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# The Same-Sex Marriage Prohibition: Religious Morality, Social Science, and the Establishment Clause

Céline Abramschmitt\*

## I. INTRODUCTION

The issue addressed is narrowly focused on whether the states that prohibit same-sex marriage within their respective jurisdictions properly separate the interests of church and state so as to pass Constitutional muster under current Establishment Clause jurisprudence.<sup>1</sup> The development of marriage laws in the United States is deeply rooted in Judeo-Christian ideals.<sup>2</sup> It is this history that prompts the question whether the laws prohibiting same-sex marriage are constitutional, or whether such laws violate the separation of church and state by endorsing and promoting the Judeo-Christian ideals that are at their foundation. In other words, the question is whether the reason for the prohibition of same-sex marriage continues to lie in the fact

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<sup>1</sup> Whether the states should, or would, recognize foreign or out-of-state same-sex marriages under the Full Faith and Credit Clause, U.S. CONST. art. IV § 1, is not within the scope of this Comment. Nor are domestic partnerships, since they are not considered to be the same as marriage and arguably present a “separate but equal” issue – which could be another paper in its entirety. See *In re* Coordination Proceeding, Special Title Rule 1550(c), No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005) (consolidating six marriage cases, the Court stated that “[t]he idea of marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal”); and, more recently, *In re* Marriage Cases, S147999 (Cal. Sup. Ct., May 15, 2008) (in this most recent grounds breaking case, the Supreme Court of California declares marriage statute banning same-sex marriages unconstitutional, in part, on grounds use of separate designation of “domestic partnership” to grant same-sex couples marriage-like rights violates equal protection principles).

<sup>2</sup> See *infra* section II-A.

that Judeo-Christianity does not approve of same-sex marriage. Or, whether the states have established valid secular reasons for prohibiting same-sex marriage and, therefore, are not violating the separation of church and state since a valid secular purpose does not endorse any particular religion, but rather serves a valid governmental purpose.

Whether the states' various bases for prohibiting same-sex marriage are valid secular bases<sup>3</sup> is examined in part through the lens of social science scholarship, which addresses social issues and human behavior, such as psychology and sociology. The social sciences focus on evaluating and understanding human behavior and social functioning. This scholarly insight can prove helpful in evaluating the validity of legal assumptions that underlie the various bases used to justify prohibiting same-sex marriage. Other questions arise such as whether the roots of marriage being Judeo-Christian in origin implies that any aspect of marriage legislation is an endorsement of Judeo-Christian ideology; and, whether the absence of a valid secular basis automatically implies an endorsement of religious ideals by the government. These preliminary questions are addressed in the text as well.

First, the history of marriage in the United States as Judeo-Christian in origin is established: Older case law exemplifies the impact of marriage's Judeo-Christian origins once had on judicial decisions. More recent cases, however, show the continued impact of Judeo-Christian ideology in decisions that support the prohibition of same-sex marriage. This is followed by a discussion on whether the prohibition of same-sex marriage violates the United States Constitution's Establishment Clause, which states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."<sup>4</sup> A discussion of current Establishment Clause jurisprudence in the United States in regard to the separation of church and state follows.

An enumeration of the various bases used by the states to justify and defend a same-sex marriage prohibition is included. Each of the 'secular bases' for prohibiting same-sex marriage is examined individually, starting with a summary of the rationale for the basis provided in the statutes and case law. This is followed by a discussion of the scholarship in the fields dealing with human behavior and social functioning which reviews arguments for and against each basis, and includes an analysis of the validity of the basis as a non-religious secular legislative ground for the prohibition of same-sex marriage. A com-

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<sup>3</sup> "Secular basis" is used to denote a basis that is neither bound by, nor attached to, religious rule.

<sup>4</sup> U.S. CONST. amend. I.

mentary on same-sex marriage and the Establishment Clause ensues, followed by a discussion on moralist philosophy and a conclusion.

## II. HISTORY OF MARRIAGE IN THE UNITED STATES

### A. Marriage and the Ecclesiastical Law

A study of the roots of marriage in the United States reveals an institution that is thickly clothed in Judeo-Christian ideals. Marriage, as defined in the common law, has its origins in canon law and passed to the United States through the early settlers.<sup>5</sup> That the origin of marriage in this country is rooted in Christian ideals can be seen in early case law, where courts openly endorsed the institution of marriage as a Christian institution. In 1840, for example,<sup>6</sup> the Supreme Court of Maine issued the *Opinion of the Justices* to address which political branch held the power to grant divorces.<sup>7</sup> In their answer, the Justices stated “[m]arriage is usually and justly regarded in *Christendom as an institution of divine origin, and regulated to a certain extent, by the divine command.*”<sup>8</sup> The Justices stated that the Legislature may regulate the institution “in all those numerous incidents *wherein the divine law is silent.*”<sup>9</sup> “Divine law,” that is, as seen in a Judeo-Christian perspective. The implication of the court in this 1840 case is that divine law, as defined by Christianity, is the primary source for defining marriage.

Similarly, in a case that addressed the validity of a non-solemnized marriage in 1905, the Supreme Court of Oklahoma noted in its decision that

[t]he history of the law of marriage in this country traces its origins back to the ancient canon law, which consisted of the decrees of the various Popes and was the basis of the matrimonial law in England, and has been recognized there ever since the establishment of Christianity in the year 605.<sup>10</sup>

This expressly recognized that marriage in the United States was originally defined by the canon law. And, since the canon laws “were a part of the common law of England, and were brought to this country

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<sup>5</sup> See *infra* notes 7-20 and accompanying text.

<sup>6</sup> For more examples of courts recognizing and acknowledging the origins of marriage from Canon Law, see *Reaves v. Reaves*, 82 P. 490, 494 (Okla. Terr. 1905); *Rosengarten v. Downes*, 802 A. 2d 170, 177-78 (Conn. App. Ct. 2002); *Goodridge v. Dep’t of Public Health*, No. 20011647A, 2002 WL 1299135, at \*4 (Mass. Super. Ct. 2002).

<sup>7</sup> *In re Opinion of the Justices*, 1840 WL 2770, at \*1.

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> *Reaves*, 82 P. at 494.

by our ancestors, then it must follow that these laws have become, and are now, a part of the laws of [the states].”<sup>11</sup>

The canon law was founded on biblical principles<sup>12</sup> and on the customs of the Catholic Church, “which was always recognized as a source of law and which down to the end of the 18th century was the constituent element of the Common Law.”<sup>13</sup> England, which incorporated the canon law into their Common Law, effectively made Christianity the law of the land.<sup>14</sup> Not only did English common law principles incorporate ecclesiastical law,<sup>15</sup> another name used to refer to the canon law, but also the issue of *who* may marry was generally left to ecclesiastical courts.<sup>16</sup> Since the canon law and the ecclesiastical courts defined marriage as a monogamous relationship being between one man and one woman with gender specific responsibilities, including the bearing of children, same-sex marriage was effectively excluded by definition.<sup>17</sup>

Since history shows that courts in the United States once recognized canon law as an authoritative source for defining marriage,<sup>18</sup> judicial decisions regarding marriage were affected and at times driven by Judeo-Christian moral values,<sup>19</sup> as is shown in the discussion above. More recently, not only have legislators expressed their religious beliefs that same-sex marriage is against Judeo-Christian tradition, they have even voted in favor of a prohibition of same-sex marriage at the federal level based on such beliefs.<sup>20</sup>

<sup>11</sup> *Id.*

<sup>12</sup> *Ramon v. Ramon*, 34 N.Y.S. 2d 100, 108 (N.Y. Fam. Ct. 1942).

<sup>13</sup> *Id.* (citing, SIR WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW (1938)).

<sup>14</sup> *Id.* (citing, NEW INTERNATIONAL ENCYCLOPEDIA, Vol. IV, 2nd Ed. (1917)).

<sup>15</sup> *Goodridge*, 14 Mass. L. Rptr. at ---, 2002 WL 1299135, at \*4.

<sup>16</sup> *Rosengarten v. Downes*, 802 A. 2d 170, 177-78 (Conn. App. Ct. 2002) (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 543 (5<sup>th</sup> Ed. 1773)).

<sup>17</sup> *Goodridge*, 14 Mass. L. Rptr. at ---, 2002 WL 1299135, at \*4.

<sup>18</sup> See *supra* notes 7-16 and accompanying text. For further discussion on the influence of religion on marriage in the United States, see Charles J. Reid, Jr., *The Unavoidable Influence of Religion Upon the Law of Marriage*, 23 QLR 493 (2004).

<sup>19</sup> The term “moral values” refers to ‘principles of right and wrong that drive the standard of behavior.’

<sup>20</sup> Alec Walen, *The “Defense of Marriage Act” and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619, 628 (1997) (member of Congress described marriage as a “covenant established by God” when voting on the federal Defense of Marriage Act) (quoting 142 CONG. REC. H7442 (daily ed. July 11, 1996) (statement of Rep. Hutchinson); 142 CONG. REC. H7441 (daily ed. July, 11, 1996) (statement of Rep. Canady) (commenting on same-sex marriage being against “our Judeo-Christian moral tradition” when voting on the federal Defense of Marriage Act)).

## B. Current State of the Law on Same-Sex Marriage

In the United States, the majority of the states<sup>21</sup> have enacted statutes expressly prohibiting same-sex marriage.<sup>22</sup> While there are a few

<sup>21</sup> The District of Columbia is included as a “state” for the purposes of this Comment.

<sup>22</sup> States that have laws expressly prohibiting same-sex marriage include: ALA. CODE § 30-1-19 (2006) (“Marriage . . . between persons of the same sex prohibited.”); ALASKA STAT. § 25.05.011 (2006) (“[M]arriage . . . by persons of the same sex . . . is void in this state . . . . A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.”); ARIZ. REV. STAT. ANN. §25-101 (West, Westlaw through End of Forty Seventh Legislature, First Regular Sess. 2005) (“Marriage between persons of same sex is void and prohibited.”); ARK. CODE ANN. § 9-11-109 (West, Westlaw through 2005 Sess.) (“Same sex marriage void”); CAL. FAM. CODE § 308.5 (West, Westlaw through 2005 Reg. Sess.) (“Only marriage between a man and a woman is valid or recognized . . . .”), *but see In re Marriage Cases*, S147999 (Cal. Sup. Ct., May 15, 2008) (recently held statute unconstitutional); COLO. REV. STAT. § 14-2-104 (2001) (“[Marriage] is only between one man and one woman.”); DEL. CODE ANN. Tit. 13, § 101a (2006) (“[M]arriage is prohibited and void between . . . persons of the same gender.”); FLA. STAT. ANN. § 741.212 (2006) (“Marriages between persons of the same sex . . . are not recognized for any purpose in this State.”); GA. CODE ANN. § 19-3-3.1 (2004) (“Same sex marriages prohibited”); HAW. REV. STAT. ANN. § 572-1 (2006) (“[M]arriage contract . . . only between a man and a woman . . . .”); IDAHO CODE ANN. § 32-209 (2004) (“Marriages that violate the public policy of this state include . . . same-sex marriages . . . .”); 750 ILL. COMP. STAT. 5/212 (2001) (“Prohibited Marriages . . . a marriage between 2 individuals of the same sex.”); IND. CODE ANN. § 31-11-1-1 (2002) (“Same sex marriages prohibited”); IOWA CODE ANN. § 595.2 (2006) (“Only a marriage between a male and a female is valid.”); KAN. STAT. ANN. § 23-101 (2003) (“[M]arriage contract . . . between two parties . . . of the opposite sex. All other marriages . . . are void . . . .”); KY. REV. STAT. ANN. § 402.020 (2006) (“Other prohibited marriages . . . Between members of the same sex . . . .”); LA. CIV. CODE ANN. art. 89 (2006) (“Persons of the same sex may not contract marriage . . . .”); ME. REV. STAT. ANN. tit. 19-A-2, § 23-I-701 (2006) (“Same sex marriage prohibited.”); MD. CODE ANN. FAM. LAW, [Marriage] § 2-201 (2006) (“Only a marriage between a man and a woman is valid in this State.”); MICH. COMP. LAWS ANN. § 551.1.1 (2006) (“[M]arriage . . . between individuals of the same sex is invalid in this state.”); MINN. STAT. ANN. § 517.01 (2007) (“Lawful marriage may be contracted only between persons of the opposite sex . . . Prohibited marriages . . . between persons of the same sex”); MISS. CODE ANN. § 93-1-1.2 (2006) (“[M]arriage between persons of the same gender is prohibited and null and void . . . .”); MO. STAT. ANN. § 451.022.2 (2007) (“Any purported marriage not between a man and a woman is invalid.”); MONT. CODE ANN. § 40-1-401 (2005) (“[M]arriages . . . prohibited . . . marriage between persons of the same sex.”); NEB. REV. STAT. ANN. § 42-1 (2001) (Cross references NEB. CONST. art. I, § 29, where marriage is void and prohibited by constitutional amendment); Nev. REV. STAT. ANN. § 122.020.1 (2006) (“A male and a female person . . . may be joined in marriage.”); N.H. REV. STAT. ANN. § 457:1 and 457:2 (2006) (“No man shall marry . . . any other man. . . . No woman shall marry . . . any other woman.”); N.C. GEN. STAT. ANN. § 51-1.2 (2006) (“Marriages between persons of the same gender not valid”); N.D. CENT. CODE § 14-03-01 (2005) (“Marriage is . . . between one man and one woman . . . . A spouse refers only to a person of the opposite sex . . . .”); OHIO REV. CODE ANN. § 3101.01 (C) (1) (2006) (“Any marriage between persons of the same sex is against the strong public policy of this state.”); OKLA. STAT. ANN. tit. 43, § 3.1 (2006) (“Recognition of marriage between persons of same gender prohibited”); OR. REV. STAT. ANN. § 106.010 (2004) (although the statutory text appears ambiguous, referring to “Marriage [as] a civil contract entered into in person by males and females . . .,” the court in *Heisler v. Heisler*, 55 P.2d 727 (Or. 1936), held that “‘marriage’ is a civil contract entered into with state’s consent between man and woman”); 23 PA. CONS. STAT. ANN. § 1704 (2006) (“Marriage between persons of same sex . . . shall be void . . . .”); S.C. CODE ANN. § 20-1-15 (2006) (“[M]arriage between persons of the same sex is void . . . .”); S.D. CODIFIED LAWS § 25-1-1 (2005) (“Marriage is a personal relation, between a man and a woman . . . .”); TENN. CODE ANN. § 36-3-113 (2006) (The legal union . . . of only one

states that do not expressly prohibit same-sex marriage, most of these states have statutory text that indicates an implied prohibition because they use statutory language that definitionally excludes same-sex couples.<sup>23</sup> For example, the use of language such as “bride” and “groom,” and “husband” and “wife,” promotes opposite-sex marriage and impliedly excludes same-sex marriages.

