

# Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective

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#### INTRODUCTION

Nearly four decades after New York's Stonewall Riots first ignited the gay rights movement,<sup>1</sup> homosexuality remains a divisive issue. While attitudes towards homosexuals have, in many ways, improved since Stonewall—for example, on November 7, 2007, the House of Representatives voted to prohibit employment discrimination on the basis of sexual orientation<sup>2</sup>—there is still a great deal of moral opposition to homosexuality. As recently as 2003, 55% of Americans believed that homosexual behavior is a sin, compared to only 33% who believed it is not.<sup>3</sup> Those numbers increase when religion is factored in—88% of highly committed white evangelicals, 64% of committed white Catholics, and 74% of black Protestants believed that homosexual conduct is sinful.<sup>4</sup>

This disparity indicates why homosexuality continues to be such a divisive issue. Unlike most other groups who have historically been discriminated against, homosexuals engage in conduct that violates (or is believed to violate)

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1. On June 28, 1969, police in New York City raided the Stonewall Inn in Greenwich Village, a popular gay bar. The raid, considered to be an unprovoked and brutal attack on the homosexual community, sparked three days of riots in Sheridan Square, which are considered the beginning of the gay rights movement. See *Police Again Rout 'Village' Youths: Outbreak by 400 Follows a Near-Riot over Raid*, N.Y. TIMES, June 30, 1969, at 22.

2. See Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (1st Sess. 2007); see also David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, available at <http://www.nytimes.com/2007/11/08/washington/08employ.html>. At the time of this writing, the Senate has yet to vote on the bill.

3. News Release, Pew Research Ctr. for the People & the Press, Pew Forum on Religion & Public Life, Republicans Unified, Democrats Split on Gay Marriage: Religious Beliefs Underpin Opposition to Homosexuality 6 (Nov. 18, 2003) [hereinafter Pew Research Ctr.], available at <http://pewforum.org/publications/surveys/religion-homosexuality.pdf>.

4. *Id.*

the religious beliefs of many Americans.<sup>5</sup> Discrimination based on social stereotypes, such as racism or sexism, appears to fade with time, as civilizations mature and as legal systems realize that there is no rational basis for such forms of discrimination.<sup>6</sup> But religion is a sticky subject. Freedom of religion was so important to the Framers of the Constitution that they began the Bill of Rights with two potentially conflicting phrases dealing with it.<sup>7</sup> Because of the “wall of separation” between Church and State, legislators must tread lightly when addressing forms of discrimination based in part on religious ideas, lest they offend the religious beliefs of large sections of their constituency.

Nowhere is the precarious relationship between religion and government more apparent than in the debate on same-sex marriage. Cognizant of the constitutional and practical dangers of putting forth a religious argument in support of a legislative or judicial position, opponents of same-sex marriage have taken to presenting their arguments in secular terms.<sup>8</sup> This Note will show, however, that such terms are only a disguise for opponents’ true arguments, which are based mostly, if not entirely, on religious and moral beliefs. Upon reaching that conclusion, this Note will then examine how such beliefs can and should be addressed under the religion clauses of the First Amendment, and what solution may exist.

Part I of this Note presents the current state of same-sex marriage in the United States. Part II examines the traditional religious arguments against same-sex marriage and their place in early jurisprudence regarding same-sex marriage. Part III then examines the secular arguments that have been put forward by opponents of same-sex marriage over the past three decades, how such arguments have evolved and become more sophisticated over the years, and why such arguments are merely a pretext for religious or moral beliefs. Part

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5. While it is true that there are other forms of discrimination—sexism for example—that find their roots in Christian religious beliefs, *see, e.g.*, 1 *Corinthians* 14:34–35 (“And if [women] will learn any thing, let them ask their husbands at home: for it is a shame for women to speak in the church.”), such forms of discrimination have long since passed out of the realm of religion and into “social tradition.” While sexism certainly persists, it is rare to hear a religious figure argue for a biblically mandated subservience of women, whereas homosexuals, engaging in conduct specifically prohibited by the Bible, *see infra* section II.A, are excoriated weekly from pulpits across America.

6. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating Virginia’s anti-miscegenation statute because “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies” prohibiting interracial marriages).

7. *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

8. *See* Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 449 (2001) (“[S]ome Christians, in deciding whether to disfavor same-sex unions, have good reason to forswear reliance on the biblically grounded belief that homosexual conduct is always immoral.”); Dale M. Schowengerdt, Note, *Defending Marriage: A Litigation Strategy To Oppose Same-Sex “Marriage,”* 14 REGENT U. L. REV. 487, 487 (2002) (“Christians may realize that homosexuality violates both Scripture and nature, yet many fear being labeled bigots by judging someone for something they themselves cannot explain.”); *see also id.* at 505 (“Because judges arguably do not give much credence to moral considerations, arguments must have one foot on principle and the other on pragmatism.”).

IV analyzes these arguments in light of current constitutional doctrine on religious freedom, and reaches the conclusion that, due to the peculiar nature of the same-sex marriage debate, a challenge on Free Exercise or Establishment Clause grounds to a statute prohibiting same-sex marriage would likely fail. Part V suggests a solution that is beneficial to everyone—separating the institutions of civil and religious marriage such that religious groups can continue to grant or refuse to officiate marriage ceremonies based on their beliefs, and government can get out of the business of granting religious marriage and instead focus on granting equal rights to all of its citizens.

### I. THE CURRENT STATE OF SAME-SEX MARRIAGE

The same-sex marriage debate in the United States is, in its current state, untenable. Ostensibly a federalist issue, different states have vastly different laws concerning recognition of same-sex marriage, civil unions, and domestic partnership. And, due to the federal Defense of Marriage Act (DOMA),<sup>9</sup> such recognition is one of the only types of laws excepted from the Full Faith and Credit Clause of the Constitution.<sup>10</sup> Therefore, individual state laws stand in a vacuum, granting no rights outside the borders of their states. For all intents and purposes, a legally married same-sex couple ceases to be married as soon as they exit the state that recognizes their union.

As of May 2008, Massachusetts is the only state in the United States that recognizes same-sex marriage.<sup>11</sup> On August 30, 2007, a district court judge in Iowa ruled that the state statute prohibiting same-sex marriage violated the due process and equal protection provisions of the Iowa Constitution,<sup>12</sup> but only a few hours later, the judge agreed to stay the ruling pending an appeal in the

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9. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 U.S.C. and 28 U.S.C.). Section 2(a) of the Act reads, in part: “No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State, . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . .” 28 U.S.C. § 1738C (2000).

10. See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”). The constitutionality of this exception has been debated since DOMA was first introduced in Congress. Compare Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 358–60 (2005) (describing arguments against DOMA’s constitutionality as “fanciful”), with Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 9, 15–18 (1997) (declaring DOMA unconstitutional because of the “invidious intent” of its choice-of-law provision).

11. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding that denial of marriage licenses to same-sex couples lacked rational basis and violated equal protection principles in the Massachusetts constitution); see also *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 567–68, 572 (Mass. 2004) (clarifying *Goodridge* and ruling that a proposed bill allowing civil unions rather than same-sex marriage violated equal protection and due process requirements of the state constitution).

12. *Varnum v. Brien*, No. CV5965, slip op. at 49–50 (Iowa Dist. Ct. Polk County Aug. 30, 2007), available at <http://www.domawatch.org/cases/iowa/Varnum%20v.%20Brien/varnum-d-08302007-ia-district.pdf>.

Iowa Supreme Court.<sup>13</sup> Additionally, between drafts of this Note, on May 15, 2008, the California Supreme Court overturned the state's statutory ban on same-sex marriage, holding that denying same-sex couples the right to full marriage "properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples."<sup>14</sup> Barring a last-minute stay or injunction, California is expected to begin issuing marriage licenses to same-sex couples on June 17, 2008.<sup>15</sup>

In a related development, New York Governor David A. Paterson issued a directive on May 14, 2008, instructing all state agencies to recognize same-sex marriages performed in other states or countries, because such marriages "should be afforded the same recognition as any other legally performed union."<sup>16</sup> This brings married same-sex couples under the rubric of "as many as 1,300 statutes and regulations in New York governing everything from joint filing of income tax returns to transferring fishing licenses between spouses."<sup>17</sup> While the governor's directive does not allow New York to issue marriage licenses to same-sex couples, some believe that the directive is a strong indication that Paterson intends to push for full legalization of same-sex marriage in New York.<sup>18</sup>

Several other states offer the functional equivalent of marriage, either fully or partially, without using the term marriage. Four states (Vermont, Connecticut, New Hampshire, and New Jersey) offer civil unions that convey all the state rights of marriage,<sup>19</sup> and Oregon offers domestic partnerships that do the same.<sup>20</sup> Three other states (Hawaii, Maine, and Washington) and the District of Columbia offer *limited* rights in the form of domestic partnerships or reciprocal beneficiaries.<sup>21</sup>

By contrast, twenty-six states have passed constitutional amendments prohib-

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13. See Monica Davey, *Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway*, N.Y. TIMES, Sept. 1, 2007, available at <http://www.nytimes.com/2007/09/01/us/01iowa.html>. In an interesting turn of events, college students Timothy McQuillan and Sean Fritz were able to obtain a marriage license and secure a minister to officiate the service before the ruling was stayed, making them the only legally recognized same-sex married couple in Iowa. *Id.*

14. *In re Marriage Cases*, 43 Cal. 4th 757, 845 (Cal. 2008).

15. See Wyatt Buchanan, *Same-Sex Weddings Rescheduled for June 17*, S.F. CHRON., May 29, 2008, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/cfa/2008/05/28/MN5110VC.CS.DTL&tsp=1>. Among those Californians eagerly awaiting the effective date is *Star Trek* actor George Takei, who plans to wed long-time companion Brad Altman. See George Takei, *Marriage Equality Comes to California* (May 16, 2008), <http://www.georgetakei.com/news.asp>.

16. Jeremy W. Peters, *New York To Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at 1, available at <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html> (quoting the directive by the governor's legal counsel, David Nocenti).

17. *Id.*

18. *Id.*

19. Human Rights Campaign, *Relationship Recognition in the U.S.*, [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf) (last visited May 29, 2008).

20. *Id.* Additionally, until the California Supreme Court decision recognizing same-sex marriage goes into effect, California also offers domestic partnerships. *Id.*

21. *Id.*

iting same-sex marriage, and seventeen of those amendments also outlaw other legal relationships such as civil unions or domestic partnerships.<sup>22</sup> All told, forty-two states have laws prohibiting same-sex marriage.<sup>23</sup>

This disparity, together with the provisions of DOMA, leads to a number of problems. If same-sex couples can be married (or attain a civil union or domestic partnership) in one state, what happens when they move to another state? If one spouse is on the other spouse's health insurance, what happens if the career of one spouse requires a move to a state that refuses to recognize the couple's relationship for the purposes of health insurance coverage? For that matter, what happens if the child of a married same-sex couple in Massachusetts decides to go to college out of state? Should the college consider both parents' incomes in making financial aid determinations, or is it free to disregard the parents' legal relationship and consider the student a child of a single parent? These questions and others indicate a growing need for uniformity across state lines, at least concerning the legal rights and privileges of the marriage relationship. In order to determine if uniformity is even possible, it is necessary first to examine the arguments underpinning the same-sex marriage debate.

## II. RELIGIOUS ARGUMENTS AGAINST SAME-SEX MARRIAGE

As a general rule, religious people in the United States oppose same-sex marriage.<sup>24</sup> According to a 2003 survey by the Pew Research Center, while 59% of Americans oppose and 32% favor same-sex marriage, a ratio of less than two-to-one, that ratio jumps to more than six-to-one (80% to 12%) for those "with a high level of religious commitment."<sup>25</sup> The reason for this is that, as a general rule, religion views homosexuality as a sin and same-sex marriage as an unacceptable extension of that sin.<sup>26</sup>

That said, it is important to point out two things. First, not every religion opposes same-sex marriage—same-sex unions are recognized by Quakers, Unitarians, Buddhists, and Reform and Reconstructionist Jews, for example.<sup>27</sup> Second, even within religions that oppose same-sex marriage, there are adher-

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22. Human Rights Campaign, *Statewide Marriage Prohibitions*, [http://www.hrc.org/documents/marriage\\_prohibit\\_20070919.pdf](http://www.hrc.org/documents/marriage_prohibit_20070919.pdf) (last visited May 29, 2008).

