religious persons from restriction. However, years of precedents eroding religious liberty will make it difficult to protect these

¹⁵⁸ See Beckford, *supra* note 81.

¹⁵⁹ See Hope, *supra* note 86.

¹⁶⁰ See *supra* Part III.

¹⁶¹ *Id.*

¹⁶² See *Same-Sex Rights: The Supreme Court Decision*, *supra* note 97.

¹⁶³ See *supra* Part IV.

¹⁶⁴ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3, at 104.

¹⁶⁵ See *supra* Part I.

¹⁶⁶ Severino, *supra* note 3, at 943-44 (Quoting *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 967-70 (Mass. 2003)).

religious rights.¹⁶⁷ Especially since courts have been "increasingly hostile" to Free Exercise claims since recent decisions of the Supreme Court.¹⁶⁸

For these reasons, it is essential not only that our government should actively support DOMA by opposing any attempt to repeal it, but that responsible citizens throughout the country adamantly advocate against legalizing same-sex marriage. It is no secret what the result will be if we continue down the path that we are on. The choice is ours; we are free to decide whether to be snared by the restrictions that this so-called progressivism would place on the free-exercise of religion or to choose the better part and preserve our rights by preventing the legalization of same-sex marriage.

¹⁶⁷ *Id.* at 945.

¹⁶⁸ *Id.* (Referring to *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Locke v. Davey*, 540 U.S. 712 (2004)).