In Massachusetts, however, the state Supreme Court declared the prohibition of same-sex marriage unconstitutional in *Goodridge v. Department of Public Health*, effectively striking the ban on same-sex marriage.<sup>24</sup> Being the first state whose court effectively struck the

(1) man and one (1) woman shall be the only recognized . . . .”); TEX. MARRIAGE CODE ANN. § 2.001 (b) (2006) (A license may not be issued for the marriage of persons of the same sex.”); UTAH CODE ANN. § 30-1-1 (2006) (“Marriages prohibited and void . . . between persons of the same sex.”); VT. STAT. ANN. tit. 15, § 8 (2006) (“Marriage is the legally recognized union of one man and one woman.”); VA. CODE ANN. § 20-45.2 (2006) (“[M]arriage between persons of the same sex is prohibited.”); WASH. REV. CODE ANN. § 26.04.020 (2007) (“Marriages . . . prohibited: . . . When the parties are persons other than a male and a female.”); W. VA. CODE ANN. § 48-2-104 (2006) (“Marriage is designed to be a loving and lifelong union between a woman and a man.”); WIS. STAT. ANN. § 765.001 (1) (2) (2006) (“[M]arriage is a legal relationship between 2 equal persons, a husband and a wife . . . .”); WYO. STAT. ANN. § 20-1-101 (2006) (“Marriage is . . . between a male and a female . . . .”).

<sup>23</sup> See, e.g., the following states that have an implied prohibition of same-sex marriage based on the text of their laws definitionally excluding same-sex marriages: CONN. GEN. STAT. § 46B-25 (in reference to marriage licenses, states that social security of the “bride and groom” are to be included); D.C. CODE § 46 (2006) (text impliedly excludes same-sex marriage by prohibiting a man from marrying certain grades of female relatives, but not excluding the same grades of male relatives, and by prohibiting women from marrying certain grades of male relatives, but not excluding the same grades of female relatives, as affirmed by the court in *In re M.M.D.*, 662 A.2d 837, 849 n.13 (D.C. 1995), which held that “District of Columbia’s substantially gender-neutral marriage statute does not authorize same-sex marriage . . . [where] the gender-specific language of the consanguinity provision . . . with the traditional understanding of the word ‘marriage,’ left no doubt that same-sex marriages were excluded.”); MASS. GEN. LAWS ANN. ch. 207 (2006) (text impliedly excludes same-sex marriage by prohibiting a man from marrying certain grades of female relatives, but not excluding the same grades of male relatives, and by prohibiting women from marrying certain grades of male relatives, but not excluding the same grades of female relatives); N.J. STAT. ANN. § 37 (2006) (text impliedly excludes same-sex marriage by prohibiting a man from marrying certain grades of female relatives, but not excluding the same grades of male relatives, and by prohibiting women from marrying certain grades of male relatives, but not excluding the same grades of female relatives); N.M. STAT. ANN. § 40 (2006) (text uses terms like “bride” and “groom” language, indicating the preference for opposite sex marriage); N.Y. DOM. REL. LAW § 14 (2006) (ch. 328 (except for ch. 1 to 3, 105, 110, 149, 161, 214, 239, 243, 262, 284 and 316)) (indicating voidable marriages include marriages between aunt and nephew, and uncle and niece, textually implying marriage is between persons of opposite sexes); R.I. GEN. LAWS § 15-1-2 and 15-1-2 (2003) (text impliedly excludes same-sex marriage by prohibiting a man from marrying certain grades of female relatives, but not excluding the same grades of male relatives, and by prohibiting women from marrying certain grades of male relatives, but not excluding the same grades of female relatives).

<sup>24</sup> See *Goodridge*, 798 N.E. 2d 941 (Mass. 2003) (finding same-sex marriage prohibition unconstitutional). See also, *In re Opinions of the Justices to the Senate*, 802 N.E. 2d 565 (Mass. 2004) (clarified that only same-sex marriage will satisfy the State’s constitution).



prohibition against same-sex marriage,<sup>25</sup> a review of the case is in good order.

The plain text of the Massachusetts marriage law implied a prohibition against same-sex couples being able to marry.<sup>26</sup> This was the basis upon which the plaintiffs in *Goodridge*, who were same-sex couples, were denied marriages licenses.<sup>27</sup> The court first established that the “history of marriage” being between one man and one woman in the state of Massachusetts does not foreclose the question of the constitutionality of the statute forbidding same-sex couples from marrying.<sup>28</sup> The court then turned to whether prohibiting same-sex marriage violated the plaintiffs’ right to equality before the law and whether the liberty and due process provisions of the state constitution secured the plaintiffs’ right to marry their chosen partner.<sup>29</sup>

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<sup>25</sup> The Supreme Court in Hawaii had also ruled that the prohibition of same-sex marriage was unconstitutional. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*19 (Haw. Cir. Ct. Dec. 3, 1996). The court held that the gender based classification for marriage violated the state constitution’s Equal Protection clause. *Id.* The court’s ruling, however, was later superseded by the addition of a state constitutional amendment: “The legislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. I, § 23 (2006).

Another recent development “in the news” on the issue of same-sex marriage lies in Iowa where, similar to the *Goodridge* Court, a District judge pronounced the Iowa Defense of Marriage Act statute unconstitutional (based upon Iowa’s state Constitution) on the ground the law fails rational basis review. See Chase Martin, *Iowa Judge Rules in Favor of Gay Marriage*, IOWA INDEPENDENT, Aug. 30, 2007, <http://www.iowaindependent.com/showDiary.do?diaryId=916> (last visited Feb. 23, 2008) (Iowa newspaper article discussing the Polk County judge’s decision striking down the Iowa DOMA law against same-sex marriage as unconstitutional for not meeting rational basis review); see also Arthur S. Leonard, *Iowa Trial Courts Rules for Same-Sex Couples in Marriage Case*, LEONARD LINK, Aug. 30, 2007, <http://newyorklawschool.typepad.com/leonardlink/2007/08/iowa-trial-cour.html> (last visited Feb. 23, 2008) (further discussing the Polk County case and enumerating the defendant’s “proposed five rationales supporting the DOMA: promoting procreation, child rearing by a mother and father in a marriage relationship, promoting stability in opposite-sex relationships, conservation of state and private resources, and promoting the concept or integrity of traditional marriage.”). The decision was stayed by the judge a few hours after being issued, and is pending appeal. See Monica Davey, *Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway*, N.Y. TIMES, Sept. 1, 2007, <http://www.nytimes.com/2007/09/01/us/01iowa.html> (last visited Feb. 23, 2008) (decision stayed); see also *Iowa Court Rules Same-Sex Couples Can Marry*, CNN.COM, Aug. 31, 2007, <http://www.cnn.com/2007/US/law/08/30/iowa.samesexmarriage/index.html> (last visited Feb. 23, 2008) (cases advanced to Iowa Supreme Court). Most recently, California lifted its ban on same-sex marriage. See *In re Marriage Cases* (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384]. The court’s ruling was made final June 19, 2008, although current efforts are already underway to overrule the court’s decision through constitutional amendment. See California’s General Election Ballot, *Proposition 8 – Eliminates Right of Same-Sex Couples to Marry* (to be voted on in the November 2008 elections).

<sup>26</sup> MASS. GEN. LAWS ANN. ch. 207 § 1 (2006) (prohibiting women from marrying certain grades of male relatives, but not excluding the same grades of female relatives).

<sup>27</sup> *Goodridge*, 798 N.E. 2d at 949-50.

<sup>28</sup> *Id.* at 953.

<sup>29</sup> *Id.*



The Supreme Court in *Goodridge* likened the prohibition on same-sex marriage to the not so distant prohibition on interracial marriages that came to an end in 1967 when the Supreme Court of the United States (*SCOTUS*) held, in *Loving v. Virginia*,<sup>30</sup> that a statutory bar to interracial marriage violated the Fourteenth amendment of the U. S. Constitution.<sup>31</sup> This decision came nineteen years after California ruled, in *Perez*, that the prohibition on interracial marriages was unconstitutional because it violated the due process and equality guarantees of the Fourteenth Amendment.<sup>32</sup> The *Goodridge* Court said that *Perez* and *Loving* made clear that the right to marry “means little if it does not include the right to marry the person of one’s choice, subject to appropriate government restrictions in the interests of *public health, safety, and welfare*.”<sup>33</sup> Just as in *Perez* and *Loving*, the court reasoned, “a statute deprives individuals access to an institution of fundamental legal, personal, and social significance . . . because of one single trait: skin color in *Perez* and *Loving*, sexual orientation [in *Goodridge*].”<sup>34</sup>

Finding that no fundamental interest or suspect class was at issue, the court applied the lowest standard of constitutional review: rational basis review.<sup>35</sup> The Commonwealth argued three bases for prohibiting same-sex marriage: “(1) providing a ‘favorable setting for procreation’; (2) ensuring the optimal setting for child rearing . . . ; and (3) preserving scarce State and private financial resources.”<sup>36</sup>

Addressing the first basis of procreation, the *Goodridge* Court repudiated procreation as the primary purpose of marriage by impliedly distinguishing civil marriage from religious marriage when noting that civil marriage “does not privilege procreative couples above every other form of adult intimacy and every other mean of creating a family.”<sup>37</sup> Massachusetts has no requirement of ability and intent to procreate by coitus, nor is fertility a condition to marriage or ground for divorce; and, people who have never consummated their marriage can be married, and those unable to consummate their marriage may also marry.<sup>38</sup> Furthermore, the Commonwealth “affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is

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<sup>30</sup> *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

<sup>31</sup> *Goodridge*, 798 N.E. 2d at 958.

<sup>32</sup> *Id.* (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948)).

<sup>33</sup> *Goodridge*, 798 N.E. 2d at 958 (emphasis added).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 961.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent is heterosexual, homosexual, or bisexual.”<sup>39</sup> The court stated that if procreation were necessary to civil marriage, the statutes would draw a tighter circle around non-marital child bearing and the creation of families by non-coital means, noting that in such “fundamentally private areas of life, such a narrow focus is inappropriate.”<sup>40</sup> By singling out a single trait, an unbridgeable difference between same-sex and opposite-sex couples, and transforming it into the essence of legal marriage, the court said that the State’s actions “confer[] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior . . . and not worthy of respect.”<sup>41</sup>

Addressing the second basis, the court found that denying same-sex marriage does not further the state interest of ensuring that children are raised in an “optimal” setting<sup>42</sup> because the best interests of a child are not dependent on the parents’ sexual orientation or marital status.<sup>43</sup> And, since there is no evidence that prohibiting same-sex marriage will increase the number of couples entering into opposite-sex marriage to raise children, the court found there is no rational relationship between the statute and the state’s goal.<sup>44</sup> The court concluded that “[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’”<sup>45</sup>

The third rationale given by the state in *Goodridge* was that prohibiting same-sex marriage would preserve the scarce resources of the state because same-sex couples are less dependent on each other than opposite-sex couples.<sup>46</sup> The court refuted this rationale because the state’s “conclusory generalization – that same-sex couples are less financially dependent on each other . . . ignores that many same-sex couples . . . have children and other dependents . . . in their care.”<sup>47</sup> In addition, the state does not bestow the economic benefits of marriage to opposite-sex couples on showing of their financial dependence on

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<sup>39</sup> *Id.* at 962.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 964 (Cordy, J., dissenting) (quoting *Goodridge v. Department of Public Health*, 440 Mass. 309, 381 (2003)).

<sup>46</sup> *Goodridge*, 798 N.E. 2d at 964.

<sup>47</sup> *Id.*

each other.<sup>48</sup> Based on these factors, the court found that there was no rational relationship between the prohibition of same-sex marriage and the state's economic goals.<sup>49</sup>

At the end of the day, while the Massachusetts Supreme Court gave “full deference to the arguments of the Commonwealth,”<sup>50</sup> it found that the Commonwealth failed to identify “any constitutionally adequate reason for denying civil marriage to same-sex couples.”<sup>51</sup> The court held that prohibiting same-sex marriage did not serve the “protection of public health, safety, or general welfare,” but that it was rather rooted in “persistent prejudices,” and that it is not for the Constitution to give such prejudices effect.<sup>52</sup>

In reaction<sup>53</sup> to the *Goodridge* Court's holding that prohibiting same-sex marriage is unconstitutional and violates the state's Equal Rights amendment,<sup>54</sup> a number of states enacted constitutional amendments that either expressly define marriage as *only* being between a man and a woman or expressly prohibit same-sex marriage.<sup>55</sup>

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 948.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 968.

<sup>53</sup> Following is an enumeration of the states who enacted constitutional amendments in reaction to *Goodridge* (organized alphabetically by state): Alabama- 2005; Arkansas- Nov. 2004; Georgia- Nov. 2004; Louisiana- Sept. 2004; Michigan- Dec. 2004; Mississippi- Nov. 2004; Missouri- 2004; Montana- Nov. 2004; North Dakota- 2004; Ohio- 2004; Oklahoma- 2004; Oregon- 2004; Utah- 2004, Texas- 2005. Several states passed constitutional amendments to prohibit same-sex marriage prior to *Goodridge*: Hawaii- 1998; Nebraska- 2000; Nevada- 2002. See also *infra* note 55, for respective citations of the states' constitutional amendments.

<sup>54</sup> *Goodridge*, 798 N.E. 2d at 969.