23. Stateline.org, *State Policies on Same-Sex Marriage*, [http://archive.stateline.org/flash-data/2007\\_May\\_31-CivilUnions/Social\\_Policy.pdf](http://archive.stateline.org/flash-data/2007_May_31-CivilUnions/Social_Policy.pdf) (last visited Nov. 8, 2007).

24. See Pew Research Ctr., *supra* note 3, at 1. Unless otherwise specified, when this Note discusses "religion," it is referring primarily to Christianity, which is the dominant religion in the United States. See *infra* notes 31–32 and accompanying text.

25. Pew Research Ctr., *supra* note 3, at 1.

26. See Steven Waldman, *A Common Missed Conception: Why Religious People Are Against Gay Marriage*, SLATE, Nov. 19, 2003, <http://www.slate.com/id/2091413/>.

27. See Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 605 (2002).

ents and even clergy who support such unions.<sup>28</sup> In 2004, “almost 500 clergy from eighteen faith traditions” signed a Religious Declaration for the Freedom of Same Sex Couples to Marry, stating that they “oppose appeals to sacred texts and religious traditions for the purpose of denying legal equality to same-gender couples.”<sup>29</sup> In describing the Declaration, Rabbi Devon Lerner, co-chair of the Religious Coalition for the Freedom to Marry, responded to the religious arguments against same-sex marriage:

In response to our call for justice, many of our religiously conservative and fundamentalist opponents turn to the Bible to justify denying same-sex couples the right to marry. They quote a passage from Leviticus and from other books to support their belief that homosexuality is a sin. Yet the Bible also supports slavery, polygamy, animal sacrifices and calls for the death of adulterers, yet we do not try to apply these laws in our society today. Our world is very different from the world of the biblical times, and so all our religious practices and interpretations of the Bible have necessarily changed and evolved through the centuries.<sup>30</sup>

Despite this religious minority, however, it is the majority that controls public sentiment in the United States. As of 2001, 76.5% of Americans identified as Christian, including over 50 million Catholics and over 33 million Baptists.<sup>31</sup> And, as the 2003 Pew Research Center survey showed, Americans who consider themselves highly religious are overwhelmingly against same-sex marriage.<sup>32</sup> For that reason, this Note will consider the religious arguments put forward by Christianity, the majority religion in the United States.

#### A. ARGUMENTS FROM THE BIBLE

##### 1. The Old Testament

As Rabbi Lerner stated, same-sex marriage opponents “quote a passage from Leviticus and from other books to support their belief that homosexuality is a sin.”<sup>33</sup> The passage from Leviticus reads, “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be* upon them.”<sup>34</sup> This single verse

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28. See, e.g., Gary Chamberlain, *A Religious Argument for Same-Sex Marriage*, 2 SEATTLE J. FOR SOC. JUST. 495 (2004); Jeremiah H. Russell, *The Religious Liberty Argument for Same-Sex Marriage and Its Effect Upon Legal Recognition*, 7 RUTGERS J. L. & RELIGION 4 (2005).

29. Rabbi Devon Lerner, *Why We Support Same-Sex Marriage: A Response from Over 450 Clergy*, 38 NEW ENG. L. REV. 527, 528 (2004) (quoting the Declaration).

30. *Id.*

31. BARRY A. KOSMIN, EGON MAYER & ARIELA KEYSAR, GRADUATE CTR. OF THE CITY UNIV. OF N.Y., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2001, at 12 exh.1 (2001), available at [http://www.gc.cuny.edu/faculty/research\\_studies/aris.pdf](http://www.gc.cuny.edu/faculty/research_studies/aris.pdf).

32. See *supra* notes 24–25 and accompanying text.

33. Lerner, *supra* note 29, at 528.

34. *Leviticus* 20:13 (King James). Similar language appears in *Leviticus* 18:22 (King James).

forms the foundation for the Judeo-Christian belief that homosexuality is a sin, and it has been debated and interpreted for centuries. The Living Bible translation even goes so far as to translate this verse as, “The penalty for homosexuality is death to both parties. They have brought it on themselves.”<sup>35</sup>

Passages elsewhere in the Old Testament have been interpreted to lend support to the prohibition in Leviticus. The first endorsement of heterosexual marriage comes almost immediately after the creation of the first woman in Genesis: “Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.”<sup>36</sup> Some same-sex marriage opponents have taken the two-in-one-flesh language from Genesis out of the religious context and used it as a moral argument to advocate a heterosexual definition of marriage.<sup>37</sup> Later in Genesis, God destroys the cities of Sodom and Gomorrah, “because their sin is very grievous.”<sup>38</sup> Although the particular “sin” is never stated explicitly, Christians have long attributed Sodom and Gomorrah’s downfall to homosexuality, based on the following two verses:

4 But before they lay down, the men of the city, *even* the men of Sodom, compassed the house round, both old and young, all the people from every quarter:

5 And they called unto Lot, and said unto him, Where *are* the men which came in to thee this night? Bring them out unto us, that we may know them.<sup>39</sup>

The tie between this story and homosexuality is so strong that the name of the city of Sodom became the basis for the word “sodomy.”<sup>40</sup>

Others have suggested that “homosexuality is wrong because it involves sex that doesn’t create life,”<sup>41</sup> citing the Old Testament story of Onan, who was slain by God for choosing to spill his seed on the ground rather than impregnate his dead brother’s wife.<sup>42</sup> The problem, however, with presenting the argument that any non-procreative sexual act is a *per se* offense against God, is that the argument shuts out heterosexual couples who are sterile or who use birth

35. *Leviticus* 20:13 (Living Bible), reprinted in Ontario Consultants on Religious Tolerance, Homosexuality in the Hebrew Scriptures: *Leviticus* 20:13, [http://www.religioustolerance.org/hom\\_bibh3.htm](http://www.religioustolerance.org/hom_bibh3.htm) (last visited Nov. 8, 2007). It is beyond the scope of this Note to debate the correct interpretation of these verses. Religious adherents are entitled to their beliefs—it is only the intersection of those beliefs and the law concerning same-sex marriage that is significant for the purposes of this Note.

36. *Genesis* 2:24 (King James).

37. See, e.g., ROBERT P. GEORGE, “Same-Sex Marriage” and “Moral Neutrality,” in *THE CLASH OF ORTHODOXIES* 75, 77–78 (2001) (suggesting that any sexual acts engaged in outside of the “one-flesh” paradigm are not, by definition, marital acts).

38. *Genesis* 18:20 (King James).

39. *Genesis* 19:4–5 (King James).

40. See Douglas Harper, *Sodomy*, in *ONLINE ETYMOLOGY DICTIONARY*, <http://www.etymonline.com/index.php?term=sodomy> (last visited Nov. 8, 2007).

41. See Waldman, *supra* note 26.

42. *Genesis* 38:4–10. For a humorous extrapolation of the implications of Onan’s story, see *Every Sperm Is Sacred*, in *MONTY PYTHON’S THE MEANING OF LIFE* (Universal Pictures 1983) (“Hindu, Taoist, Mormon / spill theirs most anywhere / But God loves those who treat their / semen with more care.”).

control.<sup>43</sup> Robert George, a law professor at Princeton University and a leading opponent of same-sex marriage, circumvents this problem by stating that:

[T]he plain fact is that the genitals of men and women are reproductive organs all of the time—even during periods of sterility. *And acts that fulfill the behavioral conditions of reproduction are acts of the reproductive-type even where the nonbehavioral conditions of reproduction do not happen to obtain.* Insofar as the point or object of sexual intercourse is marital union, the partners achieve the desired unity (i.e., become “two-in-one-flesh”) precisely insofar as they mate, that is, fulfill the behavioral conditions of reproduction, or, if you will, perform the type of act—the only type of act—upon which the gift of a child may supervene.<sup>44</sup>

If the text of the Old Testament is too vulnerable to alternate interpretations, however, the opponent of same-sex marriage can turn to the New Testament for further support.

## 2. The New Testament

One of the earliest and most outspoken opponents of homosexuality was Saint Paul. As Christian Bible scholar Ben Witherington explains: “For Paul, not unlike other early Jewish writers, homosexual behavior is perhaps the clearest example of how flouting sexual distinctions is ultimately a rejection of the Creator, who made such distinctions.”<sup>45</sup> Nowhere is this more clear than when Paul describes the actions of the Romans: “And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.”<sup>46</sup>

In his first letter to the Corinthians, Paul presents a laundry list of those too unrighteous to inherit the kingdom of God, including the Greek terms *malakoi* and *arsenokoitai*.<sup>47</sup> The terms translate literally as “effeminate” and “male copulator,” and refer, respectively, to the passive and active participants in a homosexual tryst.<sup>48</sup>

Unlike Paul, Jesus never explicitly condemned homosexuality.<sup>49</sup> However, some opponents of same-sex marriage have referred to Jesus’s discussion of

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43. See Waldman, *supra* note 26.

44. GEORGE, *supra* note 37, at 85.

45. Waldman, *supra* note 26 (quoting Ben Witherington III, *Was Sodom Into Sodomy?: What the Bible Says About Sodomy, Homosexuality, and Sin*, BELIEFNET, [http://www.beliefnet.com/story/128/story\\_12885\\_2.html](http://www.beliefnet.com/story/128/story_12885_2.html)).

46. *Romans* 1:27 (King James).

47. See Ben Witherington III, *Was Sodom into Sodomy?: What the Bible Says About Sodomy, Homosexuality, and Sin*, BELIEFNET, [http://www.beliefnet.com/story/128/story\\_12885\\_2.html](http://www.beliefnet.com/story/128/story_12885_2.html) (last visited Feb. 21, 2008) (referring to 1 *Corinthians* 6:9–10).

48. See *id.*

49. See *id.*

marriage in Matthew 19:1–12.<sup>50</sup> Jesus quotes the Genesis language about cleaving to one's wife and becoming one flesh, and suggests that one should remain faithful in marriage or celibate in singleness.<sup>51</sup> However, this passage, with its implicit (or explicit) condemnations of pre-marital sex, adultery, and divorce, may be overly broad for those wishing to condemn only homosexual conduct.

These biblical arguments, backed by over two thousand years of tradition and interpretation, have a great deal of resonance in modern society, particularly among those who adhere to traditional Judeo-Christian religious beliefs. These arguments are so ingrained, and so difficult to rebut, that it stands to reason that these beliefs should form the basis for an opposition to *legal* recognition of same-sex marriage, as opposed to simply a personal, moral opposition to such unions.

#### B. BIBLICAL REFERENCES IN SAME-SEX MARRIAGE LITIGATION

It should be no surprise, then, that such religious arguments found their way into early judicial opinions regarding same-sex marriage, before courts fully comprehended the constitutional issues such an endorsement of religion might raise. In *Baker v. Nelson*, one of the earliest cases involving same-sex marriage, the Minnesota Supreme Court held that a Minnesota statute defining marriage as a heterosexual union was not unconstitutional, stating that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”<sup>52</sup>

A federal district court in California took the analogy further in *Adams v. Howerton*:

The definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the civil law. The English civil law took its attitudes and basic principles from canon law, which, in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a “marriage” between persons of the same sex was unthinkable and, by definition, impossible.<sup>53</sup>

The most egregious use of scripture in a judicial opinion regarding same-sex

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50. *Id.*

51. *Id.*

52. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

53. *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (citations omitted).

marriage came in the 1991 case of *Dean v. District of Columbia*.<sup>54</sup> District of Columbia Superior Court Judge Shellie Bowers, a devout Baptist, issued an opinion replete with passages from Genesis, Deuteronomy, Matthew, and Ephesians, rejecting the plaintiffs' challenge to D.C.'s prohibition of same-sex marriages.<sup>55</sup> Professor William Eskridge and Darren Spedale, two leading scholars on the same-sex marriage debate, state that "Judge Bowers seemed to be importing religious values into positive law, at odds with the Constitution's establishment clause," and they also note that the District's counsel "refused to defend this particular reasoning on appeal."<sup>56</sup>

As opponents of same-sex marriage realized the constitutional dangers of utilizing religious arguments against same-sex marriage in a litigation or legislation context, they developed a number of secular arguments that could be utilized instead—arguments that, while outwardly based on rationality rather than religion, serve only as secular covers for the underlying belief that homosexuality (and, by extension, same-sex marriage) is sinful.