<sup>55</sup> See ALA. CONST. 2005-35 (2006) (“Marriage is inherently . . . between a man and a woman.”); ALASKA CONST. art. I, § 25 (2006) (“[M]arriage may exist only between one man and one woman.”); ARK. CONST. amend. 83 § 1 (2006) (“Marriage consists only . . . of one man and one woman.”); GA. CONST. art. I, § IV, p. 1 (2006) (“Marriages between persons of the same sex are prohibited . . . .”); HAW. CONST. art. I, § 23 (2006) (“[L]egislature shall have the power to limit marriage to opposite-sex couples.”); KY. CONST. § 233A (2006) (“Only a marriage between one man and one woman shall be valid or recognized . . . .”); LA. CONST. art. XII, § 15 (2006) (“Marriage . . . shall consist only of . . . one man and one woman.”); MICH. CONST. art. I, § 25 (2006) (“Union of one man and one woman as only agreement recognized as marriage . . . .”); MISS. CONST. art. 14, § 263A (2006) (“Marriage may take place . . . only between a man and a woman.”); MO. CONST. art. I, § 33 (2005) (“Only marriage between a man and a woman recognized as valid”); MONT. CONST. art. XIII, § 7 (2005) (“Only a marriage between one man and one woman shall be valid or recognized . . . .”); NEB. CONST. art. I, § 29 (2006) (“The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized . . . .”). It should be noted that this constitutional amendment was held to violate the United States Constitution by a federal District Court in *Citizen for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005); NEV. CONST. art. 1, § 21 (2006) (“Only a marriage between a male and a female person shall be recognized and given effect . . . .”); N.D. CONST. art. XI, § 28 (2006) (“Marriage consists only of the legal union between a man and a woman.”); OHIO CONST. art. XV, § 11 (2006) (“Only a union between one man and one

### C. States' Bases for Prohibiting Same-Sex Marriage

Of the states that prohibit same-sex marriage, either expressly or impliedly, only a select few have included either the rationale for the prohibition or the rationale for their marriage laws within their statute.<sup>56</sup> However, in the majority of the remaining states the rationales for the prohibition of same-sex marriage are advanced and argued in the case law.<sup>57</sup> A few of these courts have expressly declared a reli-

woman may be . . . valid and recognized . . ."); OKLA. CONST. art. II, § 35 (2006) ("Marriage . . . shall consist only of . . . one man and one woman."); OR. CONST. art. XV, § 5a (2004) ("[O]nly a marriage between one man and one woman shall be valid or legally recognized as marriage."); TEX. CONST. art. I, § 32 (2006) ("Marriage in this state shall consist only of the union of one man and one woman."); UTAH CONST. art. I, § 29 (2006) ("Marriage consists only of . . . a man and a woman.").

<sup>56</sup> Following is an enumeration of the state marriage statutes that include the rationale for the prohibition, or for the marriage laws, within their statute: ARIZ. REV. STAT. ANN. §25-103 (2002) (public policy is "To promote strong families" and "To promote strong family values"); 19-A-2 ME. REV. STAT. ANN. 23-I, § 650 (1) (A) and (2) (2006) (declares the compelling state interest to "nurture and promote the unique institution of monogamous traditional marriage in the support of harmonious families and the physical and mental health of children," and to "promot[e] the moral values inherent in traditional monogamous families," and the purposes of the statute as: "A. To encourage the traditional monogamous family unit as the basic building block of our society, the foundation of harmonious and enriching family life; B. To nurture, sustain and protect the traditional monogamous family unit in Maine society, its moral imperatives, its economic function and its unique contribution to the rearing of healthy children; and C. To support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts."); MICH. COMP. LAWS ANN. § 551.1.1 (2006) ("As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique [between a man and a woman] relationship in order to promote, among other goals, the stability and welfare of society and its children."); WIS. STAT. ANN. § 765.001 (1) (2) (2006) ("It is the intent . . . to promote the stability and best interests of marriage and the family. . . . [T]o recognize the valuable contributions of both spouses during the marriage and at termination of the marriage . . . . [It] . . . is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state.").

<sup>57</sup> See, e.g., *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at \*6 (Alaska Super. Ct. Feb. 27, 1998) (Superior Court recognized "procreation" as an oft-cited reason for marriage); *Standahrtdt v. Superior Court*, 77 P.3d 451 (Ariz. 2003) (finding state has legitimate interest in encouraging procreation and child rearing within marriage); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) ("[E]ncouraging and fostering procreation of the race . . ."); *In re Coordination Proceeding*, 2005 WL 583129, at \*11 (consolidation of six marriage cases in which State of California offered "tradition," "tradition plus marriage rights without marriage," and "procreation" as rational bases for same-sex marriage ban); *Knight v. Schwarzenegger*, Nos., 03AS05284, 03AS07035, 2004 WL 2011407, at \*6 (Cal. App. Dep't Super. Ct.) (stated marriage is the "keystone of civilized society . . . [whose] interest [is] to maintain . . . marriage for . . . societal goals ranging from property rights to procreation"); *Schaefer v. Denver*, 973 P.2d 717, 721 (Colo. Ct. App. 1998) (stated a "legislative intent to strengthen and preserve the integrity of marriage and the safeguarding of meaningful family relationships . . ."); *Rosengarten v. Downes*, 802 A.2d 170, 179-80 (Conn. App. Ct. 2002) (pointed to 'custom' and 'tradition' as sources of law in establishing who may marry); *Dean v. District of Columbia*, 653 A. 2d 307, 337 (D.C. Cir. 1995) ("[T]o regulate and legitimize the procreation of children . . ."); *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364, at \*4 (D.C. Super. June 2, 2002) (state interests include "procreation," "legislative authorization of homosexual, same-sex marriages would constitute tacit state approval . . . of the sexual conduct . . . [of] sodomy . . . ;" and that "such

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authorization would constitute unprecedented and unwarranted ‘social tinkering’ with one of the most sacred institutions known . . . namely, marriage . . . .”); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (“foster development of relationships optimal for procreation, thereby encouraging the ‘stable generational continuity of the United States’” and “encouraging creation of stable relationships that facilitate the rearing of children by both their biological parents” as state interests justifying the federal DOMA law, cited by court in a lawsuit by two lesbians married in Massachusetts); *Baehr v. Lewin*, 852 P. 2d 44, 52 (Haw. 1993) (state’s basis as ‘protecting, fostering, helping perpetuate the basic family unit that provides status and a nurturing environment to children born to married persons,’ and ‘statement of moral values of the community’); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*3 (Haw. Cir. Ct. Dec. 3, 1996) (state interests included ‘protect the health and welfare of children,’ ‘foster procreation within the marital setting,’ ‘promote optimal development of children,’ ‘it is best for children to be raised in a single home by its parents, or at least by a married male and female,’ ‘to have mothers and fathers take responsibility for their children,’ ‘to unite children with their mothers and fathers’); *Jones v. Hallahan*, 501 S.W. 2d 588, 589 (Ky. App. Ct. 1973) (court adopted outside sources for the basis of marriage, including “institution whereby men and women are joined . . . for the purpose of founding and maintaining a family,” “civil status . . . for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex,” and “custom,” admittedly originating in the church); *ACLU v. Echohawk*, 857 P. 2d 626, 627-28 (Idaho 1993) (proposed code amendment being challenged, where the prohibition of same-sex marriage was expressly based on IDAHO CONST. art. 3, § 24, which would then make “virtue . . . sobriety of the people . . . purity of the home . . . and . . . promotion of temperance and morality” the basis for the prohibition); *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998, at \*4-6 (Ind. Super. Ct. May 7, 2003), *affirmed* *Morrison v. Sadler*, 821 N.E. 2d 15 (Ind. Ct. App. 2005) (“[E]nshrine . . . traditional definition and traditional understanding of marriage . . . encouraging procreation . . . where both biological parents can raise the child . . . [P]romoting the traditional family as the basic living unit of society. . . . [P]rotecting the integrity of traditional marriage.”); *Morrison v. Sadler*, 821 N.E. 2d 15, 25 (Ind. Ct. App. 2005) (fostering interest in “responsible procreation”); *Forum for Equality v. McKeithen*, 893 So. 2d 715, 736 (La. 2005) (states “defend traditional marriage” -- but offers no underlying basis for the ‘tradition’); *Baker v. Nelson*, 191 N.W. 2d 185, 186 (Minn. 1971) (listed procreation, rearing of children within families, and history as basis); *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (this *Pre-Lawrence* adoption case reiterated the state’s prohibition on same-sex marriage, stating it is an “abominable crime against nature”); *J.P. v. P.W.*, 772 S.W. 2d 786, 792 (Mo. Ct. App. S.D. 1989) (child custody case, which stated, the state has a “concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric. . . .”); *Citizens for Equal Protection v. Bruning*, 368 F. Supp. 980, 1000 (D. Neb. 2005) (state interests include procreation, preservation of traditional marriage, and promote family life); *Lewis v. Harris*, 875 A.2d 259, 272-76 n.4 (N.J. Super. Ct. App. 2005) (stated nations’ history and traditions, contemporary religious and cultural values, and public interests to “control” procreation as fundamental, originating reason why the state privileges marriage); *Lewis v. Harris*, No.15-03, 2003 WL 23191114, 11-17 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (stated tradition through longstanding definition of marriage as between a man and a woman is seen as a sufficiently rational basis to prohibit same-sex marriage); *Hernandez v. Robles*, 794 N.Y.S. 2d 579, 597-99 (N.Y. Sup. Ct. 2005) (cited “Tradition” and “Ensuring Consistency with Federal Law and Other States” as state interests); *Seymour v. Holcomb*, 790 N.Y.S. 2d 858, 860 (N.Y. Sup. Ct. 2005) (cited “preserving historic institution of marriage as union between man and woman, which, in turn, uniquely fostered procreation”); *Shields v. Madigan*, 783 N.Y.S. 2d 270, 272 (N.Y. Sup. Ct. 2004) (cited “preserving traditional and legal concept of marriage”); *Storrs v. Holcomb*, 645 N.Y.S. 2d 286, 287 (N.Y. Sup. Ct. 1996) (cited “long tradition of marriage . . . testifies to a contrary political, cultural, religious and legal consensus”); *People v. West*, 780 N.Y.S. 2d 723, 725 (N.Y. J. Ct. 2004) (cited “history, cultural, and religious opposition to same-sex marriage”); *People v. Greenleaf*, 780 N.Y.S. 2d 899 (N.Y. J. Ct. 2004) (cited “providing favorable environment for procreation and

gious basis for the state's same-sex marriage prohibition in their decisions.<sup>58</sup> In light of all this legislative and judicial action, however, just over half the states still do not seem to have a basis for their prohibition either in the statutory text or in their case law.<sup>59</sup> At least one state however, Arizona, has a case that provides a rationale against same-sex marriage that is additional to the rationale found within the state's marriage laws.<sup>60</sup> Similarly, in some states the basis for prohibiting same-sex marriage has differed from case to case.<sup>61</sup> And, at least two

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child-rearing"); *Constant v. Paul*, 496 A. 2d 1, 6 (Pa. Super. Ct. 1985) (stated denial of same-sex marriage and history, cultural, and religious opposition to same-sex marriage rights is based on "social values" for the "propagation of the human race"); *Baker v. Vermont*, 744 A.2d 864, 865 (Vt. 1999) (stated "furthering the link between procreation and child rearing"); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (cited procreation and rearing of children as basis for denying same-sex marriage); *Andersen v. King County*, 04-2-04964-4-SEA, 2004 WL 1738447, \*7-9 (Wash. Super. Ct. Nov. 4, 2004) (analyzed bases of morality, tradition, protecting marriage, protecting children from harm of non-traditional family); *Castle v. State*, No. 042-00614-4, 2004 WL 1985215, \*13, 14 (Wash. Super. Ct. Sept. 7, 2004) (cited historical commitment to heterosexual marriage, encourage procreation and rearing of children within stable households).

<sup>58</sup> See, e.g., *Ex Parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, J., concurring) (in child custody case, where mother then engaged in a same-sex relationship sought to have custody of her child, court stated that "Alabama expressly does not recognize same-sex marriages . . . . Homosexual conduct is, and always has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated. Such conduct . . . is destructive to a basic building block of society – the family . . . . [T]he courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected."); *Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1013-14 (Miss. 2004) (although not a case directly stating religion as basis, discusses a judge who made statements to the press against same-sex marriage, stating they belonged in mental institutions, based on his deeply held religious beliefs).

<sup>59</sup> A search of the statutory and constitutional texts, as well as the case law, of the following states and their respective federal districts, did not yield any rationale for the prohibition of same-sex marriage: Arkansas, Delaware, Florida (although Florida had a federal district court case that addressed the rationale behind the Federal DOMA law, see *Wilson v. Ake*, 354 F. Supp. 2d 1298), Georgia, Kansas, Illinois, Maryland, Michigan, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

<sup>60</sup> Compare ARIZ. REV. STAT. ANN. §25-103 (2002) (public policy is "To promote strong families" and "To promote strong family values"), with *Standhardt v. Superior Court*, 77 P. 3d 451, 463-64 (Ariz. Ct. App. 2004) (Gemmill, J. and Portley, M., concurring) (recognized that "encouraging procreation and child rearing within the marital relationship [are legitimate state interests] and that limiting marriage to opposite-sex couples is rationally related to that interest.").

<sup>61</sup> See, e.g., *Ex Parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, J., concurring) (in child custody case, where mother then engaged in a same-sex relationship sought to have custody of her child, court stated that "Alabama expressly does not recognize same-sex marriages . . . . Homosexual conduct is, and always has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated. Such conduct . . . is destructive to a basic building block of society – the family . . . . [T]he courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected."); *Mississippi Commission on Judicial Performance v.*



of the states have different bases enumerated in different courts on the same case.<sup>62</sup>

The various bases that are enumerated in the state statutes, constitutional amendments, and case law can be classified into six categories. These are: preserving history and tradition, promoting moral values, pro-creation, protecting the traditional family, promoting the welfare of children, and promoting a political purpose.