### III. SECULAR ARGUMENTS AGAINST SAME-SEX MARRIAGE

Professor Eskridge and Darren Spedale, in their excellent and comprehensive book *Gay Marriage: For Better or for Worse?*, divide the secular arguments against same-sex marriage into three main categories.<sup>57</sup> The first category is the *definitional argument*: marriage is a union between a man and a woman because that's the way it's always been.<sup>58</sup> The second category is the *stamp-of-approval argument*: any rights of marriage afforded to same-sex couples will be perceived as an endorsement of homosexuality.<sup>59</sup> The third category is the *defense-of-marriage argument*: same-sex marriage, if sanctioned, will undermine the sanctity of "traditional marriage" and lead to a moral collapse.<sup>60</sup> Professor Eskridge describes these three arguments as "sedimented"—rather than being interchangeable or mutually exclusive, each argument builds on those before it.<sup>61</sup> So, a defense-of-marriage argument will also incorporate a stamp-of-approval argument and a definitional argument.

This Part will parse these three categories of secular arguments put forward by opponents of same-sex marriage, and will attempt to point out the logical inconsistencies or practical problems with each. Then, this Part will expose these secular arguments for what they truly are—pretexts for the religious

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54. See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* 25 (2006) (describing the religious nature of the *Dean* opinion and its aftermath).

55. *Id.* at 25.

56. *Id.*

57. See *id.* at 20–31.

58. See *id.* at 21–22.

59. See *id.* at 25–26.

60. See *id.* at 28–29.

61. See *id.* at 21; see also William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1362–65 (2000).

arguments detailed in the previous Part.

A. DEFINITIONAL ARGUMENT, OR “THAT’S THE WAY IT IS”

“[M]arriage has got to be a man and a woman. Always has been. Always will be.”<sup>62</sup> The definitional argument is the simplest secular argument against same-sex marriage: Marriage is defined as the union of a man and a woman because that’s just the way it’s always been.

Although its usage has waned in recent years, the definitional argument was virtually the only secular argument available in the early days of the same-sex marriage debate. When Tracy Knight and Marjorie Jones went to the Jefferson County courthouse in 1970 and asked the clerk for a marriage license, the district attorney advised that the application should be denied because it represented “the pure pursuit of hedonistic and sexual pleasure.”<sup>63</sup> When Knight and Jones sued on the grounds that the denial of a marriage license violated their constitutional rights, the court consulted little besides Webster’s New International Dictionary, The Century Dictionary and Encyclopedia, and Black’s Law Dictionary in reaching the conclusion that “marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.”<sup>64</sup> The court continued, “It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.”<sup>65</sup> The following year, a court in Washington found that the definition of marriage as one man and one woman was “so obvious as not to require recitation.”<sup>66</sup>

The clearest difficulty with defining marriage as one man and one woman because “that’s the way it’s always been” is that it is simply not true. Same-sex unions have been recognized throughout history, in ancient Greece and Rome, Egypt, parts of China, Japan, South East Asia, Australia, India, South America, Medieval Eastern Europe, and practically everywhere else in the world.<sup>67</sup> Additionally, same-sex couples can currently be legally married in Canada, Belgium, the Netherlands, Spain, and South Africa, and civil union or domestic partnership equivalencies are available in Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Mexico, Norway, and Sweden.<sup>68</sup> Therefore, given the fact that marriage is being defined more broadly across the world,

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62. ESKRIDGE & SPEDALE, *supra* note 54, at 21–22.

63. *Id.* at 20–21.

64. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973).

65. *Id.*

66. Singer v. Hara, 522 P.2d 1187, 1191–92 (Wash. App. 1974).

67. See KATHLEEN A. LAHEY & KEVIN ALDERSON, SAME-SEX MARRIAGE: THE PERSONAL AND THE POLITICAL 16 (2004).

68. DENIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 19 (14th ed. 2007).

“that’s just the way it is” carries less weight than it used to.<sup>69</sup>

B. STAMP-OF-APPROVAL ARGUMENT, OR “NO PROMO HOMO”

The second category of argument put forward by opponents of same-sex marriage is that any legislation that endorses same-sex marriage would encourage homosexuality—would place a stamp of approval on homosexual conduct. This category is also known as “no promotion of homosexuality,” or “no promo homo”:<sup>70</sup>

1. If the state adopts policy x (abandons policy y), it would be endorsing and promoting homosexuality or homosexual conduct.
  2. The state ought to endorse and promote good lives and good conduct and ought not to endorse and promote less good lives and conduct.
  3. Homosexuality and homosexual conduct are not as good as heterosexuality and heterosexual conduct.
- Therefore, policy x should not be adopted (policy y should be retained).<sup>71</sup>

This argument appears logical, and has become tremendously popular as a justification of rejecting any legislation that benefits homosexuals, particularly same-sex marriage.<sup>72</sup> The stamp-of-approval argument is tied closely to the idea that, by seeking to be legally married, same-sex couples are asking for “special rights.”<sup>73</sup>

Richard Posner, in his influential book *Sex and Reason*, argues for tolerance

69. Despite this, the definitional argument is still the simplest and easiest-to-digest “sound bite” argument in opposition to same-sex marriage. For this reason, it is the argument put forward by the Republican candidate for the 2008 presidential election. See John McCain, Human Dignity & the Sanctity of Life, <http://www.johnmccain.com/Informing/Issues/95b18512-d5b6-456e-90a2-12028d71df58.htm> (last visited Mar. 8, 2008) (“The family represents the foundation of Western Civilization and civil society and John McCain believes the institution of marriage is a union between one man and one woman. It is only *this definition* that sufficiently recognizes the vital and unique role played by mothers and fathers in the raising of children, and the role of the family in shaping, stabilizing, and strengthening communities and our nation.”) (emphasis added).

70. It is unclear who originally coined the term “no promo homo,” but the phrase first appeared in print in a 1996 Washington Post article describing the policy of a Virginia school board’s refusal to endorse homosexual student activity. See David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223, 226 n.13 (citing Dan Beyers, *Montgomery Students Push for Discussion of Gay Issues*, WASH. POST, Dec. 8, 1996, at B1).

71. Eskridge, *supra* note 61, at 1329.

72. See, e.g., PAUL CAMERON, FAMILY RESEARCH INST., SAME SEX MARRIAGE: TIL DEATH DO US PART? (1999), available at [http://www.familyresearchinst.org/FRI\\_EduPamphlet7.html](http://www.familyresearchinst.org/FRI_EduPamphlet7.html) (“The best scientific evidence suggests that putting society’s *stamp of approval* on homosexual partnerships would harm society in general and homosexuals in particular, the very individuals some contend would be helped.”) (emphasis added).

73. See, e.g., Alert, Family Research Council, Oppose Special Rights Bill for Homosexual Conduct (Nov. 6, 2007), available at <http://www.frc.org/get.cfm?i=AL07K02> (urging readers to contact their Congresspersons regarding the anti-discrimination legislation discussed *supra* note 2, because it would “grant special rights to transgendered people” and “mainstream homosexuality, bisexuality and transgenderism and provide activists a legal tool for punishing employers who do not approve of these lifestyles”).

of sexual variation, including a repeal of sodomy laws.<sup>74</sup> But Posner draws the line at same-sex marriage, stating that “permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality.”<sup>75</sup> He seems to opine instead that, given the general public’s distaste for homosexuality, “the most that homosexuals could expect from the tolerant state is noninterference in their relationships—but not positive support and approval that equal marriage rights would signify.”<sup>76</sup>

Posner’s commentary indicates the great benefits of the stamp-of-approval argument—it can be argued from a position of tolerance, moving away from a tone of fire and brimstone towards a more (seemingly) rational viewpoint. Commenting on a proposed New York State gay rights bill, state senator John R. Kuhl, Jr. said, “I don’t think I’m going to support it. I don’t condone their lifestyle . . . . Sexual orientation is their choice and I don’t think it’s our place to force people that might have a moral opposition to it to have to put up with it and condone it.”<sup>77</sup> During the debates surrounding DOMA, many proponents of the bill chose to take the moral and tolerant high ground. Senator Dan Coats said that “when we prefer traditional marriage and family in our law, it is not intolerance. Tolerance does not require us to say that all lifestyles are morally equal.”<sup>78</sup> Florida representative Charles Canady liked the argument so much that he used it two days in a row: Should the Congress “tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?”<sup>79</sup>

A sensible response to the stamp-of-approval argument is that “when the state recognizes same-sex marriages, it purports to be and actually is supporting interpersonal commitment (marriage), not homosexuality.”<sup>80</sup> Given the government’s recent push of promoting marriage as an anti-poverty and child-welfare initiative,<sup>81</sup> one would assume that marriage in all its forms would be desirable, if at least for the opportunity for more children to grow up in stable, legally sanctioned marriages. Another response to the stamp-of-approval argument is that recognition of same-sex marriages does not constitute endorsement of

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74. RICHARD A. POSNER, *SEX AND REASON* 311–13 (1992).

75. *Id.* at 311.

76. ESKRIDGE & SPEDALE, *supra* note 54, at 26.

77. Kevin Sack, *Albany G.O.P. Grappling With Gay Rights*, N.Y. TIMES, Feb. 6, 1993, at 23 (quoting Kuhl).

78. ESKRIDGE & SPEDALE, *supra* note 54, at 27 (citing 142 CONG. REC. 22,451 (1996) (statement of Sen. Coats)).

79. *Id.* (citing 142 CONG. REC. 16,976, 17,079 (1996) (statement of Rep. Canady)).

80. William N. Eskridge, Jr., *The Same-Sex-Marriage Debate and Three Conceptions of Equality*, in *MARRIAGE AND SAME-SEX UNIONS: A DEBATE* 167, 179 (Lynn D. Wardle et al. eds., 2003).

81. See Robin Toner, *Welfare Chief Is Hoping To Promote Marriage*, N.Y. TIMES, Feb. 19, 2002, at 1 (“[T]he empirical literature is quite clear that, on average, kids who grow up in stable, healthy, married, two-parent households do better than kids who grow up in some other kind of arrangement.” (quoting Wade F. Horn, the overseer of the federal welfare program)).

homosexuality, but “simple respect for homosexuals’ freedom of association.”<sup>82</sup> Professor Chai Feldblum describes a different response, based on the theory of liberal neutrality—if we are (or should be) agnostic as to whether marriage is a normative good, then

the governmental action of granting a marriage license to a same-gender couple signals no more approval of the act of gay sex or the group of gay couples, than the governmental action of granting a marriage license to a convicted rapist signals approval of the act of rape or the group of rapists.<sup>83</sup>

The stamp-of-approval argument was dealt a serious blow by the Supreme Court decision of *Romer v. Evans*, which invalidated a Colorado constitutional amendment prohibiting Colorado or any of its municipalities from creating anti-discrimination legislation aimed at protecting homosexuals.<sup>84</sup> The State, in defending the amendment, relied heavily on the stamp-of-approval argument, claiming that “the measure does no more than deny homosexuals special rights.”<sup>85</sup> The Court, in a six-vote majority opinion written by Justice Kennedy, struck down the amendment on a number of equal protection grounds, particularly the lack of a rational relationship to legitimate state interests.<sup>86</sup> The language of the opinion that has resonated, however, is nearly tossed off as an afterthought. Justice Kennedy states that the amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>87</sup>

Justice Scalia powerfully defended the stamp-of-approval and “special rights” arguments in his vociferous dissent, in which he claims that Coloradans are “entitled to be hostile toward homosexual conduct.”<sup>88</sup> Justice Scalia says that the amendment only “prohibits *special treatment* of homosexuals,”<sup>89</sup> and then he launches with full force at Justice Kennedy’s finding of “animus”:

The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of “animus” or “animosity” toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for

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82. EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 35 (2004) (“[I]t is no more an endorsement of homosexuality to grant gays and lesbians marriage licenses than it is to grant them driver’s licenses.”).