#### D. The Federal Paradigm of Same-Sex Marriage

While an examination of the issue of comity between states is not within the scope of this paper, it will be examined briefly. The reason for its inclusion is to help establish the effect of the federal Defense of Marriage Act (DOMA)<sup>63</sup> as a compelling force in the states' stance against same-sex marriage and to provide foundation for some of the issues discussed below.

The very title of Defense of Marriage Act, which Congress passed in 1996, implied that marriage was under attack.<sup>64</sup> DOMA focused specifically on granting states the right to refuse to extend comity to the same-sex marriages recognized in other states.<sup>65</sup> More specifically, the implication is that marriage is under attack by same-sex couples. Such a legal theoretical framework on the part of the federal government is highly relevant because while the body of the Act appears to leave the definitional question of marriage to the states, the title implies that same-sex couples are a threat to the social institution of marriage and, by implication, to society. Such an implication serves to perpetuate the fear that already exists in American society in regards to same-sex couples by "implement[ing] official prejudice against

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Wilkerson, 876 So. 2d 1006, 1013-14 (Miss. 2004) (although not a case directly stating religion as basis, discusses a judge who made statements to the press against same-sex marriage, stating they belonged in mental institutions, based on his deeply held religious beliefs).

<sup>62</sup> See D.C., Indiana, and New Jersey cases, *supra* note 57 (different bases in *Dean v. D.C.* in the D.C. Circuit and D.C. Superior Courts; in *Morrison v. Saddler* in the Indiana Superior and Appellate Courts; in *Lewis v. Harris* in the N.J. Super. Ct. App. Div. and N.J. Super. Ct. Law Div.).

<sup>63</sup> 28 U.S.C. § 1738C (2007).

<sup>64</sup> It is quite possible that the Federal Government proposed DOMA in reaction to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a same-sex marriage case that won same-sex marriage in Hawaii, until it was later repealed by constitutional amendment. See HAW. CONST. art. I, § 23 (2006).

<sup>65</sup> 28 U.S.C. § 1738C (2007) (stating that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship *between persons of the same sex* that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship") (emphasis added).



gays,” as Senator Kennedy put it.<sup>66</sup> The perpetuation of such fear and prejudice becomes more evident when a study of the legislative history of the states reveals that after *Goodridge*<sup>67</sup> legalized same-sex marriage in Massachusetts, a number of states reactively latched on to the federal DOMA and enacted their own defense of marriage laws<sup>68</sup> in order to “defend” marriage within their respective states.

While many states latched on to DOMA, so to speak, and prohibited recognition of the same-sex marriages of other states by enacting their own defense of marriage laws,<sup>69</sup> some scholars now argue that DOMA was unconstitutional because it effectively amended the Constitution’s Full Faith and Credit Clause through a statutory enactment.<sup>70</sup> The United States Constitution requires states to give effect to each other’s acts, records, and proceedings, through the Full Faith and Credit clause.<sup>71</sup> While the Full Faith and Credit clause allows Congress to “prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof,”<sup>72</sup> it does not give Congress the authority to allow the states to deny recognition of these acts by effectively amending the United States Constitution through the passing of a federal statute.<sup>73</sup> Not only is the Constitutionality of the federal DOMA questionable because it appears to effectively amend the Constitution through a legislative act, but that the vote was passed

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<sup>66</sup> One Senator, in support of DOMA, claimed that same-sex marriage had led to the decline in heterosexual marriage in other countries. Joanna Grossman, *As the Federal Marriage Amendment Fails in the Senate, Recent and Older Examples in Legal History Provide Insight*, FINDLAW’S WRIT, July 15, 2004, available at <http://writ.news.findlaw.com/grossman/20040715.html>. Also in support of DOMA, another Senator claimed that “traditional marriage” is “good for everyone.” *Id.* In contrast, Senator Edward Kennedy said, “DOMA was wrong because it constituted the implementation of official prejudice against gays.” *Id.*

<sup>67</sup> *Goodridge*, 798 N.E. 2d at 941.

<sup>68</sup> As of July 15, 2004, 37 states had adopted their own DOMAs. See Grossman, *supra* note 66. See also Sarah Carlson-Wallrath, *Why the Civil Institution of Marriage Must be Extended to Same-Sex Couples*, 26 *HAMLIN J. PUB. L. & POL’Y* 73, 88-89 (2004). Texas followed and added a constitutional amendment, making it the 38<sup>th</sup> state to enact “defense of marriage” legislation. See TEX. CONST. art. I, § 32.

<sup>69</sup> See *supra* notes 22-23 and 55 for citations of statutes and constitutional amendments to protect marriage by barring same-sex marriage.

<sup>70</sup> Grossman, *supra* note 66. For more discussion on the constitutionality of the Defense of Marriage Act debate, see also Brian Bix, *State of the Union: The States’ Interest in the Marital Status of Their Citizens*, 55 *U. MIAMI L. REV.* 1, 23-26 (2000).

<sup>71</sup> Bix, *supra* note 70. See also, U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given to the public Acts, Records, and judicial Proceedings of every other state.”).

<sup>72</sup> U.S. CONST. art. IV, § 1.

<sup>73</sup> Grossman, *supra* note 66 (stating “An ordinary statute, Republicans now suggest, cannot have effectively amended the Constitution”). See also, U.S. CONST. art. IV, § 1.

in such a fashion as to seemingly legislate some of the legislators' own religious views raises Establishment Clause issues as well.<sup>74</sup>

This federal paradigm – that traditional marriage has to be *protected* from same-sex couples – is fueled by fears and has served as a compelling force in the states' position on same-sex marriage.<sup>75</sup> Much of these fears appear to be rooted in and fueled by Judeo-Christian beliefs.

For example, the Congressional Record shows that, in support of DOMA, Senator Byrd declared: “Woe betide that society that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning . . . . Certainly we do not want to launch further assault on the institution of marriage by blurring its definition in this unwise way.”<sup>76</sup> Senator Coats invoked nature as marriage's interminable source when he said:

The definition of marriage is not created by politicians and judges, and it cannot be changed by them. It is rooted in our history, in our laws and *our deepest moral and religious convictions*, and in our nature as human beings. It is the union of one man and one woman. This fact can be respected, or it can be resented, but it cannot be altered.<sup>77</sup>

Statements such as these not only show that DOMA was passed in some measure based on religious ideology, but it also raises questions as to the states' reasons for upholding a prohibition since these members of Congress are representing their respective state's interest in Congress.

#### E. Establishment Clause Issue

Historically religious institutions can, and have, become secularized. For example, in *McGowan v. Maryland*,<sup>78</sup> one of the issues addressed by the *SCOTUS* was whether Sunday Closing Laws<sup>79</sup> violated

<sup>74</sup> See *infra* note 408 for examples of legislators' religiously based votes on DOMA.

<sup>75</sup> The compelling force of the Federal DOMA becomes evident in light of 38 states having adopted their own DOMAs.

<sup>76</sup> Heather Lauren Hughes, Note, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R.-C.L. L. REV. 237, 243 (1998) (quoting 142 CONG. REC. S10, 110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd)).

<sup>77</sup> *Id.* at 245 (quoting 142 CONG. REC. S10, 113 (daily ed. Sept. 10, 1996) (statement of Sen. Coats)) (emphasis added).

<sup>78</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>79</sup> See *id.* (Sunday Closing Laws are laws that mandated some degree or form of business closures, e.g. that businesses be closed on Sunday altogether, or that they be closed during certain hours on Sunday which generally coincided with hours of Christian worship).

the Establishment Clause.<sup>80</sup> Ruling in the negative, the Court stated that the “‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”<sup>81</sup> In a separate *McGowan* opinion,<sup>82</sup> Justice Frankfurter<sup>83</sup> recognized that a state’s interests may at times appear to endorse the ideals of religion when noting that “[a]s the state’s interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities.”<sup>84</sup> Therefore, an institution may become secularized in spite of its historical roots as a religious institution if it serves a current valid secular purpose.<sup>85</sup> In *McGowan*, the Court held that while Sunday, as a day of rest, had been unquestionably religious in purpose,<sup>86</sup> it had become secularized because the “present purpose and effect . . . [was] to provide a uniform day of rest . . . .”<sup>87</sup>

Marriage is another example of an institution that has its historical roots in religious ideals, yet has become secularized over its legal evolution. The law of marriage in the United States reflects a strong historical link to Judeo-Christian religious origins.<sup>88</sup> The structure of the marriage laws is traceable to fifth century theologizing, which was later reduced to a legal framework by canon lawyers.<sup>89</sup> This history has been acknowledged all the way to the *SCOTUS*, as is evident on examination of Justice Story’s 1834 *Commentaries of the Conflict of Laws*, which advocated that marriage was a religious institution that started with “Adam and Eve” and that it was a religious as well as a civil contract.<sup>90</sup>

Marriage laws have evolved, however, to serve many secular purposes in the United States. The Supreme Court of Massachusetts, for example, recognized that marriage in Massachusetts was not religious-

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<sup>80</sup> *McGowan*, 366 U.S. at 422.

<sup>81</sup> *Id.* at 442.

<sup>82</sup> *Id.* at 459-551.

<sup>83</sup> Joined by Justice Harlan.

<sup>84</sup> *McGowan*, 366 U.S. at 461.

<sup>85</sup> *Id.* at 444 (“In light of the evolution of our Sunday Closing Laws through centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character.”).

<sup>86</sup> *Id.* at 487.

<sup>87</sup> *Id.* at 445.

<sup>88</sup> See *supra* section II-A. See also Reid, *supra* note 18.

<sup>89</sup> Reid, *supra* note 18, at 496.

<sup>90</sup> *Id.* at 502-03 (citing Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS 100 (1834)).

ly driven but, rather, was civil and a “wholly secular institution.”<sup>91</sup> The court saw civil marriage as created and regulated “through the exercise of the police power . . . to [the] extent necessary . . . ‘to secure the health, safety, good order, comfort, or general welfare of the community.’”<sup>92</sup> One scholar argues that the *Goodridge* Court misrepresented the history of marriage by claiming that it is state created because the history of its religious roots as a source of authority for state law is well documented.<sup>93</sup> In light of both the documented history of the origins of marriage and the *Goodridge* Court’s position on seeing marriage as a secular institution, however, one can see an example of how the evolution of marriage from a religious institution to a secular institution with secular purposes can occur.

That marriage as an institution has become secularized because it fulfills secular purposes does not necessarily imply that the prohibition of same-sex marriage that definitionally originated in Judeo-Christian theology has been secularized as well. It is entirely possible that while marriage has become secularized, same-sex marriage could continue to be prohibited based on religious reasons.

In a 2002 case, for example, where a mother who was involved in a same-sex relationship sought to have custody of her child, Chief Justice Moore of the Alabama Supreme Court stated in a concurring opinion:

Alabama expressly does not recognize same-sex marriages . . . Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our laws are predicated. Such conduct . . . is destructive to a basic building block of society – the family. . . . [T]he courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.<sup>94</sup>

While this view is that of the concurring Justice, and not formally adopted by the Court in the majority opinion, it reveals a view against same-sex marriage that strongly reflects the view upheld by traditional Judeo-Christian moral values and propagated by the canon law and

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<sup>91</sup> *Goodridge v. Department of Public Health*, 798 N.E. 2d 941, 954 (Mass. 2003).

<sup>92</sup> *Id.*

<sup>93</sup> See Reid, *supra* note 18, at 517.

<sup>94</sup> *Ex Parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, J., concurring).

the ecclesiastical courts.<sup>95</sup> Arguably, such a basis for a majority decision would bluntly violate the separation of Church and State.<sup>96</sup>

Similarly, in Mississippi, action was taken against a judge for statements he made to a newspaper regarding homosexuals.<sup>97</sup> Mississippi's judicial Canon 4A(1) requires a judge to "conduct all extra-judicial activities so that they do not cast doubt on the judge's capacity to act impartially as a judge."<sup>98</sup> The judge opined, "homosexuals belong in mental institutions . . . homosexuality is an 'illness' . . ."<sup>99</sup> He further stated that his beliefs were grounded in his Christian faith and upon biblical principles.<sup>100</sup> In finding that the judge's anti-gay statements were protected political speech under the First Amendment<sup>101</sup> because it deemed gay rights a political issue,<sup>102</sup> the court failed to answer the Mississippi Commission on Judicial Performance's concerns in regard to the judge's ability to rule impartially, given his views against gays and lesbians. While the views of a Justice in a concurring opinion and of a judge in a letter to a newspaper are not formally the views of a majority court, from these arise valid concerns of the judiciary's ability to remain impartial. It is necessary to question these judges/justices' ability to not use their government position to promote the interests of their own religious views when ruling on the constitutionality of a statute prohibiting same-sex marriage.

The focus, then, is whether the current reasons for prohibiting same-sex marriage *continue* to be rooted in religious ideals, or whether a valid secular purpose for the ongoing prohibition of same-sex marriage has evolved. Traditional Judeo-Christianity has always defined marriage as being solely the union of one man and one woman.<sup>103</sup> That "same-gender relations violate the historical western cultural ideals[,] [as is the case in the United States,] of what is morally proper human nature . . . [is] the expression of very old . . . ideas that derive from the Judeo-Christian worldview . . .," which has long defined same-sex relations as sinful and morally improper.<sup>104</sup>

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<sup>95</sup> The term "traditional Judeo-Christian moral values," as used herein, refers to those principles of right and wrong driving the standard of behavior which were propagated by the Canon Laws and the Ecclesiastical Courts.

<sup>96</sup> See *infra* section F for discussion of "separation of church and state" and the applicable test.

<sup>97</sup> Mississippi Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1008-09 (Miss. 2004).

<sup>98</sup> *Id.* at 1009.

<sup>99</sup> *Id.* at 1008.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1016.

<sup>102</sup> *Id.* at 1011.

<sup>103</sup> See *supra* section II-A.

<sup>104</sup> GILBERT HERDT, SAME-SEX, DIFFERENT CULTURES 22 (1997).

In *McGowan*, “Sunday [was] a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization . . . .”<sup>105</sup> Likewise, the same-sex marriage prohibition is heavily overlaid with connotations of the Christian roots of our civilization. And, whereas the *McGowan* Court determined that the Sunday Closing laws had become secular in purpose and therefore did not violate the Establishment Clause,<sup>106</sup> similarly, this work seeks to analyze whether the prohibition of same-sex marriage has become secularized, or whether it continues to be rooted in Judeo-Christian ideals and thus violates the separation of Church and State under current Establishment Clause jurisprudence.

What is, then, a “separation of Church and State”? And what test is applied to determine if a law that has its origins in religion violates the separation of Church and State? These questions call for a history of Establishment Clause jurisprudence, which has defined the rules and set the parameters for what it means to separate Church and State.

#### F. The Establishment Clause and the Lemon Test

The Establishment Clause states “*Congress* shall make no law respecting an establishment of religion . . . .”<sup>107</sup> It says nothing about the states not making a law regarding the establishment of religion. In *McGowan*, however, the *SCOTUS* reaffirmed that the principles of the First Amendment apply equally to the states, through the Due Process Clause of the Fourteenth Amendment, as they apply to the federal government.<sup>108</sup>

In defining the scope of the First Amendment, the *McGowan* Court determined, based on the writings of Madison – who was the “architect” of the First Amendment, which passed in the Senate on September 9, 1789 – that the First Amendment protection extended to preventing the establishment of government religion.<sup>109</sup> In light of its history and the framers’ intent, the *SCOTUS* has granted the amendment broad interpretation.<sup>110</sup> Thus, protection against the establishment of religion means more than merely forbidding a national or state church.<sup>111</sup> It has been interpreted to mean:

<sup>105</sup> *McGowan v. Maryland*, 366 U.S. 420, 565 (Douglas, J., dissenting).

<sup>106</sup> See *supra* notes 80-89 and accompanying text.

<sup>107</sup> U.S. CONST. amend. I.

<sup>108</sup> *McGowan*, 366 U.S. at 430.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 441-42.

<sup>111</sup> *Id.* at 442.

Neither a state nor the federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’<sup>112</sup>

However, Establishment Clause jurisprudence does not disallow a religious ideal from guiding any particular rule of law.<sup>113</sup> Rather, it protects from “sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>114</sup> Some relationship between government and religious organizations is inevitable; total separation of Church and State is not possible in an absolute sense.<sup>115</sup> The Establishment Clause, however, protects the integrity of the Church and the State by keeping the two institutions at arms length from each other.<sup>116</sup>

In *Lemon v. Kurtzman*,<sup>117</sup> where statutes providing financial support to teachers who taught secular subjects in parochial schools were held to violate the Establishment Clause, the Court introduced a three-prong test for analyzing government conduct under the Establishment Clause.<sup>118</sup> The three-pronged test in *Lemon* [*Lemon test*] is the cumulative set of criteria the *SCOTUS* established over the years preceding *Lemon* when addressing Establishment Clause issues.<sup>119</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 government entanglement with religion.”<sup>120</sup>

While the *Lemon test* “remains the touchstone for Establishment Clause jurisprudence,” its formula has been modified over the years.<sup>121</sup> The modifications stem primarily from the efforts of Justice

<sup>112</sup> *Id.* at 443 (quoting *Everson v. Board of Education*, 330 U.S. 1, 16 (1947)).

<sup>113</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>114</sup> *Id.* at 612 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

<sup>115</sup> *Id.* at 614.

<sup>116</sup> *Citizens v. Montgomery County*, No. Civ.A. AW-05-1194, 2005 WL 1075634, 8 (D. Md.) (citing *McCollum v. Board of Ed.*, 333 U.S. 203, 212 (1948)).

<sup>117</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>118</sup> *See id.* (in which the Supreme Court decided whether state aid to, or for the benefit of, nonpublic schools involved excessive entanglement of church and state).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 612-13 (quoting *Board of Education v. Allen*, 392 U.S. 236, 243 (1968) and *Walz V. Tax Commission*, 397 U.S. 664, 674 (1970)).

<sup>121</sup> Marc L. Rubinstein, Note, *Gay Rights and Religion: A Doctrinal Approach to the Argument That Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585, 1596 (1995).



O'Connor.<sup>122</sup> In *Lynch v. Donnelly*,<sup>123</sup> a case in which the Court addressed whether a municipality's display of a nativity scene violated the Establishment Clause, Justice O'Connor wrote a concurring opinion with the primary purpose of clarifying Establishment Clause doctrine.<sup>124</sup> In so doing, Justice O'Connor explained the Establishment Clause stands for two fundamental principles.<sup>125</sup> First, that there should not be excessive entanglement between government and religious institutions.<sup>126</sup> Excessive entanglement was defined as when the government intrudes on the activities of religious organizations in such a manner as to interfere with the institution's independence, or to give religious institutions access to government or governmental powers that are not fully shared by non-adherents of religion, or to foster political constituencies that are defined by religion.<sup>127</sup>

Second, that there should be no government endorsement or disapproval of religion.<sup>128</sup> This second principle of the Establishment Clause, Justice Connor argued, embodies the first two prongs of the *Lemon test*.<sup>129</sup> Justice O'Connor argued these two prongs had an objective and a subjective component.<sup>130</sup> The purpose prong of the *Lemon test* asked that the government have a valid secular purpose.<sup>131</sup> Justice O'Connor suggests "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion."<sup>132</sup> Applying this interpretation of the *Lemon test*, Justice O'Connor found that the intent of having a nativity scene displayed was not to endorse Christianity, but to celebrate a "public holiday through its traditional symbols."<sup>133</sup>

The effect prong asks whether, regardless of the government's actual purpose, the practice under review in fact conveys a message of approval or disapproval of religion.<sup>134</sup> As Justice O'Connor explained:

[T]he effect prong of the *Lemon test* [does not] require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibi-

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<sup>122</sup> *Id.* at 1597.

<sup>123</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>124</sup> *Id.* at 687 (O'Connor, J., concurring).

<sup>125</sup> *Id.* at 687-88.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 688.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 690.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 691.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 691-92.

tion of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.<sup>135</sup>

Justice O'Connor further stated:

[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.<sup>136</sup>

Applying this framework to the analysis of the *Lynch* case, Justice O'Connor found that since Christmas is a holiday with "very strong secular components and traditions," and the symbols of the nativity scene were displayed with other secular symbols representing the holiday, it did not send a message that government was endorsing Christianity.<sup>137</sup>

The majority of the *SCOTUS* has essentially adopted Justice O'Connor's interpretation of the *Lemon test*.<sup>138</sup> In *County of Allegheny v. ACLU*,<sup>139</sup> for example, four justices concurred with Justice Blackmun on the validity of Justice O'Connor's formulation of the *Lemon test*.<sup>140</sup> As in *Lynch*, however, while a majority of the Justices accepted Justice O'Connor's endorsement standard, there was disagreement as to its application, which prevented a majority opinion using Justice O'Connor's test.<sup>141</sup>

Justice O'Connor's framework has gained sufficient popularity amongst her peers that, in the words of one scholar, an Establishment Clause analysis should be "guided by Justice O'Connor's Establishment Clause framework and ask if the [same-sex marriage prohibition] in question was adopted with the purpose of endorsing religion,"<sup>142</sup> paying close attention to *McGowan*, which stands for the premise that a law is not invalid merely because it coincides or harmonizes with some or all of the tenets of some or all religions.<sup>143</sup>

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 693-94.

<sup>137</sup> *Id.* at 692.

<sup>138</sup> Rubinstein, *supra* note 121, at 1600.

<sup>139</sup> 492 U.S. 573 (1989).

<sup>140</sup> Rubinstein, *supra* note 121, at 1601.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1603.

<sup>143</sup> *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

That Judeo-Christianity condemns homosexuality today, then, is not enough to support an Establishment Clause violation, since *McGowan* stands for the premise that a law will not be invalidated simply because it happens to harmonize with religious tenets. The issue lies in whether the prohibition was adopted, and continues to exist, with the purpose of endorsing religious values or beliefs.

### III. SECULAR BASES AND THE SAME-SEX MARRIAGE PROHIBITION

As has been shown, a prohibition of same-sex marriage, *on its face*, appears to be a violation of the Establishment Clause because the foundation of the institution of marriage in the United States is historically rooted, and thickly clothed, in Judeo-Christian ideals. Since same-sex marriage has always been definitionally excluded since the Canon law and, as a result, from the common law, the states' recent statutory enactments against same-sex marriage are simply an express codification of already existing law. Since our common law definition of marriage originated from the Canon law and Ecclesiastical courts, it is indisputable that the original intent in prohibiting same-sex marriage was to promote the interest of Judeo-Christian values. *Lemon* establishes that a law that is rooted in religion must have a valid secular legislative purpose, its primary effect cannot be to advance or inhibit religion, and it must not foster an excessive government entanglement with religion. The Canon law heritage of our common law, however, predates the founding of our Nation. Given such extensive passage of time, it could not legitimately be presupposed that the states have inherently continued to prohibit same-sex marriage for the same reasons for which it was originally definitionally excluded. The issue turns, at least in part, on whether the states have developed a valid secular basis for the prohibition – thus secularizing the prohibition.

The vast number of bases for prohibiting same-sex marriage that have been provided in the marriage statutes, constitutions, and case law of the various states, can be categorized as addressing concerns dealing with either preserving history and tradition, promoting moral values, procreation, protecting the traditional family,<sup>144</sup> promoting the welfare of children, or promoting a political purpose. The validity of the secular bases is examined through a survey of both legal scholarship and social science (where appropriate).

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<sup>144</sup> For definition of "Traditional family," see *infra* note 298.

### A. Preserving History and Tradition

While the core issue presented is that religious dictates lie at the foundation of the history and tradition definitionally excluding same-sex marriage in the United States, preserving this ‘religious history and tradition’ cannot stand as a ‘secular’ purpose to prohibiting same-sex marriage.<sup>145</sup> When constitutional rights are at stake, history and tradition alone is often not sufficient to uphold a rule of law. As the majority opinion in *Lawrence v. Texas*<sup>146</sup> puts it, “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>147</sup>

The *Lawrence* Court, in addressing whether a Texas sodomy statute prohibiting same-sex sexual activity was constitutional,<sup>148</sup> stated that the longstanding history of prohibition against sexual activity between persons of the same sex was insufficient to allow the statute to stand.<sup>149</sup> The Court reversed *Bowers*,<sup>150</sup> which held that a Georgia sodomy statute did not violate the fundamental rights of homosexuals.<sup>151</sup> In so doing, the *Lawrence* Court found that the *Bowers* Court, when taking into account the history of sodomy laws, failed to take into account the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>152</sup>

The Court also found that Justice Burger’s “sweeping references . . . to the history of Western Civilization and to Judeo-Christian moral and ethical standards [in his *Bowers* concurring opinion] did not take account of other authorities pointing in an opposite direction.”<sup>153</sup> Among the ‘other authorities’ referenced by the *Lawrence* Court are: Reports of the British Parliament recommending repeal of laws pu-

<sup>145</sup> One court notes the legislature has often codified history and tradition, but that in each such instance a basis beyond general acceptance by society justified the codification. *See In re Coordination Proceeding*, No. 4365, 2005 WL 583129, at \*3.

<sup>146</sup> *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (where, after quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), for the proposition that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack,” the court held that the reasoning of Justice Stevens’ dissent in *Bowers* should have been controlling).

<sup>147</sup> *Lawrence*, 539 U.S. at 572 (Kennedy, J., concurring) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998)).

<sup>148</sup> *See id.* at 562.

<sup>149</sup> *See id.* at 577 (“*stare decisis* . . . is not, however, an inexorable command,” and discussing how the *Lawrence* Court rejected the *Bowers* Court’s premise that the history of laws against homosexuals was not longstanding, but acknowledging that broader point in *Bowers* was fact that for centuries powerful voices have condemned homosexuality as immoral).

<sup>150</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by*, 539 U.S. 558 (2003).

<sup>151</sup> *Id.* at 195-96.

<sup>152</sup> *See Lawrence*, 539 U.S. at 572.

<sup>153</sup> *Id.*

nishing homosexual conduct and a case in the European Court of Human Rights which held that laws proscribing homosexual conduct were invalid under the European Convention of Human Rights.<sup>154</sup> In addition, the Court took into account that other nations had taken affirmative steps in protecting the rights of homosexuals to engage in “intimate, consensual” conduct.<sup>155</sup> At the end of the day, the *Lawrence* Court found that the Texas statute proscribing same-sex sexual intimacy was unconstitutional.<sup>156</sup>

Similarly, a court in California held that history and tradition was not enough to support a law prohibiting same-sex marriage.<sup>157</sup> Same-sex couples brought actions to challenge the constitutionality of statutes limiting marriage to the union of one man and one woman.<sup>158</sup> One of the bases in support of the state law banning same-sex marriage was that opposite-sex marriage has been deeply rooted in California’s history, culture, and tradition.<sup>159</sup> The court rejected this argument, holding that “same-sex marriage cannot be prohibited solely because California has always done so before.”<sup>160</sup>

In contrast to the California decision, an Indiana court found history and tradition were sufficient to uphold the validity of the law prohibiting same-sex marriage.<sup>161</sup> The court reasoned “restrictions against same-sex marriage reinforce, rather than disrupt, the traditional understanding of marriage as a unique relationship between a woman and a man.”<sup>162</sup> In its analysis, the Indiana court failed to take into account that since the history of marriage is deeply rooted in Judeo-Christian ideals, a state’s interest to preserve the history and tradition of marriage can only serve to preserve the Judeo-Christian ideal of marriage as an opposite-sex institution – upon which the prohibition was founded in the first place. The case, however, was being argued under Equal Rights, rather than Establishment Clause, grounds.<sup>163</sup> As such, that marriage has its roots in Judeo-Christian ideology was not at issue in the case.

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<sup>154</sup> *Id.* at 572-73.

<sup>155</sup> *Id.* at 576.

<sup>156</sup> See *Lawrence*, 539 U.S. 558.

<sup>157</sup> See *In re Coordination Proceeding*, *supra* note 147, at \*11.