83. Chai R. Feldblum, *The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 55, 60 (Robert Wintemute & Mads Andenas eds., 2001).

84. *Romer v. Evans*, 517 U.S. 620, 620–22 (1996).

85. *Id.* at 626.

86. *Id.* at 622, 632–35.

87. *Id.* at 632.

88. *Id.* at 644 (Scalia, J., dissenting).

89. *Id.* at 638 (Scalia, J., dissenting).

example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.<sup>90</sup> The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are *homosexuals*; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct*—that is, it prohibits favored status *for homosexuality*.<sup>91</sup>

While Justice Scalia does not expressly use the phrase “stamp-of-approval,” it is clear from his declarations of “favored status” and “special rights,” and his statements likening homosexuals to murderers, polygamists, and animal abusers, that he is strongly opposed to any legislation that could be perceived as an “endorsement” of homosexual conduct. He even tempers his argument by taking the tolerant high-road at the end of his dissent, where he quotes with approval an anti-polygamy Court opinion extolling the virtues of traditional marriage, and then says, “I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.”<sup>92</sup>

The Court’s rejection of these arguments placed legislators on notice that they could not get away with creating antigay legislation under the guise of avoiding a “stamp of approval” or declining to grant “special rights” to homosexuals, if such legislation was perceived as being motivated by animosity towards homosexuals.<sup>93</sup> In response, opponents of same-sex marriage turned their attention away from homosexuality entirely, and focused instead on an effort to “protect” the “sanctity” of “traditional marriage.”<sup>94</sup> If opponents could not appeal to rationality, they would use an even greater motivator—fear.

C. DEFENSE-OF-MARRIAGE ARGUMENT, OR “WON’T SOMEBODY PLEASE THINK OF THE CHILDREN?”

The *Romer* decision was announced during congressional consideration of DOMA, and it shifted the rhetoric of the debates. The House Judiciary Committee concluded that “civil society has an interest in maintaining and protecting

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90. Justice Scalia is referring to *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding the constitutionality of a state anti-sodomy law), which was later overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), another 6-3 Kennedy opinion with a scathing dissent from Justice Scalia. See *Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting).

91. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

92. *Id.* at 652 (Scalia, J., dissenting).

93. See ESKRIDGE & SPEDALE, *supra* note 54, at 28 (stating that *Romer*’s “antianimous rationale raised red flags about the DOMA enterprise” and prompted lawmakers to reject “intemperate language” in favor of “consequentialist arguments”).

94. See *id.* at 28–29.

the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.”<sup>95</sup> This idea of protecting traditional marriage from ruin because of the government’s interest in promoting responsible parenting (among other things) is the defense-of-marriage argument.<sup>96</sup>

The question that has never been adequately answered is: Defend marriage from what? Eskridge and Spedale sum up the reasoning behind this argument: “[T]he great virtue of marriage is the creation of an altruistic space, where adults sacrifice their own self-interest in service of mutual commitment to one another and to children they raise together.”<sup>97</sup> The belief is that same-sex unions are fundamentally self-centered, and that belief perhaps stems from the view that homosexual sex has no value other than pleasure. Traditionalists believe, therefore, that an endorsement of such conduct would “devalue marriage as an altruistic space and thereby undermine its ability to advance the community values it has long promoted.”<sup>98</sup> The imagined consequences would be disastrous. According to Senator Rick Santorum, “toleration of same-sex unions has not only undermined the altruistic ideals of marriage but also depopulated Europe, as straight couples abandon marriage and the family as aspirations for their lives.”<sup>99</sup>

And if same-sex marriage alone is not bad enough, it is only the first in the parade of horrors that would follow—this forms the basis of a popular offshoot of the defense-of-marriage argument: the slippery slope.<sup>100</sup> Senator Santorum, referring to the Supreme Court decision in *Lawrence v. Texas*, which overturned a Texas sodomy law,<sup>101</sup> described the progression: “If the Supreme

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95. H.R. REP. NO. 104-664, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917. The report also distinguishes *Romer* on the grounds that “[i]t would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2) motivated by animus towards homosexuals.” *Id.* at 32, *reprinted in* 1996 U.S.C.C.A.N. at 2937.

96. Professor Robin West breaks the defense-of-marriage argument down further by categorizing the various types of “promarriage advocates”: “neonatural lawyers” see marriage as worthy of celebration because of its traditional nature; “social utilitarians” see marriage as a civil and legal institution, worthy of defense on utilitarian grounds because of the benefits it gives to its participants; and “virtue theorists” see marriage as a particularly virtuous way of life, and therefore worthy of defense for the normative goodness it promotes. *See* ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 57–58 (2007).

97. ESKRIDGE & SPEDALE, *supra* note 54, at 29.

98. *Id.* One need look no further than the tabloid magazines at the local supermarket to see that the concept of heterosexual marriage as one of “altruistic space” in which to raise children is almost laughably utopian. *See, e.g.,* Ken Lee, *Attorneys Go to Court; No Changes in Britney Custody*, PEOPLE, Feb. 4, 2008, <http://www.people.com/people/article/0,,20175948,00.html> (detailing the ongoing custody battle between fallen pop icon Britney Spears and ex-husband Kevin Federline).

99. ESKRIDGE & SPEDALE, *supra* note 54, at 38 (citing RICK SANTORUM, IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD 27–38 (2005)).

100. Eskridge describes the slippery slope argument as growing from the definitional argument, but in this author’s opinion, its fearmongering aspect makes it a better fit as an offshoot of defense-of-marriage. *See* ESKRIDGE & SPEDALE, *supra* note 54, at 24 (“[I]f you take step 1 (same-sex marriage), then the same reasoning will lead to step 2 (no age-of-consent rules), step 3 (polygamy), and so forth.”).

101. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery.”<sup>102</sup> Santorum even went on to compare homosexuality to other “deviant” sexual behaviors such as “man on child” and “man on dog.”<sup>103</sup> Similarly, Justice Scalia cautioned in his dissent to *Lawrence* that the Court’s decision would lead to the invalidation of laws against “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”<sup>104</sup>

Putting aside “man on dog” for the moment, the most popular slippery slope argument is that if same-sex marriages are legally recognized, polygamy is next.<sup>105</sup> Much has been written distinguishing same-sex marriage from polygamy, describing the slippery slope argument as a “red herring.”<sup>106</sup> Some have even suggested that even if same-sex marriage does lead to the legalization of polygamy, that is not necessarily a bad thing.<sup>107</sup>

The truth is probably somewhere in between. While there may be a connection between same-sex marriage and polygamy, and while the recognition of same-sex marriages may open up a new legal avenue for polygamists to use, that does not end the debate. Polygamy is a separate issue that will require its own debate when the time comes.<sup>108</sup> Professor Eugene Volokh points out a

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102. Adam Nagourney & Sheryl Gay Stolberg, *Impolitic, Maybe, but in Character*, N.Y. TIMES, Apr. 25, 2003 (quoting an April 20, 2003 Associated Press interview with Sen. Santorum).

103. John Corvino, *The Inclusive Santorum*, BETWEEN THE LINES, May 1, 2003, available at <http://www.indegayforum.org/news/show/26727.html> (quoting the same interview). Santorum’s “man on dog” comment surprised the interviewer so much that he interrupted by saying, “I’m sorry, I didn’t think I was going to talk about ‘man on dog’ with a United States senator; it’s sort of freaking me out.” *Id.*

104. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

105. See, e.g., Michael G. Myers, Comment, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1475 (2006) (arguing that if courts conclude *Lawrence* requires recognition of same sex marriage, *Lawrence*’s logic likely applies to polygamy).

106. See, e.g., Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101 (2006) (polygamy and same-sex marriage are distinguishable); Ruth K. Khalsa, Note, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665 (2005) (the polygamy issue is irrelevant to same-sex marriage debate).

107. See, e.g., Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1027 (2005) (“The proper response to same-sex marriage opponents’ reductio argument may instead be, ‘And indeed, why not also polygamy?’”).

108. See, e.g., Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1111 (2006) (“The legalization of polygamy is a legal concern, but not a foregone conclusion.”); Dahlia Lithwick, *Slippery Slope: The Maddening “Slippery Slope” Argument Against Gay Marriage*, SLATE, May 19, 2004, <http://www.slate.com/id/2100824> (“Just because advocates of polygamy have tried to leverage the *Lawrence* decision to support their cause doesn’t mean there are no differences between the two marginalized groups. And it’s not an argument against gay marriage to say, ‘I told you those bigamists would use this in court!’ It would be stupid for the bigamists not to try.”) For more on comparisons between same-sex marriage and polygamy in a Free Exercise context, see *infra* section IV.A.1.

fundamental difficulty in dealing with slippery slope arguments—“the argument isn’t a logical one, but a psychological one.”<sup>109</sup> Volokh goes on to conclude that, while the possibility of slippage is miniscule, slippery slope risks are still real, and should not be completely discounted.<sup>110</sup>

The defense-of-marriage and slippery slope arguments operate on fear—the fear that, even if one accepts a current situation, that situation could make things in the future much, much worse. But these arguments also generate some important questions: Where does this fear come from? What do we mean by “bad” or “worse”? Indeed, what is underpinning these arguments against same-sex marriage?

#### D. WHY THESE ARGUMENTS ARE PRETEXTUAL

One commentator has pointed out that “[w]hen courts hear Free Exercise claims, they frequently inquire as to the sincerity with which the claimed adherents hold their beliefs,” and therefore “so it should be in the search for a secular purpose: Divining a secular purpose for a government action demands an inquiry into the sincerity with which its proponents believe the action to be genuinely secular.”<sup>111</sup> And so, we inquire into the sincerity of the secular purposes claimed by opponents of same-sex marriage.

All of the secular arguments against same-sex marriage—definitional arguments, stamp-of-approval and special-rights arguments, defense-of-marriage and slippery slope arguments—have been successful in preventing recognition of same-sex marriage. Despite the advances in Massachusetts, California, Vermont, Iowa, and other states, forty-two states have laws or constitutional amendments defining marriage as a union between one man and one woman.<sup>112</sup> But all of these arguments have a fundamental logical flaw: *they all start from the assumption that homosexuality is “bad.”*

Why don’t we want to place a stamp of approval on homosexual conduct? Because it’s bad. Why do we believe that same-sex marriage will undermine the integrity of the American family unit? Because it’s bad. Why has marriage always been defined as the union of a man and a woman? Because anything else would be bad. In this way, all of the secular arguments become reflexive arguments—x equals y because y equals x. We don’t want to encourage homosexuality because homosexuality is the sort of bad behavior that doesn’t deserve encouragement—rather than a logical argument, it is a syllogism that contains its own conclusion.

If all secular arguments against same-sex marriage start from the assumption

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109. Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1156 (2005).

110. *Id.* at 1198–1201.

111. Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL’Y 561, 596 (2007) (“Merely claiming a secular purpose does not mean that one exists.”).

112. See Stateline.org, *supra* note 23.

that same-sex marriage is bad, where does that assumption come from? While it is true that there are secular grounds for deciding that something is intrinsically “bad” (such as Kant’s deontology, Rawls’s absolutism, or other ethical constructs<sup>113</sup>), the average American is not a philosophy student. Rather, fifty-seven percent of Americans have stated that “faith in God is a prerequisite for morality.”<sup>114</sup> Given the religious makeup of the American public,<sup>115</sup> it is far more likely that the assumption that homosexuality is “bad” really means that homosexuality offends the religious beliefs of the majority of Americans. While religious beliefs are certainly not the *only* possible reason for believing that homosexuality is “bad,” common sense would suggest that the pervasiveness of such beliefs are a “major factor” underpinning the average American’s view of homosexuality and same-sex marriage.<sup>116</sup>

There is no substance to the claims that same-sex marriage causes harm—while empirical data is often circulated,<sup>117</sup> it is always debunked.<sup>118</sup> Indeed,

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113. See, e.g., MICHAEL J. ZIMMERMAN, *THE NATURE OF INTRINSIC VALUE* 202 (2001) (“Pleasure in the bad is intrinsically bad.”).

114. PEW RESEARCH CTR., *WORLD PUBLICS WELCOME GLOBAL TRADE—BUT NOT IMMIGRATION* 33, 116 (2007), available at <http://pewglobal.org/reports/pdf/258.pdf>.