<sup>158</sup> *Id.* at \*2.

<sup>159</sup> See *id.* at \*3.

<sup>160</sup> *Id.* at \*4. The second premise advanced was that same-sex couples have been advanced the benefits of marriage through civil union laws, which the court also rejected, stating that it “smacks of a concept long rejected by the courts: separate but equal.” *Id.* at \*4-5. But see *In re Marriage Cases*, S147999 (Cal., May 15, 2008) (recently holding California statute defining marriage as heterosexual institution unconstitutional).

<sup>161</sup> *Morrison v. Sadler*, 2003 WL 23119998, at \*5.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at \*9-10 (stating Equal Rights grounds for deciding the case).

Under the Establishment Clause jurisprudence's *Lemon test*, it would seem upholding a statute prohibiting same-sex marriage based on history and tradition would be an impermissible entanglement of Church and State because the historical Canonical purpose for the prohibition is not secular. In the absence of any other valid state purpose to continue the prohibition of same-sex marriage besides *history and tradition*, the prohibition of same-sex marriage arguably remains rooted in the religious Canon law that founded it as an opposite-sex institution. Therefore, it would violate the Establishment Clause under the original *Lemon test*, since the original Canonical purpose for excluding same-sex marriage definitionally was rooted in the religious values of the Judeo-Christian faith. It would also violate the Establishment Clause under Justice O'Connor's framework, because the intent of the framers of the Canon laws was to promote the religious interests of traditional Judeo-Christianity. On this basis, it would appear history and tradition inherently cannot stand as the sole basis for a prohibition of same-sex marriages.

There are, however, secular schools of thought that argue the preservation of history and tradition for the benefit of society. These are discussed below.

#### 1. Burke and Oakeshott – conservative thinkers

In a symposium on the meaning of marriage, Amy Wax discussed the traditionalist conservative and rationalist liberal views on the issue of preserving history and tradition.<sup>164</sup> Wax posits the scholarly literature that makes a serious effort to formulate an argument against same-sex marriage is scarce.<sup>165</sup> And, what is written lacks a unified and systematic exposition of the anti-gay marriage position.<sup>166</sup> As a result of this scarcity, Wax looks to thinkers identified with conservative views on politics and social life and draws on these works to explore whether these conservative theories provide any guidance on the question whether marriage should include same-sex marriages.<sup>167</sup>

According to Burke, a conservative thinker, traditional institutions and customary practices represent experience embodied as wisdom.<sup>168</sup> These traditions are presumed to be good or useful to society.<sup>169</sup>

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<sup>164</sup> See generally Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005).

<sup>165</sup> *Id.* at 1060 ("One searches long and hard for a piece in law or social policy that rejects, or even makes a serious effort to formulate a case against, the official recognition of gay marriage . . .").

<sup>166</sup> *Id.* at 1065.

<sup>167</sup> *Id.* at 1065-66.

<sup>168</sup> *Id.* at 1066.

And, since no one can accurately predict the outcome of any human plan, Burke warns that reliance on “formal learning” and “individual reason” is “far more prone to error and unintended consequences” than reliance on the accumulated wisdom embodied in customs, traditions, and settled practices.<sup>170</sup> These themes of reliance on collective wisdom, rather than on formal learning and individual reason, are also prominent in the works of Michael Oakeshott.<sup>171</sup>

Argument, analysis, and criticism of social practices are not rejected by Burke and Oakeshott, however.<sup>172</sup> Rather, they see institutional change as a part of social and economic life which cannot be avoided.<sup>173</sup> Burke believes change, when properly guided, can be a source of renewal.<sup>174</sup> The notion that customs and traditions represent experience embodied as wisdom is in conflict with the notion that institutional change is inevitable.<sup>175</sup> Evolutionary social changes that occur naturally and become self-executing as they gain popular support, however, are distinguished from legal reforms – which are imposed deliberately and consciously.<sup>176</sup>

Based on this, Burke’s school of thought would advocate that legislative change should only be the result of “generally felt need.”<sup>177</sup> Moreover, such a need for change would only warrant respect if it was the felt need of a conservative with adherence to tradition, since they lack eagerness to change.<sup>178</sup> “‘Tradition . . . [in Burke’s thinking] isn’t the enemy of change. . . . Political institutions require ongoing reform. . . [but change should] take the form of scrutinizing existing problems and canvassing available solutions, not trying to redesign things from scratch.’”<sup>179</sup>

In asking how this applies to answering whether same-sex marriages should be allowed, Wax recognizes that these conservative ideas are complicated by the role of religion in the politics of same-sex marriage.<sup>180</sup> The conservative views of Burke and Oakeshott are primarily

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1066-67.

<sup>171</sup> *Id.* at 1067.

<sup>172</sup> *Id.* at 1069.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1070.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1070 n.33 (quoting RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA* 40 (1953)).

<sup>178</sup> Wax, *supra* note 164, at 1070.

<sup>179</sup> See *id.* at 1069 n.32 (quoting Don Herzog, *Puzzling Through Burke*, 19 *POL. THEORY* 336, 344 (1991)).

<sup>180</sup> Wax, *supra* note 164, at 1073.



secular.<sup>181</sup> In an apparent recognition of the separation of Church and State, Wax notes that “[i]f faith-based convictions are a major factor, the theorists’ ideas may not matter much.”<sup>182</sup> That these conservative secular views simply happen to coincide with religious outlook, however, does not rule out their secular validity.

In contrast with conservative thought, liberal thought abandons history and looks to principle.<sup>183</sup> Principles of equality, nondiscrimination, and rights are predominant themes.<sup>184</sup> Strengthening these arguments is the fact that gender and sexual preference are immutable or deeply engrained.<sup>185</sup> Liberal thinkers approach the same-sex marriage issue from a presumption of equality and demand rational, logical reasons for denying equality.<sup>186</sup> As such, the focus of the liberal thinker focuses on logical inconsistencies of the conservative’s position.<sup>187</sup>

This plays out in the California and Indiana cases discussed above. The California (liberal) court said that the state cannot deny same-sex marriage simply because it had done so in the past,<sup>188</sup> and the Indiana (conservative) court said that denying same-sex marriage only served to reinforce the traditional definition of marriage as an opposite-sex institution.<sup>189</sup>

## 2. Traditionalists v. Rationalists

In the same symposium on the meaning of marriage, Gail Heriot seems to expand on the discussion of the conservative versus the liberal thinker. Framing the conservative thinker as a Traditionalist and the liberal thinker as a Rationalist.<sup>190</sup> Traditionalists and Rationalists are not real individuals.<sup>191</sup> Rather, they are “types . . . [that] help explain some of the legal and policy debates . . . .”<sup>192</sup>

Traditionalists and Rationalist often “butt heads,” Heriot explains.<sup>193</sup> Rationalists are often baffled at the Traditionalists’ “irrational fondness for established practice.”<sup>194</sup> Meanwhile, Traditionalists see

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1075.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1076.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1077.

<sup>188</sup> See *supra* notes 157-60 and accompanying text.

<sup>189</sup> See *supra* notes 161-63 and accompanying text.

<sup>190</sup> See generally Gail Heriot, *Traditionalism and Rationalism in the Court*, 42 SAN DIEGO L. REV. 1105 (2005).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* (alteration in original).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

the Rationalists' confidence in "the superiority of [the] intellect over the collective wisdom of the ages [as] irrational."<sup>195</sup> This gap, Heriot explains, is often unbridgeable,<sup>196</sup> and the issue of same-sex marriage may be such an area where the gap cannot be bridged.<sup>197</sup> These views are discussed below in light of the polar views on the same-sex marriage issue.

The Rationalist wants proof that a break in the traditional definition of marriage as being between opposite-sex parties, as opposed to same-sex parties, would have a detrimental effect on society.<sup>198</sup> The Traditionalist wants proof that a break in the traditional definition of marriage as being between opposite-sex parties, as opposed to same-sex parties, will *not* have a detrimental effect on society.<sup>199</sup> Rationalists are zealous and can make progress but are unprotected by the moderating influence of tradition.<sup>200</sup> In the field of academia, the zealous Rationalist is incapable of doing much harm or good except insofar as his ideas are persuasive.<sup>201</sup> But a judge's professional merits are different than that of an academic.<sup>202</sup> A judge's decisions affect real persons, living real lives, in very real ways.<sup>203</sup> Therefore, Heriot argues, judicial decision-making must be cautious and conservative.<sup>204</sup> This is why legal traditionalism has been the rule of our courts, as is well exemplified by the principle of *stare decisis* – which calls for judicial decision-making based on legal precedent.<sup>205</sup>

Arguably then, traditionalism belongs in the courts and rationalism may be better left to the legislature.<sup>206</sup> Since a majority is required to change a rule of law, there is inherently more protection from error.<sup>207</sup> This underlies the argument against judicial activism.<sup>208</sup> What if the issue is the constitutionality of a statute? "[C]ourts . . . are in their most rationalist mode . . . usually [when] deciding issues of constitutional law."<sup>209</sup>

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<sup>195</sup> *Id.* (alteration in original).

<sup>196</sup> *Id.* at 1106.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1106-07.

<sup>202</sup> *Id.* at 1107.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *See generally, id.* at 1107-10.

<sup>207</sup> *Id.* at 1107.

<sup>208</sup> *Id.* at 1108.

<sup>209</sup> *Id.* at 1109.

### 3. History and tradition as a valid basis

Both Wax and Heriot's papers advance a plausible secular argument for the proposition that preserving history and tradition could promote a valid state interest. However, while Wax slightly brushed on the notion that the religious political aspect of same-sex marriage could invalidate the conservative theorists' positions, neither of them truly addressed the Establishment Clause issues surrounding the prohibition of same-sex marriage. As Wax brushed on, however, since marriage is a fundamental right,<sup>210</sup> the exclusion of same-sex couples solely on the basis of 'because they have always been,' should not stand. To paraphrase the *Lawrence* Court, history and tradition should be the starting point but not the ending point of the Establishment Clause inquiry.<sup>211</sup>

## B. Promoting Moral Values

To prohibit same-sex marriage in order to promote moral values implies one of two things: that same-sex couples are inherently immoral or that they do not share the moral values equivalent to that of opposite-sex couples.

### 1. Moral values after *Romer* and *Lawrence*

The Supreme Court, in *Romer*<sup>212</sup> and *Lawrence*,<sup>213</sup> "rejected moral disapproval, without more, as a basis for subjecting gay<sup>214</sup> citizens to selectively disfavored treatment."<sup>215</sup> In a concurrence in *Lawrence*, Justice O'Connor expressly added, "moral disapproval, without any other asserted state interest, is [not] a sufficient rationale . . . to justify a law that discriminates among groups of persons."<sup>216</sup> Based on these Court rulings, the basis for promoting moral values must then lie on ground other than the belief that same-sex marriage is inherently immoral. Therefore, an expression of moral disapproval that is un-

<sup>210</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is part of the fundamental right to privacy . . .").

<sup>211</sup> *Lawrence*, 539 U.S. at 572.

<sup>212</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>213</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>214</sup> The term "gay" throughout this paper refers to same-sex couples, either male-male or female-female.

<sup>215</sup> Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2216-17 (2005) (relying on the *Lawrence* majority). See also *Morrison v. Sadler*, 821 N.E. 2d 15, 20 (Ind. Ct. App. 2005) (state concedes that "*Lawrence* effectively forecloses the possibility of relying upon moral disapproval of homosexual relationships as the sole justification for limiting marriage to opposite-sex couples only.").

<sup>216</sup> *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

ported by a further explanation of the state's interest is no longer a proper basis for prohibiting same-sex marriage, since a prohibition based on promoting moral values must go beyond a judgment of the same-sex relationship itself.<sup>217</sup>

## 2. Moral values as a valid basis

Historically, sodomy statutes have always sought to condemn non-procreative sex.<sup>218</sup> The idea that sex is for reproduction, and therefore sex for pleasure is wrong, is a reproductive logic that “capitalizes on traditional Judeo-Christian morality.”<sup>219</sup> This ideology places same-sex sexual practices,<sup>220</sup> and inherently same-sex relationships, as subjects of constant moral judgment. This does not imply that a given state's same-sex marriage prohibition based on the ‘promotion of moral values’ is religious in nature, however.

A reading of the state's bases aiming to promote moral values seem to imply a general belief that traditional families have “inherent”<sup>221</sup> moral values, unique “moral imperatives,”<sup>222</sup> provide a “basic morality” to society,<sup>223</sup> provide a unique “moral statement to the com-

<sup>217</sup> Wolff, *supra* note 215, at 2232-33.

<sup>218</sup> See *Lawrence*, 539 U.S. at 559-60 (recognizing the criminalization of non-procreative sex through sodomy statutes).

<sup>219</sup> Herdt, *supra* note 104, at 29; *Christensen v. State*, 468 S.E. 2d 188, 189-95 (Ga. 1996) (Georgia judge, in a pre-*Lawrence* dissent where a man was seeking a “blow job,” expressly opposed the state's proposition that the statute should be upheld because “such acts were proscribed by Judeo-Christian values, and were punishable during the Middle Ages and Reformation,” because it would be improper that a minority groups' rights should be dependent on majoritarian approval where no public harm would result from granting the minority group their right to privacy).

<sup>220</sup> “Gay sex” refers to sex between persons of the same sex, for the purposes of this paper.

<sup>221</sup> See, e.g., 19-A-2 ME. REV. STAT. ANN. 23-I, § 650 (1) (A) and (2) (West, Westlaw through 2005 First Reg. Sess. of 122d Legis. and with emergency legislation through the 2005 First Spec. Sess. of 122d Legis.) (declares the compelling state interest to “nurture and promote the unique institution of monogamous traditional marriage in the support of harmonious families and the physical and mental health of children,” and to “promot[e] the moral values inherent in traditional monogamous families,” and the purposes of the statute as: “A. To encourage the traditional monogamous family unit as the basic building block of our society, the foundation of harmonious and enriching family life; B. To nurture, sustain and protect the traditional monogamous family unit in Maine society, its moral imperatives, its economic function and its unique contribution to the rearing of healthy children; and C. To support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts.”).

<sup>222</sup> *Id.*

<sup>223</sup> See, e.g., WIS. STAT. ANN. § 765.001 (1) (2) (West, Westlaw through 2005 Act 21, published 7/22/05) (“It is the intent . . . to promote the stability and best interests of marriage and the family. . . . [T]o recognize the valuable contributions of both spouses during the marriage and at termination of the marriage . . . . [It] . . . is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state.”).

munity,”<sup>224</sup> foster “virtue” and “purity of the home” that promote “morality.”<sup>225</sup> Underlying these bases for prohibiting same-sex marriage is the implication that a non-traditional family headed by same-gender parents would lack inherent moral values, lack moral imperatives, lack basic morality, fail to provide a statement of morality to the community, fail to foster virtue, and fail to foster purity in the home.

The social science literature on morality as a basis to prohibit same-sex marriage is scarce. One family counselor, however, in an article opposing same-sex marriage, writes “heterosexual couples teach and model sound morals to children . . . . These morals include truthfulness, respect for others, commitment, perseverance, kindness, committed long-term sexuality, self-control, and others.”<sup>226</sup> Implied in this statement is that same-sex couples lack such moral values. However, there is no scientific or scholarly support offered in that article to support the premise that same-sex couples lack such values.

Another scholar suggests that such implications are inherently non-secular when he notes that *Romer* and *Lawrence* forbid the state to prohibit same-sex marriage by “dressing” the state’s basis for the prohibition in “lay clothing” – the justification for prohibiting same-sex marriage “must be both secular and concrete.”<sup>227</sup>

A review of the statutes and the case law using the promotion of moral values as their underlying rationales fails to explain how same-sex marriage would undermine these moral values.<sup>228</sup> What is revealed in some of the case law, which discusses moral values as a basis for the prohibition, is an attitude of moral judgment that same-sex sexual practices are inherently immoral and thus same-sex marriage is morally wrong.<sup>229</sup>

<sup>224</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993) (listing one of the state’s basis as a ‘statement of moral values to the community’).

<sup>225</sup> See, e.g., IDAHO CONST. art. 3, § 24 (basis of prohibition of same-sex marriage is to have “virtue . . . sobriety of the people . . . purity of the home . . . and . . . promotion of temperance and morality”).

<sup>226</sup> Bradley P. Hayton, *Homosexual Partners are Undermining the Family*, FAMILY IN AMERICA: OPPOSING VIEWPOINTS 25, 63-70 (David L. Bender & Bruno Leone eds., 1992).

<sup>227</sup> Wolff, *supra* note 215, at 2233.

<sup>228</sup> See generally, *supra* notes 55-58 for laws, cases, and the bases used by states.

<sup>229</sup> See, e.g., *supra* note 57 cases and parentheticals for these states: D.C. - 1992 WL 685364, (same-sex marriage would constitute state approval of sodomy); *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993), overruled by *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996) (claiming prohibition makes moral statement of the community, giving no reason how lifting the prohibition would cause harm); *Am. Civil Liberties Union, Idaho Chapter v. Echohawk* 857 P.2d 626, 627-28 (Idaho 1993) (where a prohibition on discussing homosexuality as acceptable behavior, private sexual practices could be considered as non-job factors in public employment, implying a moral judgment on same-sex sexual practices); *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (finding same-sex sexual practices an “abominable crime against nature,” viewing it as “errant sexual behavior which threatens the fabric of society”); *Hyché Landfill, LLC v. Winston County*, 878 So. 2d 258,

Political moralists and religious fundamentalists confuse and lump together the nineteenth-century homosexuals to the twentieth-century lesbians or gay men.<sup>230</sup> There is an important distinction between the two.<sup>231</sup> The nineteenth century homosexual, forced to live hidden from society, could not lead a normal life.<sup>232</sup> Twentieth-century gays and lesbians, however, are able to live more open and fully, and can live normal social lives.<sup>233</sup> This change becomes evident when one looks at the onslaught of cases nationwide that are filed by same-sex couples in an effort to obtain the right to legally enter into civil marriage.

Failing to distinguish this evolution in the social lives of gays and lesbians, political moralists make policy based on the stereotype that all gays and lesbians, unless laws control them, are hypersexual and unable to control their sexual desires.<sup>234</sup> Statements made by Senators in support of the federal DOMA<sup>235</sup> further illustrate the pervasiveness of the belief amongst some lawmakers that same-sex sexual practices are inherently immoral and against ‘natural law,’ based on religious ideology.<sup>236</sup> And, as recently as 2002 and 2004, judges speaking from the bench – as gatekeepers of the law – have referred to same-sex sexual practices and gay persons as “abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature,” destructive to society, and belonging in mental institutions – all based on religious moral beliefs.<sup>237</sup>

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272-76 (Ala. 2003) (stating political, cultural, religious, and legal beliefs- all of which are rooted in the Judeo-Christian tradition as previously documented in *supra* n.16-18 and accompanying text); *Storrs v. Holcomb*, 645 N.Y.S. 2d 286, 287 (N.Y. App. Div. 1996) (stating cultural and religious beliefs – the cultural beliefs being historically rooted in the Judeo-Christian tradition as previously documented in *supra* note 16-18 and accompanying text); *Constant A. v. Paul C.A.*, 496 A. 2d 1, 6 (Pa. 1985) (also stating cultural and religious beliefs); *Anderson v. King County*, 2004 WL 1738447, \*7 (Wash. 2004) (to protect children from harm of non-traditional family as reason – recognizing the morality argument as rooted in religion, the court expressly concludes “[i]t is not for our government to choose between religions and take moral or religious sides in such a debate”).

<sup>230</sup> See, e.g., Herdt, *supra* note 104, at 32-33.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 32.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 32-33.

<sup>235</sup> See, e.g., Hughes, *supra* notes 76-77 and accompanying text, for quotes of Senators.

<sup>236</sup> The natural law argument is based on the belief that same-sex sexual practices are unnatural and relies strictly on the doctrine of morality as its basis. See John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1198-00 (1999).

<sup>237</sup> See cases cited *supra* note 57. See also Herdt, *supra* note 104 (“The most destructive effect of the old rhetoric of sin and degeneracy is the treatment of homosexuality as a ‘problem’ to fix or a ‘flaw’ to remove. . . . The abnormal/disease rhetoric thus seeks to locate a cause for ‘what went wrong’ with the homosexual in order to ‘fix, repair, or cure it.’”).

In fact, as evidenced by the gay community's nationwide efforts to legalize same-sex marriage, same-sex couples desire to enter into marriage-like<sup>238</sup> relationships and to share the moral values that are traditionally associated with marriage.<sup>239</sup> Gay couples who enter into marriage-like relationships do so with what are "very traditional concepts of the nature of the relationship."<sup>240</sup> Gays and lesbians share in the same culture as everyone else, and also want gold bands, legal documents, and kids.<sup>241</sup> These facts do not support that same-sex households lack in morals, but rather that they embrace the same moral values for family life as their heterosexual counterpart. Even if they did not, however, *Romer* and *Lawrence* would require more than mere moral disapproval to sustain a same-sex marriage prohibition.<sup>242</sup>

If the morality underlying a rule of law is purely secular and merely coincides with religious tenets then, perhaps, it would pass Establishment Clause muster. However, statements such as the ones made in the Congress when passing DOMA and statements such as the ones made from the bench, openly denouncing homosexual relationships as being immoral based on religious credence, bring into question the secular validity of the resulting laws and rulings from these legislators and judges. Such an imposition of their moral majority upon the homosexual minority is exactly the type of religious imposition the Establishment Clause seeks to prevent.

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Historically, same-sex sexual practices were seen as deviant, a sin, and a form of mental illness. PAULINE IRIT ERERA, FAMILY DIVERSITY 161 (2002). "Gay men and lesbians have been burned, beheaded, institutionalized, subjected to lobotomy and electroshock treatment, and placed in concentration camps during the Holocaust." *Id.*

<sup>238</sup> The term "marriage-like" is used to depict that there is no "marriage" for gays in the United States. A marriage in Massachusetts, for example, is also not the equivalent of an opposite-sex marriage since, while these couples may get in-state benefits from a state sanctioned marriage, the federal benefits accorded to traditional marriages are denied to same-sex couples legally married within the state of Massachusetts.

<sup>239</sup> Like their opposite-sex (straight) counterparts, gays and lesbians (gays) cherish their families and the ideals of family life. Gay couples seek to commit to each other's mutual well-being over the course of their lives. See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 583 (1994-1995); see also Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 L. & SEXUALITY 187, 189 (2001).

<sup>240</sup> See Sparling, *supra* note 239.

<sup>241</sup> Wolfson, *supra* note 239, at 583.

<sup>242</sup> See Wolff, *supra* note 215 and accompanying text.



### C. Procreation<sup>243</sup>

The procreation theory sees traditional marriage as the basic social fabric of society.<sup>244</sup> It is most often rooted in the premise that procreation promotes the continuity of the human race.<sup>245</sup> Some states promote procreation as it relates to child rearing as a rational basis because it promotes the presence of both biological parents.<sup>246</sup> Scholars recognize that, on their face, these arguments appear valid because it is undeniable that procreation is fundamental to the survival of the human race,<sup>247</sup> and it is also irrefutable that same-sex couples cannot procreate together.<sup>248</sup> Many courts upholding procreation as a valid basis for prohibiting same-sex marriage have reasoned that limiting marriage to those relationships capable of producing children is a reasonable restriction.<sup>249</sup>

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<sup>243</sup> Since some states relate procreation to child welfare, it should be noted that whether the welfare of children is at risk when raised by a same-sex couple will be discussed in the “Promoting the Welfare of Children” section below. This section concerns itself with the primary argument that procreation is needed for the continuity of the race and that since same-sex couples inherently cannot procreate their marriage does not fulfill the state’s interest in promoting procreation.

<sup>244</sup> See, e.g., *Knight v. Schwarzenegger*, Nos. 03AS05284, 2004 WL 2011407, at \*6 (marriage is the “keystone of civilized society . . . [whose] interest [is] to maintain . . . marriage for . . . societal goals ranging from property rights to procreation”). See also *supra* note 57.

<sup>245</sup> See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (“foster development of relationships optimal for procreation, thereby encouraging the ‘stable generational continuity of the United States’” and “encouraging creation of stable relationships that facilitate the rearing of children by both their biological parents” as bases for the federal DOMA law in a lawsuit by two lesbians married in Massachusetts). See also *supra* note 57.

<sup>246</sup> See, e.g., *Baker v. Vermont*, 744 A.2d 864, 865 (Vt. 1999) (stated “furthering the link between procreation and child rearing”). See also *supra* note 57.

<sup>247</sup> See Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 587 (1972-1973) [hereinafter *Legality of Homosexual Marriage*] (recognizing same-sex couples cannot procreate together). See also Dale Carpenter, Draft, *Bad Arguments Against Gay Marriage*, Law & Society Abstracts, vol. I, No. 33, Nov. 18, 2005, at 20, available at <http://ssrn.com/abstract=832008> (“[G]ay couples, note procreationists, cannot procreate as a couple.”).

<sup>248</sup> See Note, *supra* note 247, at 587. See also, Carpenter, *supra* note 247.

<sup>249</sup> See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451, 461 (Ariz. Ct. App. 2004) (Gemmill, J. and Portley, M., concurring) (“State’s interest . . . limited to those capable of producing children . . .”); *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. Cir. 1995) (permitting limitation to opposite-sex couples because of emphasis on child bearing); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (permitting denial of same-sex marriage based on interest of procreation to foster generational continuity); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*3 (fostering interest of procreation within marital setting allowed to prohibit same-sex marriage); *Baker v. Nelson*, 191 N.W. 2d 185, 186 (Minn. 1971) (fostering procreation for the rearing of children within the family setting); *Lewis v. Harris*, 875 A.2d 259, 272-76 n.4 (N.J. Super. Ct. App. 2005) (recognizing the unique procreative quality of male and female bonding); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at \*13 (traditional marriage uniquely fosters procreation); *People v. Greenleaf*, 780 N.Y.S. 2d 899 (N.Y. J. Ct. 2004) (traditional marriage provides favorable environment for procreation); *Constant v. Paul*, 496 A.2d 1, 6 (Pa. Super. Ct. 1985) (implies procreation when stating that traditional marriage promotes propagation of the human race); *Baker v. Vermont*, 744 A.2d 864, 865 (Vt. 1999) (based on link between procreation and child rearing).

A variant of the procreation rationale frames procreation within the marital setting as “responsible procreation.”<sup>250</sup> The term “responsible procreation” is defined as “the procreation and raising of children by persons who have contemplated, and are well suited for, the required commitment and challenges of child rearing,”<sup>251</sup> implying that same-sex couples fail to contemplate, and are not suited for the challenges of child rearing.

This idea, that procreation is a fundamental purpose of marriage, is deeply rooted in Judeo-Christian ideals.<sup>252</sup> Canon 1096 of the Code of Canon law specifically provided that marriage between a man and woman was organized for the procreation of children by sexual cooperation.<sup>253</sup> “The history of the law of marriage in this country traces its origins back to the ancient Canon law.”<sup>254</sup> Thus, the idea that marriage is for the fundamental purpose of procreation is an ideal that is rooted in Judeo-Christian values in the United States. As such, procreation as an element of marriage was once regulated insofar as our original sodomy laws aimed to prosecute any non-procreative sexual activity.<sup>255</sup>

The courts are split on whether procreation is a valid state purpose to support a same-sex marriage prohibition. For example, the Superior Court of San Francisco, addressing procreation as a state purpose for marriage, said that one does not:

have to be married in order to procreate, nor does one have to procreate in order to be married. . . . [M]arriage is available to heterosexual couples regardless of whether they can or want to procreate. . . . Given this situation, one cannot conclude that singling out the same-sex couple classification

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<sup>250</sup> See *Morrison v. Sadler*, 821 N.E. 2d 15, 25 (Ind. Ct. App. 2005) (fostering interest in “responsible procreation”).

<sup>251</sup> *Id.* at 25 n.13.