115. See *supra* note 31 and accompanying text.

116. See Pew Research Ctr., *supra* note 3, at 1 (“[M]any Americans remain highly critical of homosexuals—and religious belief is a major factor in these attitudes.”).

117. See, e.g., Stanley Kurtz, *The End of Marriage in Scandinavia*, WKLY. STANDARD, Feb. 2, 2004, at 26, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp> (“A majority of children in Sweden and Norway are born out of wedlock. Sixty percent of first-born children in Denmark have unmarried parents. Not coincidentally, these countries have had something close to full gay marriage for a decade or more.”). Kurtz directly challenges the research and conclusions of Eskridge and Spedale, but is unable to draw a causal relationship between Scandinavia’s statistical increase in the number of children born out of wedlock and the legalization of same-sex marriage. Kurtz simply points out the correlation between the two and then jumps to the conclusion that the one must cause the other. *Id.* Republicans in Congress have adopted Kurtz’s reasoning and evidence as support for adopting a Federal Marriage Amendment. See *ESKRIDGE & SPEDALE, supra* note 54, at 8 & n.13.

118. See, e.g., *ESKRIDGE & SPEDALE, supra* note 54, at 131–67 (detailing the beneficial effects same-sex marriage has had in Scandinavia, including longer unions, lower rates of sexually transmitted diseases, and more protection for children); see also *id.* at 171–72 (stating that the empirical trends presented by Stanley Kurtz predated Scandinavian same-sex marriage laws by decades, and therefore no causal relationship is plausible). According to Eskridge and Spedale:

If state-recognized same-sex partnerships ‘contributed’ to the decline of marriage, as the critics maintain, we would expect to see *something more than* falling marriage rates, rising divorce rates, and soaring nonmarital birth rates in Denmark after 1989, Norway after 1993, and Sweden after 1995. Rather, we should expect to see marriage rates falling faster, divorce rates accelerating upward, and a surge in nonmarital birth rates. The data reveal no such trend. Not only do the registered partnership laws in Denmark, Norway, and Sweden not correlate to supernormal plunges in marriage rates and superelevated divorce rates but some of the trends move in the other direction. The 1990s do not even remotely indicate the approach of the “end of marriage”—rather, the institution shows renewed signs of life in the new millennium.

*Id.* at 172 (pointing out also that “[e]ven if marriage rates fell more dramatically and nonmarital rates rose more dramatically after registered partnerships, such a sequence would not establish that the latter caused the former”); see also *id.* at 173–202 (debunking the claims of Kurtz, Senator Santorum, Kathleen Kiernan, Robert Bork, and others regarding the deleterious effects of registered partnership

more credible research indicates that, instead of being harmful, same-sex marriage may actually be beneficial to society.<sup>119</sup> In 2004, the American Anthropological Association issued this statement regarding same-sex marriage:

The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies.<sup>120</sup>

Absent credible data of harm, the secular arguments advanced by opponents of same-sex marriage appear increasingly insubstantial, and religious beliefs become a more plausible basis for such opposition.

Consider the survey from the Pew Research Center,<sup>121</sup> showing that opposition to same-sex marriage increases exponentially with the amount of religious commitment.<sup>122</sup> Among opponents of same-sex marriage, the survey found that the most common reasons given for such opposition are religious and moral.<sup>123</sup> Living in a country with such a large religious population, and given the pervasive quality of religious beliefs in American society, it stands to reason that even those who do not consider themselves religious will be influenced by such beliefs. For that reason, even though secular reasons for opposing same-sex marriage do exist, and even though same-sex marriage is also opposed by twenty-eight percent of those who consider themselves “secular,”<sup>124</sup> it is worth examining the same-sex marriage debate in the religious context, because religion informs the debate even if some of the participants do not consciously realize it.

Professor Eskridge described the arguments against same-sex marriage as being “sedimented”;<sup>125</sup> that is, each successive argument is built upon the foundations of earlier arguments. But there is a further layer of sedimentation beneath that discussed by Eskridge. Like an archaeologist, one can dig deeper

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laws on the state of marriage in Scandinavia).

119. See Press Release, Am. Anthropological Ass’n, Statement on Marriage and the Family from the American Anthropological Association (Feb. 25, 2004), available at [http://www.aaanet.org/press/ma\\_stmt\\_marriage.htm](http://www.aaanet.org/press/ma_stmt_marriage.htm).

120. *Id.*

121. Pew Research Ctr., *supra* note 3.

122. See *supra* notes 24–25 and accompanying text.

123. Pew Research Ctr., *supra* note 3, at 14 (finding that 28% of same-sex marriage opponents justify their opposition with the reasoning that “homosexuality is immoral, a sin, or inconsistent to biblical teaching, and that another 17% say that homosexuality is in conflict with their religious beliefs”).

124. See *id.* at 22. Regardless, 28% is a small number compared to 81% of “White Protestant Evangelicals” who oppose same-sex marriage. See *id.*

125. See Eskridge, *supra* note 61, at 1362–64.

and deeper into the sedimentation of arguments proposed by opponents of same-sex marriage. At the bottom, once all the sedimentation is cleared away, one is left with the most influential belief underpinning all anti-gay rhetoric, the one argument alluded to by the Supreme Court of Minnesota nearly forty years ago in *Baker v. Nelson*:<sup>126</sup> “Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.”<sup>127</sup>

#### IV. THE DIFFICULTIES OF CONSIDERING SAME-SEX MARRIAGE AS A RELIGIOUS ISSUE

Having reached the conclusion that all arguments against same-sex marriage are, at least in part, religious arguments, we must deal with the religious implications of the same-sex marriage debate.<sup>128</sup> As a general rule, governments cannot create laws “respecting an establishment of religion, or prohibiting the free exercise thereof,”<sup>129</sup> but in practice, these rules have been modified and interpreted by over one hundred years of jurisprudence. This Part will show that the same-sex marriage debate presents unique issues that make it difficult to analyze under either the Free Exercise or the Establishment Clause, and that, in fact, neither clause is a plausible route for challenging same-sex marriage bans.

##### A. THE FREE EXERCISE CLAUSE

Can either side of the same-sex marriage debate claim that recognition or prohibition of same-sex marriage constitutes an infringement of the free exercise of religion? While there are some religions that allow same-sex marriage,<sup>130</sup> there are none that mandate it. Free exercise cases generally involve religious beliefs that affect the religion as a whole, such as the day of worship.<sup>131</sup> Same-sex couples are not a religion unto themselves; nor are they all members of the same religion. This makes a free exercise challenge more

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126. See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

127. *Genesis* 2:24 (King James).

128. The judicial decisions which, heretofore, have invalidated statutes that prevent same-sex marriage have done so on equal protection and/or due process grounds. See *In re Marriage Cases*, 43 Cal. 4th 757, 784 (Cal. 2008); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (finding that marriage statute was subject to “strict scrutiny” on equal protection challenge, and ordering the state to justify the discrimination by compelling state interest); *Varnum v. Brien*, No. CV5965, slip op. at 49–50 (Iowa Dist. Ct. Polk County Aug. 30, 2007), *available at* <http://www.domawatch.org/cases/iowa/Varnum%20v.%20Brien/varnum-d-08302007-ia-district.pdf> (stayed awaiting appeal); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding that denial of marriage licenses to same-sex couples lacked rational basis and violated equal protection principles in the Massachusetts constitution). For the purposes of this Note, however, I will focus only on the viability of constitutional arguments based on the religion clauses of the First Amendment.

129. U.S. CONST. amend. I.

130. See *supra* note 27 and accompanying text.

131. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 399–400 (1963) (establishing an exception to the South Carolina Unemployment Compensation Act for Seventh-Day Adventists, who cannot work on Saturday).

difficult to sustain.

Conversely, while there are religions that prohibit same-sex marriage, can opponents of same-sex marriage use the Free Exercise Clause to circumscribe the behavior of those who do not share their religious beliefs? To do so would be the equivalent of kosher Jews making a claim that allowing non-Jews to eat pork is a violation of the Jews' free exercise of religion.

### 1. Comparisons with Polygamy

It is this aspect—the fact that homosexuality is prohibited, rather than endorsed, by religious belief—that makes same-sex marriage difficult to resolve under the Free Exercise Clause. Take, for example, the ubiquitous comparisons with polygamy.<sup>132</sup> The primary difference between polygamy and same-sex marriage, from a free exercise standpoint, is that polygamy is (or was) *mandated* under certain religious beliefs,<sup>133</sup> while same-sex marriage is *prohibited* under certain religious beliefs.

In *Reynolds v. United States*, a case upholding a federal anti-polygamy law against the Mormon Church, the Supreme Court drew a line between religious beliefs, which are untouchable, and religiously motivated actions, which can be regulated.<sup>134</sup> The Court opined that the Free Exercise Clause would not allow for human sacrifice, or ritual immolation, and it found that polygamy, which “fetters the people in stationary despotism,” likewise may be prohibited by Congress.<sup>135</sup> Indeed, religious beliefs aside, the institution of polygamy causes social problems that same-sex marriage does not, creating a greater state interest in prohibiting polygamy than same-sex marriage.<sup>136</sup>

So, thus far, the polygamy comparison is inapposite. To see if a free exercise claim is possible, however, it is necessary to view the debate in light of the current state of free exercise doctrine.

### 2. Free Exercise After *Smith*

In *Employment Division v. Smith*,<sup>137</sup> the Supreme Court crafted a new rule—an incidental burden on the free exercise of religion does not amount to a constitutional violation as long as it is imposed by a “valid and neutral law of

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132. See *supra* notes 105–10 and accompanying text.

133. See *Reynolds v. United States*, 98 U.S. 145, 161, 166–67 (1878) (upholding a federal anti-polygamy statute as applied to Mormons, who had a “duty . . . to practise polygamy” that “was enjoined by different books which the members of said church believed to be of divine origin”).

134. See *id.* at 166.

135. *Id.* at 166–67.

136. See Chatlani, *supra* note 106, at 128–32 (stating that polygamy, unlike same-sex marriage, leads to statutory rape, sexual abuse, incest, poverty, and other ills).

137. *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that a Native American’s right to free exercise was not violated when he was prohibited from using peyote by federal anti-drug laws), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

general applicability.”<sup>138</sup> The Court, per Justice Scalia, held that a violation arises from a neutral law only when it implicates “hybrid rights”—that is, free exercise rights and another constitutional right such as free speech or association.<sup>139</sup>

Congress, unhappy with the outcome of *Smith*, enacted the Religious Freedom Restoration Act (RFRA),<sup>140</sup> which provides that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government can prove that the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that . . . interest.”<sup>141</sup> Not to be outdone, the Supreme Court held RFRA unconstitutional when applied to free exercise claims against a state.<sup>142</sup>

The Court added another layer to free exercise doctrine with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which invalidated a city ordinance directed specifically at the ritual slaughter of animals practiced by Santerians.<sup>143</sup> The Court stated that, “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”<sup>144</sup> In a sense, *Lukumi* is an easy case<sup>145</sup> because, by virtue of being directed specifically (if implicitly) at Santerians, the statute could not possibly have been neutral or generally applicable as required by *Smith*.

To summarize, current Supreme Court free exercise doctrine has a number of different avenues: per RFRA, strict scrutiny is required for any federal legislation that burdens the free exercise of religion; per *Smith*, or the part of *Smith* not abrogated by RFRA, a free exercise violation does not arise out of a “valid and neutral law of general applicability,” unless such a law infringes on more than one constitutional right; and per *Lukumi*, any law directed at a specific religious practice can be deemed a free exercise violation.

Ariel Graff and Mark Strasser have separately suggested that statutes prohibit-

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138. *Id.* at 879–81.

139. *Id.* at 881–82 (citing with approval other Supreme Court decisions that involved violations of the Free Exercise Clause and another constitutional right).

140. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

141. 42 U.S.C. § 2000bb-1.

142. *See* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress exceeded the scope of its enforcement power under the Fourteenth Amendment in applying RFRA to the states).

143. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Santeria is a Pagan religion that combines the African religion of Yoruba with elements of the Roman Catholicism of the Spanish and Portuguese that colonized Africa. *See* MARGOT ADLER, *DRAWING DOWN THE MOON: WITCHES, DRUIDS, GODDESS-WORSHIPPERS, AND OTHER PAGANS IN AMERICA TODAY* 244–45 (1979). As of 2001, approximately 22,000 Americans identified themselves as Santerian. *See* KOSMIN, MAYER & KEYSAR, *supra* note 31, at 13.

144. *Lukumi*, 508 U.S. at 532.

145. The judgment was unanimous, even if the members of the Court did not agree on the exact reasoning. Justices Scalia and Souter filed separate opinions concurring in part and concurring in the judgment, and Justice Blackmun filed an opinion concurring in the judgment. *Id.* at 522.

ing same-sex marriage could indeed give rise to free exercise violations.<sup>146</sup> Marriage is, after all, a religious sacrament.<sup>147</sup> While not required by most (if any) religions, many religious people see marriage as the only true consummation of a relationship between two people. Graff points to a pending resolution by the Committee on Jewish Law and Standards on same-sex marriage as an affirmative religious choice, which, since the publication of Graff's article, has been approved by the Committee.<sup>148</sup> The resolution states that the traditional prohibition on same-sex relationships is superseded by the principle of *kvod habriot*, "our obligation to preserve the human dignity of all people."<sup>149</sup> According to the resolution, the unions of homosexuals are to be celebrated because loving, monogamous relationships are normatively desirable.<sup>150</sup> Homosexual Jews who are unable to gain recognition for their relationships would be unable to participate fully in the Jewish community. Graff points out similar movements within Reconstructionist and Reform Judaism, the United Church of Christ, Unitarian Universalists, and other religious groups as supporting the proposition that "members of many religions sincerely believe that their faiths require the provision of same-sex marriages for their homosexual coreligionists."<sup>151</sup> Strasser additionally states that the Supreme Court has held that "many religions recognize marriage as having spiritual significance; for some . . . therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication."<sup>152</sup>

Does denial of same-sex marriage, then, violate the Free Exercise Clause? Graff says yes, but performs some acrobatic reasoning to reach his conclusion. First, he says that same-sex couples are faced with a choice: being true to themselves, or accepting the multitude of benefits that come with federally sanctioned legal marriage.<sup>153</sup> If their religion includes a "religious imperative to accept their homosexual identity and marry an individual of the same sex," they are legally barred from seeking a legal marriage, and that bar imposes a "constitutionally significant burden" on that couple's free exercise.<sup>154</sup> However,

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146. Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23 (2006); Strasser, *supra* note 27, at 598.

147. See August Lehmkuhl, *Sacrament of Marriage*, in 9 THE CATHOLIC ENCYCLOPEDIA (1910), available at <http://www.newadvent.org/cathen/09707a.htm>.

148. Graff, *supra* note 146, at 35–36; see also RABBIS ELLIOT N. DORFF, DANIEL S. NEVINS & AVRAM I. REISNER, *HOMOSEXUALITY, HUMAN DIGNITY & HALAKHAH: A COMBINED RESPONSUM FOR THE COMMITTEE ON JEWISH LAW AND STANDARDS* (2006), available at [http://www.rabbinicalassembly.org/docs/Dorff\\_Nevins\\_Reisner\\_Final.pdf](http://www.rabbinicalassembly.org/docs/Dorff_Nevins_Reisner_Final.pdf) (approved on December 6, 2006, by a vote of thirteen to twelve).

149. DORFF ET AL., *supra* note 148, at 19. Interestingly, while the resolution acknowledges homosexuals in the Jewish community and recognizes their right to human dignity, it continues to uphold the biblical ban on sex between men. *Id.*

150. *Id.* at 17. Again, the resolution does not provide for full marriage to same-sex couples, but it recognizes and celebrates such relationships. *Id.*

151. See Graff, *supra* note 146, at 37–38.

152. Strasser, *supra* note 27, at 616 (quoting *Turner v. Safley*, 482 U.S. 78, 96 (1987)).

153. Graff, *supra* note 146, at 40–41.

154. *Id.*

this argument is a bit of a stretch, and reads like an equal protection argument dressed up in religious language.

A more plausible argument put forward by Graff grows out of the “hybrid rights” language of *Smith*. Given that the Supreme Court in *Smith* carves out an exception for statutes that impose a burden on free exercise *and* another constitutional right, a defense-of-marriage statute could be challenged on the grounds that it violates the Free Exercise Clause and another constitutional right—Graff suggests due process, equal protection, or the freedom of association.<sup>155</sup>

Strasser suggests that the underdog status of same-sex couples may be their key to a successful free exercise claim, particularly when considering that “the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.”<sup>156</sup> Marriage is a “religious practice,” and same-sex bans interfere with that practice—further, because states have “not yet offered justifications for [their] same-sex marriage bans,” such bans would be subject to strict scrutiny, a test they would be unlikely to pass.<sup>157</sup>

Graff and Strasser may be right, but their conclusions seem overly optimistic. Such arguments have been proposed and rejected before. Robin Joy Shahar’s offer of employment was revoked by the Attorney General of Georgia when he learned of her plans to marry another woman.<sup>158</sup> Shahar sued, claiming that the revocation violated her free exercise and free association rights, as well as her rights to equal protection and substantive due process.<sup>159</sup> Shahar’s free exercise claim centered on the suggestion that the Attorney General’s decision was based on Shahar’s participation in a religious wedding ceremony.<sup>160</sup> The Eleventh Circuit rejected her claims, stating that “[g]iven especially that Plaintiff’s religion requires a woman neither to ‘marry’ another female—even in the case of lesbian couples—nor to marry at all, considerable doubt also exists that she has a constitutionally protected federal right to be ‘married’ to another woman to engage in her religion.”<sup>161</sup> The court did not even consider whether the free exercise claim, when combined with free association, due process, and equal protection, might give rise to a “hybrid rights” claim under *Smith*.

For these reasons, and given the current political climate, it appears unlikely that a free exercise claim would be successful in invalidating a state defense-of-marriage statute. It is possible that, under the stricter scrutiny of RFRA, it might be easier to bring a claim in federal court challenging the constitutionality of the

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155. *Id.* at 43–47.

156. Strasser, *supra* note 27, at 625 (quoting Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O’Connor, J., concurring in the judgment)).

157. *Id.* at 629–30.

158. Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997).

159. *Id.*

160. *Id.* at 1111.

161. *Id.* at 1099.

federal DOMA. Currently, however, no cases appear to be pending on this issue.

#### B. THE ESTABLISHMENT CLAUSE

If government cannot enact legislation that prevents the free exercise of religion, neither can it enact legislation that “establishes” it.<sup>162</sup> The intersection between these two clauses is complicated at best,<sup>163</sup> and the Supreme Court’s current Establishment Clause doctrine is most accurately described as “hopeless disarray.”<sup>164</sup> Currently, there are no fewer than four separate and independent tests that have been applied by the Court to determine whether the Establishment Clause has been violated: the *Lemon* test, the “historical” test, the “endorsement” test, and the “coercion” test. In the interests of completeness, this section will attempt to analyze the same-sex marriage debate in light of all four of these tests.

##### 1. The *Lemon* Test

The Court in *Lemon v. Kurtzman* created a three-prong test for determining whether a statute has violated the Establishment Clause—the statute must pass all three prongs of the test in order to be upheld.<sup>165</sup> “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive entanglement with religion.’”<sup>166</sup> Since its inception, the *Lemon* test has been treated erratically—sometimes followed, sometimes ignored, often vilified.<sup>167</sup>

For an example of how the *Lemon* test has caused flared tempers within the Supreme Court, one need look no further than this evocative statement in Justice Scalia’s opinion concurring in the judgment of *Lamb’s Chapel v. Center Moriches Union Free School District*: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center

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162. See U.S. CONST. amend. I.

163. For example, the existence of military chaplains could be interpreted as an establishment of religion, but the absence of military chaplains in areas where soldiers could not otherwise find particular clergy could be interpreted as a violation of those soldiers’ free exercise rights.

164. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

165. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

166. *Id.* (citations omitted).

167. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 (1993) (dismissing the Court of Appeals’ use of the *Lemon* test and then ignoring the test in ruling that the Establishment Clause was not violated); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (applying the *Lemon* test, but stating that “our cases have also emphasized that [the *Lemon* test] provides ‘no more than [a] helpful signpost’ in dealing with Establishment Clause challenges” (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973))); see also ROGER J. R. LEVESQUE, NOT BY FAITH ALONE: RELIGION, LAW, AND ADOLESCENCE 91–95 (2002) (detailing the erosion of the *Lemon* test).

Moriches Union Free School District.”<sup>168</sup> This statement prompted Justice White, writing for the Court, to reply: “While we are somewhat diverted by Justice Scalia’s evening at the cinema, . . . we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled.”<sup>169</sup> Justice White is correct about one thing: whatever its faults, the *Lemon* test has never been overruled.

Applying the test, we first ask the question: Do statutes prohibiting same-sex marriage have a “secular legislative purpose”? The purported secular purpose must be “genuine, not a sham, and not merely secondary to a religious objective.”<sup>170</sup> Despite this Note’s conclusion that all arguments against same-sex marriage are, primarily, religious arguments,<sup>171</sup> the statutes’ drafters would surely argue all manner of secular purposes, from defending the sanctity of traditional marriage to encouraging responsible child-rearing. The Court is unlikely to dig through the “sedimentation” surrounding those arguments and would simply take them at face value.

Even though the Court has said that a purported secular purpose may not be a “sham,” the cases in which it has rejected secular purposes as pretextual involve topics such as public displays of the Ten Commandments and prayer in schools, topics that clearly involve religion, and for which it would be profoundly difficult to craft a believable secular purpose that would pass scrutiny.<sup>172</sup> In other words, for the Supreme Court to find a secular purpose to be a sham, it must be a bald-faced whopper of a sham. Indeed, sometimes the Court will find a secular purpose in conduct with an obviously religious purpose, as in *Lynch v. Donnelly*, where it held that a city’s Christmas display had a secular purpose because it included a Santa Claus house, a Christmas tree, and a banner that read “SEASONS GREETINGS” alongside the standard crèche.<sup>173</sup> Same-sex marriage does not *directly* implicate religion; its prohibition is a side effect of religious belief. The issue is far enough removed from religion itself that the Court is unlikely to put aside the purported secular arguments and rule that the purpose is purely religious.

Do statutes prohibiting same-sex marriage primarily advance or inhibit reli-

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168. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring in the judgment).

169. *Id.* at 395 n.7 (majority opinion).

170. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (declining to eliminate the secular purpose requirement of the *Lemon* test concerning public displays of the Ten Commandments in courthouses in two Kentucky counties).

171. *See supra* section III.D.

172. *See, e.g., Stone v. Graham*, 449 U.S. 39, 41 (1980) (rejecting the suggestion that the secular purpose of displaying the Ten Commandments in classrooms is that they are “the fundamental legal code of Western Civilization and the Common Law of the United States”); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223–24 (1963) (rejecting the suggestion that the secular purposes of having students read from the King James Bible were “the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature”).

173. *Lynch v. Donnelly*, 464 U.S. 668, 671, 680–81 (1984).

gion? This is a more difficult question. On one hand, same-sex couples come from all possible religious backgrounds, so it would be difficult to argue that preventing them from marrying inhibits a particular religion. But on the other hand, opposition to same-sex marriage is primarily religious, so it can be argued that prohibiting same-sex marriage does have the primary effect of advancing the religious beliefs of those who oppose it.

Do statutes prohibiting same-sex marriage lead to an “excessive entanglement with religion”? Perhaps, but the current state of marriage is already an excessive entanglement with religion, given the connection between the state and clergy in sanctioning a legal marriage relationship. Of course, because participation of clergy is technically optional (one could be married by a Justice of the Peace), the counterargument is that any entanglement with religion is purely voluntary. But when religious beliefs encroach on legal rights—that is, when religious beliefs have dictated that same-sex couples cannot be legally married—that certainly looks like excessive entanglement. The question then is whether courts would see the prohibition of same-sex marriage as creating more entanglement with religion than currently exists.

Regardless, the *Lemon* test has been applied in same-sex marriage cases and rejected. In *Dean v. District of Columbia*, the D.C. Superior Court drew a distinction between advancing religion and “merely being motivated by religious convictions.”<sup>174</sup> The court concluded that “there is no presumption that a law ‘advances religion’ merely because it happens to coincide with the tenets of some or all religions.”<sup>175</sup>

For these reasons, it seems likely that a defense-of-marriage statute would pass the *Lemon* test.

## 2. The Historical Test

The historical test presents the most significant challenge to same-sex marriage advocates. The reasoning is simple: if the practice is one that has been common throughout United States history, it is not a violation of the Establishment Clause.<sup>176</sup> The historical test, first iterated by Chief Justice Burger in 1983 in *Marsh v. Chambers*,<sup>177</sup> has been described as “a free pass to Christian

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174. *Dean v. Dist. of Columbia*, No. 90-13892, 1992 WL 685364, at \*5 (D.C. Super. Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995).

175. *Id.* Mark Strasser points out that, “Such a statement is unobjectionable—murder, for example, is both religiously and legally proscribed.” Strasser, *supra* note 27, at 606. Strasser criticizes the court’s reasoning, however, stating that it could be used to validate behavior that the Supreme Court has found to violate the Establishment Clause. *See id.* at 606–07.

176. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (allowing a Ten Commandments display on the grounds of the Texas State Capitol to remain because it had been there for forty years and thus represented “an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life,” and also restricting *Stone* to Ten Commandments displays in public schools); *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (upholding the practice of opening a legislative session with a prayer, because such practice dated back over 200 years).

177. *Marsh*, 463 U.S. at 792–95.

majorities,” for the simple reason that any practice (particularly a religious practice) which has existed for a long period of time is likely to be one practiced by the majority.<sup>178</sup> But as the United States becomes an increasingly pluralistic country,<sup>179</sup> the status quo is questioned more often on “historical” subjects such as segregation,<sup>180</sup> anti-miscegenation,<sup>181</sup> and abortion rights.<sup>182</sup> Had a variation of Burger’s historical test, which has been applied as recently as 2005,<sup>183</sup> been used in deciding any of those three issues, the outcomes might have been quite different.

However, as it stands, and as Chief Justice Rehnquist articulated the historical test in *Van Orden v. Perry*,<sup>184</sup> opposition to same-sex marriage, whatever its religious origins, has been prevalent throughout American history and may simply be considered an “official acknowledgement . . . of the role of religion in American life.”<sup>185</sup> As such, opposition to same-sex marriage passes the historical test.

### 3. The Endorsement Test

Under the endorsement test, if a reasonable observer would find a particular practice to be an endorsement of religion, that practice violates the Establishment Clause.<sup>186</sup> The test was suggested by Justice O’Connor in her concurrence to *Lynch v. Donnelly*.<sup>187</sup> As mentioned earlier,<sup>188</sup> the majority in *Lynch* applied the *Lemon* test and found that the holiday display at issue had a secular purpose. Justice O’Connor, however, described the *Lemon* test as unclear and suggested that focusing instead on “institutional entanglement and on endorsement or disapproval of religion” would clarify the doctrine.<sup>189</sup>

With its focus on effect rather than history, the endorsement test has the opposite effect of the historical test. “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of

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178. See Wilson, *supra* note 111, at 611.

179. See KOSMIN, MAYER & KEYSAR, *supra* note 31, at 9–10, 13 (finding, for example, that “there are more than three times as many Hindus in the U.S. today as there were in 1990,” that the Christian percentage of the population declined from 86% in 1990 to 77% in 2001, and that those identifying as non-religious increased from 8.2% to 14.1% over the same time period).

180. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

181. See *Loving v. Virginia*, 388 U.S. 1 (1967).

182. See *Roe v. Wade*, 410 U.S. 113 (1973).

183. See *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

184. *Id.* at 686 (describing the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life”).

185. *Id.*

186. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

187. *Id.* The endorsement test was later validated by the plurality opinion (the relevant portion of which was supported by five Justices) in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989).

188. See *supra* text accompanying notes 172–73.

189. *Lynch*, 465 U.S. at 688–89 (O’Connor, J., concurring).

the political community.”<sup>190</sup> As such, the endorsement test is more effective at protecting the rights of religious minorities (or, indeed, those who are non-religious) rather than religious majorities.

Under the endorsement test, the most problematic question for same-sex marriage advocates, that of whether the practice has a secular purpose, is removed. The analysis of entanglement is the same as under the *Lemon* test. So that leaves us with the question of whether a ban on same-sex marriage can be considered, by an objective observer, an “endorsement” of religion. The problem with answering this question is that it is almost impossible to define what would constitute a reasonable observer for these purposes. From whose point of view should the level of endorsement be measured? A reasonable gay person who wishes to be married? A reasonable Christian whose beliefs are so ingrained that they feel more like natural law than religion? Where religion is concerned, everyone has a bias—it is safe to say that where religion is concerned, there are no reasonable observers. Therefore, the endorsement test is vulnerable to manipulation by judges based on how they would characterize a reasonable observer.

Having said that, it is difficult to make a case that same-sex marriage bans endorse religion. While this Note has shown that the reasoning behind such bans is almost entirely religious, there is no language in the federal DOMA or in state defense-of-marriage laws implicating religion or religious beliefs. Additionally, given the various religions that disapprove of same-sex marriage, and the disagreement within certain religious groups on the issue, it would be difficult to successfully argue that same-sex marriage bans endorse a *particular* religion, or even religion in general. Regardless, the question is probably moot now that the endorsement test’s greatest supporter, Justice O’Connor, has retired from the bench.

#### 4. The Coercion Test

No sooner was the endorsement test codified than it was criticized. In his partial concurrence/partial dissent with the judgment in *County of Allegheny v. ACLU*, Justice Kennedy stated that the endorsement test was “flawed in its fundamentals and unworkable in practice,” and he claimed that the test would further muddle, rather than clarify, Establishment Clause doctrine.<sup>191</sup> Instead,

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190. *Id.* at 688.

191. *Allegheny*, 492 U.S. at 668–69 (Kennedy, J., concurring in the judgment in part and dissenting in part). To see just how confusing and bizarre the Court’s Establishment Clause doctrine has become, and how each Justice has very different and particular opinions about what tests should be applied and how, one need look no further than the syllabus to *Allegheny*:

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O’CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O’CONNOR, JJ., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O’CONNOR, J., joined, and an opinion with

Justice Kennedy suggested what he believed to be a more basic rule: “government may not coerce anyone to support or participate in any religion or its exercise.”<sup>192</sup>

On a surface level, banning same-sex marriage does not coerce anyone to participate in any religion or its exercise. Same-sex couples are not forced into church services by such laws (nor could they be). But it could be argued that, by being forbidden to marry, same-sex couples are coerced into supporting a particular religion, or at least a particular religious belief—the belief that homosexuality is a sin. At the very least, they are coerced into the action of remaining single by the religious beliefs of others.

At least one court has addressed coercion in the same-sex marriage context, and it did not find these arguments convincing. The D.C. Superior Court in *Dean v. District of Columbia*, discussed *supra* in the context of the *Lemon* test,<sup>193</sup> found that “[n]o ‘religion’ is advanced by a refusal to [recognize same-sex marriages], since said refusal applies equally to same-sex applicants who are atheists, agnostics or believers, and no one thereby is coerced in the slightest to alter his or her convictions.”<sup>194</sup>

As it stands, neither the coercion test, nor any of the three other tests, provides a clear path for arguing that same-sex marriage bans violate the Establishment Clause. The same-sex marriage debate exhibits some unusual qualities—opposition to same-sex marriage is rooted in religious belief without ever mentioning religion directly; same-sex marriage is a practice prohibited by, rather than mandated by, religious beliefs; and antipathy towards same-sex marriage exists across various religions. Because of these qualities, it appears unlikely, despite the evidence and common sense indicating that opposition to same-sex marriage is in essence the imposition of a particularly religious belief on those who do not share that belief, that same-sex marriage bans could be successfully challenged under either of the religion clauses of the First Amendment.

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respect to Part VI. O’CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, post, p. 3117. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, post, p. 3124. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 3129. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C.J., and WHITE and SCALIA, JJ., joined, post, p. 3134.

*Id.* at 577 (syllabus).

192. *Id.* at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part). The coercion test does not appear to have been endorsed by a majority opinion of the Court, but has nonetheless been used in conjunction with other tests.

193. *Dean* was discussed *supra* notes 173–75 and accompanying text. Most modern Establishment Clause cases, especially those outside of the Supreme Court, utilize a combination of the four tests discussed in this Note, which explains why *Dean* addressed the *Lemon* test while also discussing endorsement, history, and coercion.

194. *Dean v. Dist. of Columbia*, No. 90-13892, 1992 WL 685364, at \*7 (D.C. Super. Ct. June 2, 1992), *aff’d*, 653 A.2d 307 (D.C. 1995).

## V. THE SOLUTION

The same-sex marriage debate is at an impasse, and no one solution will satisfy all parties. “Marriage” is a term with a great number of implications—religious, legal, social—and therefore many disparate groups use the term to represent certain interests. Allowing any particular group to lay claim to marriage, and thereby define it according to their interest and theirs alone, would be simply unfair. Lots of people want to be married—be they religious, gay, both, or neither. One term seems too narrow to encompass such a large number of interests, but creating separate terms for separate people (such as “marriage” and “civil union”) implies that one group is better than another. However, some qualification of the term is possible.

The solution that meets the interests of the largest number of people is dividing marriage into two related concepts—civil marriage and religious marriage. This is not a new suggestion<sup>195</sup>—rather, this Note endeavors to take the current system one step further. Currently, a couple may get a marriage “solemnized” (that is, recognized by the state) by either a clergyperson or a magistrate (that is, either a religious figure or a legal figure).<sup>196</sup> Separating religious and civil marriage would remove the interplay between church and state that has led to the disenfranchisement of a group of people solely because their unions are not endorsed by the majority religion. Conversely, separating religious and civil marriage would protect religious groups’ rights to maintain complete control over whose unions they choose to officiate or sanction within their congregations.

States have begun to experiment with this sort of solution. In January 2008, forty-nine Maryland state legislators introduced the Religious Freedom and Civil Marriage Protection Act,<sup>197</sup> which would recognize as valid a marriage between “two individuals who are not otherwise prohibited from marrying,” but would exempt religious officials from being required to solemnize marriages that conflict with their religious beliefs.<sup>198</sup> While this partial separation of civil and religious marriage is clearly a step in the right direction, it may not be enough to remove religious influence from the legal implications of marriage.

Before detailing what the ideal separation of civil and religious marriage

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195. See, e.g., Wilson, *supra* note 111, at 677 (stating that “[t]he alternate course of action suggested here is to deliberately extricate civil marriage from religious marriage,” but not going into detail about what that means or entails). But cf. Daniel Avila, *To Wed & Let Wed? The Intrusive Impact on Dissenting Religious Belief & Practices Created by Same-Sex Marriages*, 38 NEW ENG. L. REV. 621, 621 (2004) (presenting the argument that “marriage will be entirely divided into two subsets: civil and religious,” but suggesting that this division will not prevent state intrusion into the practices of religious groups).

196. See, e.g., CAL. FAM. CODE § 400 (West 2007); N.Y. DOM. REL. LAW § 12 (McKinney 2007).

197. S.B. 290, 2008 Leg., 425th Sess. (Md. 2008); see also Lisa Rein, *In a Nod to Britt, Democrats Push Same-Sex Marriage as Civil Rights Issue*, WASH. POST, Jan. 26, 2008, at B04. The headline refers to State Senator Gwendolyn Britt, who had planned to be a lead sponsor of the bill, but who died on January 12, 2008. *Id.*

198. Md. S.B. 290.

would entail, it is helpful to first discuss why civil unions, viewed by many as a reasonable compromise between advocates and opponents of same-sex marriage, are not sufficient to resolve the debate.

#### A. WHY NOT CIVIL UNIONS?

Civil unions are the epitome of “separate but equal.” Same-sex marriage advocates are supposed to be mollified by receiving similar benefits under a different name, but the very fact of it having a different name implies a difference in status. Mark Strasser states that the “separate but equal” status of civil unions communicates at least two messages:

First, it suggests that same-sex relationships are not as good as different-sex relationships . . . . Second, it suggests that same-sex unions are somehow an affront to religious principles, notwithstanding that some religions recognize such unions. The very term “civil union” suggests that while the union may be recognized by the state, it certainly should not be recognized as having any spiritual significance. Indeed, the language describing the process by which these unions are recognized says a great deal, since different-sex couples’ marriages are “solemnized” and same-sex couples’ civil unions are “certified.”<sup>199</sup>

Professor Robin West states that two harms are caused by prohibiting same-sex couples from marrying: “harms of exclusion” and “harms of legitimation.”<sup>200</sup> Harms of exclusion are those caused by being shut out of the legal benefits of marriage—the difficulties encountered by a non-biological mother in adopting the child her partner has given birth to, for example.<sup>201</sup> These harms are, or should be, solved by civil unions, which purport to provide all of the legal protections of marriage.<sup>202</sup> It is the harms of legitimation that are not served by civil unions. “The state sanction of a married couple’s union sends a powerful message to the couple’s community, of the legitimacy, orderliness, and well-being, of their private lives, and the absence of that message can be sorely felt.”<sup>203</sup>

Perhaps the strongest argument against civil unions comes from conservative columnist Andrew Sullivan, in a column he wrote for TIME Magazine. “The

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199. Strasser, *supra* note 27, at 628–29.

200. See WEST, *supra* note 96, at 77–79.

201. *Id.* at 77, 143–45 (“That the state, through over a thousand laws, makes it somewhat easier for married partners, but not for unmarried partners, to plan responsibly for risk, is a major difference in the treatment of couples who share with their straight and traditionally married friends and neighbors a common desire to engage in responsible caregiving.”).

202. The suggestion that civil unions provide *all* the legal protections of marriage is, of course, not true, in that civil unions only guarantee *state* rights. A couple with a civil union cannot file a joint federal tax return, and cannot have their union recognized by other states. Of course, same-sex couples married in Massachusetts have the same problems.

203. WEST, *supra* note 96, at 145.

most important day of your life,” writes Sullivan, discussing the values instilled in him as a child, “was not graduation from college or your first day of work or a raise or even your first house. The most important day of your life was when you got married.”<sup>204</sup> He continues:

When people talk about gay marriage, they miss the point. This isn't about gay marriage. It's about marriage. It's about family. It's about love. It isn't about religion. It's about civil marriage licenses. Churches can and should have the right to say no to marriage for gays in their congregations, just as Catholics say no to divorce, but divorce is still a civil option. These family values are not options for a happy and stable life. They are necessities. Putting gay relationships in some other category—civil unions, domestic partnerships, whatever—may alleviate real human needs, but by their very euphemism, by their very separateness, they actually build a wall between gay people and their families. They put back the barrier many of us have spent a lifetime trying to erase.<sup>205</sup>

Sullivan's message, personal and impassioned, conveys the humanness of the same-sex marriage debate in a way that no amount of statistics or arguments can.

#### B. CIVIL MARRIAGE

Viewing marriage as a civil institution is by no means a new concept. Consider this passage from Reverend William Bradford's *Of Plymouth Plantation*:

May 12 was the first marriage in this place which, according to the laudable custom of the Low Countries, in which they had lived, was thought most requisite to be performed by the magistrate, as being a civil thing, upon which many questions about inheritances do depend, with other things most proper to their cognizance and most consonant to the scriptures (Ruth iv) and nowhere found in the Gospel to be laid on the ministers as part of their office.<sup>206</sup>

A new civil marriage paradigm would be largely similar to what currently exists, except without the use of religious beliefs in determining who can and who cannot receive a civil marriage. If opposition to same-sex marriage is purely religious in nature, and if we divide religious marriage away from civil marriage, there is no reason for religious beliefs to impact eligibility at all.

A civil marriage is, essentially, the recognition of a union by the State. Upon

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204. Andrew Sullivan, *Why the M Word Matters to Me*, TIME, Feb. 8, 2004, at 104, available at <http://www.time.com/time/magazine/article/0,9171,1101040216-588877,00.html>.

205. *Id.*

206. WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION 1620–1647*, at 86 (Alfred A. Knopf 1952) (1856).

receiving a civil marriage, the couple is entitled to all rights and privileges afforded to married couples under state or federal law, *and* is entitled to have those rights recognized in all fifty states. A civil marriage (divorced from all religious significance) entitles a couple to all rights of marriage under law, and as such should be available to any two consenting adults, heterosexual or homosexual.

#### C. RELIGIOUS MARRIAGE

Religious marriage would serve the opposite purpose. Religious marriage is the sacrament, the ritual, standing before God (or whomever) and declaring love for one another. This is a vital part of the process for many people, and should not be demeaned. By dividing civil and religious marriage, religious groups would have the power (as they do now) to refuse to officiate any marriages contrary to their religious beliefs, or to accept those couples into their congregations. Religious groups already have this right—divorced people cannot be married in a Catholic church; interfaith couples cannot be married in an Orthodox synagogue. Further, some religious groups already recognize this separation of the religious from the civil—in some sects of Judaism, a couple wishing to be divorced must have their marriage terminated both by a civil court and by obtaining a *get*, the Jewish document of divorce.<sup>207</sup> Separating religious marriage from civil marriage would not affect the separations that already exist.

This separation would, however, have an added benefit. While those religious organizations that prohibit same-sex marriage could continue to exclude same-sex couples, religious organizations that support same-sex marriage would be able to officiate such ceremonies knowing that the marriage would be fully recognized under the law. To protect the rights of religious organizations, while also assuring equal protection under the law to same-sex couples, the current division between civil and religious marriage needs to be more sharply delineated—so that the church and the state have as little influence over each other's practices as possible.

#### D. IMPLEMENTATION

One problem presented by this solution is that of implementation. It is reasonable to assume that most people are likely to seek both a civil marriage *and* a religious marriage. Is it sensible, then, to force them to have separate ceremonies led by clergy and magistrate? Such inefficiency is likely to turn people off of the proposed separation of civil and religious marriage.

Another possible implementation would be to allow religious leaders to continue to serve as quasi-state actors and solemnize a civil marriage on behalf

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207. See WAYNE D. DOSICK, *LIVING JUDAISM: THE COMPLETE GUIDE TO JEWISH BELIEF, TRADITION, AND PRACTICE* 301–02 (1995) (“[A] civil court cannot terminate the Jewish aspect of the marriage, so even after a civil divorce, the Jewish aspect of the marriage is still intact.”). I am grateful to my mother, Dr. Mindy Schuman, for suggesting this point.

of the state. While this is a more efficient solution, it has its obvious drawbacks. If we are to separate the religious and civil portions of marriage entirely, that separation is undermined by granting religious leaders special authority in this one area of law. After all, one wouldn't expect to find a rabbi performing restaurant inspections for the health department, so why should a religious leader have the power to grant a civil marriage?<sup>208</sup>

A better solution would be to make the civil marriage self-certifying. As the law currently stands, every state requires couples to obtain a marriage license in order to legalize a marriage.<sup>209</sup> In most cases, that license must be solemnized by either a religious leader or a civil judge.<sup>210</sup> Under the new separation, obtaining a marriage license (witnessed by the court clerk) would be all that is necessary to obtain a civil marriage. Thus, couples would have the option of obtaining a separate religious marriage from a religious leader—no efficiency is lost, and the status quo is maintained for a large number of people. Also, the process is made easier for those who do not wish to obtain a religious marriage, as they would no longer have to seek out a justice of the peace in order to be considered married by the state. This solution prevents the redundancy that would occur if couples were required to have separate religious and civil officials ceremonialize their respective religious and civil marriages, and it would more easily allow same-sex couples both to receive recognition from the state, and to obtain a religious marriage at any house of worship that is willing to have them.

The separation of civil marriage and religious marriage satisfies (at least to a certain extent) everyone's interests. Religious same-sex marriage opponents would be free to attend congregations where such marriages are neither officiated nor endorsed. Same-sex couples could receive the sacrament of religious marriage from a congregation that supported them, and then also be entitled to all the legal rights of civil marriage. Presumably this is not everyone's ideal solution<sup>211</sup>—same-sex marriage opponents would surely prefer no sanctioning of same-sex marriage at all—but it does satisfy to a certain degree the interests of all parties. It is a compromise more fitting than civil unions—same-sex couples will be able to have their marriages recognized by the state, with all the benefits that entails, while opponents of same-sex marriage will maintain control over the beliefs and practices of their own congregations. It is less than ideal only in the sense that neither side can force its opinions on the other—same-sex marriage opponents cannot use religion to invalidate same-sex marriage, and conversely, same-sex marriage proponents cannot force religious organizations to perform or recognize such unions—but it serves the primary interests of

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208. I am grateful to Professor Steven Goldberg for this fantastic analogy.

209. See US Marriage Laws, <http://usmarriagelaws.com> (last visited Dec. 19, 2007).

210. See *supra* note 196 and accompanying text.

211. See Avila, *supra* note 195, at 621–26 (suggesting that allowing same-sex couples access to civil marriage over the objections of religious groups would expose those religious groups to potential charges of discrimination in employment law situations).

each side very well.

Even if this solution is not ideal for same-sex marriage opponents, it would be more beneficial in the long run for religious opponents of same-sex marriage to embrace this compromise. If the debate is settled through the judicial system, religion is likely to lose out entirely. In May 2008 alone, same-sex couples made great strides towards marriage equality through judicial and executive means in California and New York<sup>212</sup>—the actions of these two influential states is sure to change to landscape of same-sex marriage in the United States. And, as Congress stands poised to enact the first legislation protecting people from discrimination for reasons of sexual orientation,<sup>213</sup> equal rights for homosexuals appear to be on the horizon. By recognizing the merits of keeping the religious and civil arms of marriage separate, religious groups can take an active role in the move towards equal rights.

Religious groups may even embrace this compromise for moral reasons. Despite opponents' claims of "special rights," same-sex couples are seeking the sort of lifestyle that is put forward by religious people as morally desirable—marriage, family, children, monogamy. By taking an active role in separating religion from civil marriage, religious groups can make the argument that their value agenda is good for *everyone*.

#### CONCLUSION

The same-sex marriage debate will not go away overnight. Nor does this Note argue that the solution proposed here is a foregone conclusion, or even necessarily feasible. Religious groups should not be expected to agree to such a suggestion easily, given the power they have historically exercised over many aspects of government. Rather, it seems likely that if and when the same-sex marriage debate is ultimately settled, it will be through the mechanism of the courts, ruling, as *Goodridge* did in Massachusetts, that same-sex marriage bans violate fundamental principles of equal protection under law without ever reaching a religious issue.

The purpose of this Note, rather, is to explore how pervasive religious beliefs are in the same-sex marriage debate—how those beliefs are inextricable from the secular arguments used to oppose same-sex marriage, and indeed, from marriage policy itself throughout history. This Note also points out the limitations of the judicial system's religious freedom doctrines—how a practice, primarily motivated by religious beliefs, can nevertheless be insulated from challenges of being an unconstitutional establishment of religion or an unconstitutional infringement of free exercise, merely by being so integral to the culture and history of the majority that they are willing to use any forms of cognitive dissonance to justify it.

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212. See *supra* notes 14–18 and accompanying text.

213. See *supra* note 2 and accompanying text.

The solution proposed is not a quick fix, or an easy fix, or a comprehensive fix. It is a suggestion of how best to settle these religious issues in a way that is most fair to everyone. While one may personally support same-sex marriage, that does not give one the right to denigrate the sincerely held religious beliefs of another who does not support same-sex marriage. And vice versa. Dividing civil marriage from religious marriage, keeping the church out of the state and the state out of the church, is the best method for preventing injustice to either side.

This compromise generates, at least to some extent, a positive outcome for everyone involved. Religious groups maintain their deeply held beliefs, while taking an active role in promoting an agenda of marriage and the family as morally desirable. Same-sex couples get the marriage, the normalcy, and the recognition they have sought for decades. And the First Amendment of the Constitution, with its provisions for freedom of religion and freedom *from* religion, gets the respect it truly deserves.