<sup>252</sup> Claudina Richards, *Legal Recognition of Same-Sex Couples – the French Perspective*, 51 *Int'l & Comp. L.Q.* 305, 308 (2002).

<sup>253</sup> *Id.*

<sup>254</sup> *Ramon v. Ramon*, 34 N.Y.S. 2d 100, 108 (N.Y. Fam. Ct. 1942) (quoting *Reaves v. Reaves*, 82 P. 490, 494 (Okla. 1905)). See also Gary Chamberlain, *A Religious Argument for Same-Sex Marriage*, 2 *SEATTLE J. FOR SOC. JUST.* 495, 500 (2004) (Vatican believes procreation is one of the main purposes for marriage).

<sup>255</sup> *Lawrence*, 539 U.S. at 559 (“Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally, whether between men and women or men and men.”). Non-procreative sexual activity was defined as any sex other than male-female penis to vagina sex. That the couple be able to procreate was not at issue under the sodomy laws. Only that the form of sex had to have the ability to cause procreation in a fertile couple was at issue.

of non-child-bearers is necessary to any perceived government interest in allowing marriage to further procreation.<sup>256</sup>

Contrast this court's decision on procreation with the following decision from an older case in a California United States District Court:

[T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race. Plaintiffs argue that some persons are allowed to marry . . . even though the above stated justification procreation is not possible. They point to marriages being sanctioned between couples who are sterile because of age or physical infirmity, and between couples who make clear they have chosen not to have children. . . . [I]f the classification of the group who may marry is overinclusive, it does not affect the validity of the classification. . . . [T]he state has a compelling interest in encouraging and fostering procreation of the race . . . there is no real alternative to overbreadth . . . . The alternative would be to require each couple, before issuing a marriage license, as to their plans for children and give sterility tests to all applicants . . . .<sup>257</sup>

Interestingly, both of these cases applied a strict scrutiny standard in their analysis. Legal scholars continue to be split on the issue. Below are discussions on these two polar views.

### 1. Why procreation is a bad argument

Proponents of same-sex marriage argue the procreation basis is a bad argument against same-sex marriage.<sup>258</sup> Through means such as artificial insemination and surrogacy, same-sex couples – either male or female – *are* able to procreate and form a family in much the same manner as many heterosexual couples procreate and form families.<sup>259</sup> In fact, heterosexual insemination has gained such acceptance as a method of reproduction that most jurisdictions recognize the spouse of an inseminated mother as the “real” father and deny parental rights

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<sup>256</sup> *In re* Coordination Proceeding, 2005 WL 583129, at \*8-12 (finding “procreation” is irrational basis for same-sex marriage ban because there is no requirement to procreate in order for heterosexuals to be able to marry).

<sup>257</sup> *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980).

<sup>258</sup> *Carpenter*, *supra* note 247, at 15-23.

<sup>259</sup> *Id.* at 20. *See also* Roni Berger, *Gay Stepfamilies: A Triple Stigmatized Group*, 81 FAMILIES IN SOCIETY 504, 507 (2000) (discussing same-sex couples becoming adoptive parents, or using advanced technologies such as artificial insemination, in vitro fertilization, or surrogacy to procreate).

to the donor.<sup>260</sup> New reproductive technologies, such as artificial insemination and surrogacy through in vitro fertilization, have expanded the traditional undertaking of families to include non-biological family members as “real” family members.<sup>261</sup> “Families formed through reproductive technologies, similar to adoptive-foster families, and to some extent like stepfamilies, defy the notion that biological conception has to be the basis for family formation.”<sup>262</sup>

Legal scholar Mark Strasser notes the *SCOTUS* has linked marriage to procreation.<sup>263</sup> In *Board of Directors*, the Court expressly recognized “marriage, begetting and bearing children, child rearing and education, and cohabitation with relatives” are intimate relationships that are constitutionally protected.<sup>264</sup> The Court explicitly rejected, however, that only those relationships implicating familial associations would be constitutionally protected<sup>265</sup> so that procreation, then, is a protected right even outside the scope of marital relations. Strasser posits that not allowing same-sex couples to marry may in fact deter same-sex couples from procreating, thus “to use it as a reason to prohibit such unions is to turn the rationale on its head.”<sup>266</sup>

In another case, *Turner*,<sup>267</sup> the Court decided whether an inmate had a right to marry while in prison.<sup>268</sup> Strasser emphasizes that the Court upheld the inmate’s right to marry because marriages express moral support and public commitment, marriages may involve the exercise of faith and personal commitment, marriages are formed in the hopes they will be consummated, and marriages are often a precondition to government benefits:<sup>269</sup> none of the reasons enumerated by the Supreme Court framed the fundamental right of marriage as being dependent upon procreation.<sup>270</sup>

In the past, the Supreme Court has supported the notion that procreation is fundamental to the very existence of the human race.<sup>271</sup> In spite of this history, Justice Scalia effectively rebutted the procrea-

<sup>260</sup> Erera, *supra* note 237, at 7.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Mark Strasser, LEGALLY WED 62 (1997). See also *Legality of Homosexual Marriage*, *supra* note 247, at 579 n.24.

<sup>264</sup> *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

<sup>265</sup> Strasser, *supra* note 263.

<sup>266</sup> *Id.* at 59.

<sup>267</sup> *Turner v. Saffley*, 482 U.S. 78 (1987).

<sup>268</sup> *Id.*

<sup>269</sup> Strasser, *supra* note 263, at 62-63.

<sup>270</sup> *Id.* at 63.

<sup>271</sup> *Legality of Homosexuality*, *supra* note 247, at 579 (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (where the Supreme Court advocated strict scrutiny in a sterilization case finding that “[m]arriage and procreation” are fundamental rights).

tion argument as an adequate basis for prohibiting same-sex marriage.<sup>272</sup> In *Lawrence*, Scalia wrote:

[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “the liberty protected by the Constitution”? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.<sup>273</sup>

Whereas sex was once a prerequisite to procreation, this is no longer so in light of technological advances. Given the widespread acceptance and use of technology to procreate, whether traditional marriage for the purpose of procreation continues to be the basic fabric of society is negligible. The procreation argument appears logically flawed in light of the fact that one does not need to procreate to get married, that one does not have to get married to procreate, and that same-sex couples are able to procreate through the use of alternative methods of conception.<sup>274</sup>

The argument for procreation is further weakened by the fact that only sixteen percent of married couples see having children as the main purpose for marriage, notes one sociologist.<sup>275</sup> As a result of the weakening social norms that have traditionally defined partner’s roles and behaviors, the meaning of marriage has evolved over the years.<sup>276</sup> As marriage evolved, so did the laws regarding marriage.<sup>277</sup> Under this view, that same-sex couples are seeking to marry can be seen as the natural result of the weakening of social norms and the ongoing gradual deinstitutionalization of traditional marriage.<sup>278</sup>

<sup>272</sup> Carpenter, *supra* note 247, at 18.

<sup>273</sup> *Id.* (quoting *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting)). Similar reasoning to that of Justice Scalia’s response to the procreation argument was also discussed, previous to the *Lawrence* decision, by other legal scholars. See also Sparling, *supra* note 239, at 194 (citing Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible*, 47 CATH. U. L. REV. 1245 (1998)).

<sup>274</sup> See, e.g., *In re Coordination Proceeding*, 2005 WL 583129, at \*11 (court rejected procreation as a basis to prohibit same-sex marriage because one need not procreate to be married).

<sup>275</sup> Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. OF MARRIAGE & FAMILY 848, 856 (2004).

<sup>276</sup> *Id.* at 848-53 (notes stages of evolution in marriage: (a) 1950’s when the breadwinner/homemaker marriage flourished, (b) 1960’s where marriage’s dominance began to vanish and cohabitation become more acceptable, and (c) 1970’s and 1980’s where more forms of marriage and more alternatives to marriage became acceptable).

<sup>277</sup> *Id.* at 852-53 (the most notable of the legal changes being in divorce laws both in the United States and other nations).

<sup>278</sup> *Id.* at 850-51 (Nov. 2004).

## 2. Why procreation is a good argument

Some believe that reproductive technologies do not counter the validity of procreation as a rational basis for prohibiting same-sex marriage.<sup>279</sup> Rather, one view sees it as undermining the ‘family’,<sup>280</sup> because it results in anonymous fatherhood,<sup>281</sup> exploits children – because it “remov[es] procreation from the context of loving, marital intercourse,”<sup>282</sup> allows lesbians and single women to have children of their own – affronting the ‘traditional family’ and moral standards of marriage.<sup>283</sup>

Some opponents of same-sex marriage argue that while same-sex couple may be able to procreate through alternate means, they are unable to procreate *together* by definition.<sup>284</sup> Only heterosexual couples are able to have biological children.<sup>285</sup> This is seen as the “procreative ideal.”<sup>286</sup> Therefore, if same-sex couples were allowed to marry, then many couples would “fall short of the procreative ideal.”<sup>287</sup> Proponents of same-sex marriage argue the inconsistency of procreation being the primary purpose of marriage in light of the fact that many heterosexual couples are allowed to marry who cannot, or do not want to, procreate.<sup>288</sup>

Opponents, however, make the distinction that barrenness is the exception for the heterosexual couple, whereas inability to procreate together is the rule for homosexual couples.<sup>289</sup> This does not imply *per se* that same-sex couples are barren and unable to have children, but rather that they are unable to have children *together*.<sup>290</sup> This distinction is deemed critical on the basis that parents tend to treat their natural children better than their adopted children.<sup>291</sup>

That opposite-sex marriage is the “optimum arrangement” for procreation should not imply that every heterosexual couple must achieve procreation.<sup>292</sup> Because same-sex couples are unable to

<sup>279</sup> See, e.g., Donald Demarco, *Reproductive Technology Is Undermining the Family*, in FAMILY IN AMERICA: OPPOSING VIEWPOINTS 25, 79-86 (David L. Bender & Bruno Leone eds., 1992).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 80.

<sup>282</sup> *Id.* at 82-83.

<sup>283</sup> *Id.* at 83.

<sup>284</sup> Wax, *supra* note 164, at 1077-78.

<sup>285</sup> *Id.* at 1077.

<sup>286</sup> *Id.* at 1078.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* See also Carpenter, *supra* note 247, at 20.

<sup>291</sup> Carpenter, *supra* note 247, at 20.

<sup>292</sup> See *id.*

achieve the ideal of procreation *per se*, traditionalist ideology advocates that allowing same-sex couples to marry may have undesirable effects – which could only be known after the reforms have taken place – on the real-world institution of marriage.<sup>293</sup>

### 3. Procreation as a valid secular basis

The traditionalist view advances one of the strongest arguments in regards to procreation, namely, that the social repercussions of legalizing same-sex marriage are unpredictable. To bar same-sex marriage because it cannot provide what some see as the optimum setting for procreation is not very likely to pass muster at the *SCOTUS*, however, when Justice Scalia – one of the most conservative Justices on the Court – has already refuted it as a valid basis to prohibit same-sex marriage.

The question would most likely turn on whether possible and unpredictable social repercussions regarding procreation are sufficient to preserve the state's interest in keeping marriage an opposite-sex institution. This position loses strength in light of the fact that only sixteen percent of married couples see procreation as the main purpose to marriage.<sup>294</sup> This, however, does not necessarily imply that only sixteen percent of married couples are procreating.

In 1978, only one out of six children were born outside of marriage.<sup>295</sup> However, by 2003, this had increased to one of three children being born outside marriage.<sup>296</sup> This is attributed, in part, to the increase in cohabitation, which has become an increasingly accepted alternative to marriage, especially among lower income households.<sup>297</sup> Given the decrease in marital births by fifty percent in the last twenty-seven years, it is hard to imagine that denying same-sex marriages would serve the state's interest of 'procreation within marriage.' This procreation argument is negligible at best and should fail to substantiate a valid ground upon which to continue denying same-sex marriage on its own merits.

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<sup>293</sup> Wax, *supra* note 164, at 1080.

<sup>294</sup> Cherlin, *supra* note 275, at 856.

<sup>295</sup> *Id.* at 849.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 849-50.



#### D. Protecting the Traditional Family<sup>298</sup>

That at least thirty-seven states have passed defense of marriage laws to prohibit same-sex marriage in their respective states implies that same-sex marriage is seen by these states as a threat to the institution of marriage. There are divergent viewpoints regarding what same-sex marriage would mean to the family.

##### 1. The family as transitioning

One viewpoint sees the family not as under attack, but as transitioning.<sup>299</sup> In the eyes of this viewpoint, family analysts are too quick to see the family as being in decline.<sup>300</sup> One sociologist, Orthner, asserts “fundamental values, such as caring for children and the importance of kinship, have not changed.”<sup>301</sup> Orthner proposes, rather, what is changing is the way people choose to live with each other.<sup>302</sup>

It is generally agreed upon that transition has been occurring for years in the traditional family.<sup>303</sup> The American family has been in transition “as long as there have been American families.”<sup>304</sup> Sociologists have recognized the shifts in family patterns since at least the 1930’s.<sup>305</sup> Examples of the shift in family patterns include: rising divorce rates, women entering the labor force, and more children being left at daycare.<sup>306</sup> Where there has been less agreement is on the meaning of these changes.<sup>307</sup> Is the family falling apart or reorganizing? Are we seeing institutional decline or change? Are family values no longer important or have new beliefs and values begun to replace

<sup>298</sup> The term ‘traditional family’ throughout this paper refers to the family headed by a married, monogamous, opposite-sex couple. This definition of ‘traditional family’ has its roots in Judeo-Christian ideology of the family ideal. See, e.g., *supra* note 17 and accompanying text for reference by the *Goodridge* court to the ecclesiastical definition of “family.”

<sup>299</sup> DENNIS K. ORTHNER, *The Family is in Transition*, in *FAMILY IN AMERICA: OPPOSING VIEWPOINTS* 25, 25-32 (David L. Bender & Bruno Leone eds., 1992).

<sup>300</sup> *Id.* at 25.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 26.

<sup>304</sup> Ted L. Huston & Heidi Melz, *The Case for (Promoting) Marriage: The Devil is in the Details*, 66 J. OF MARRIAGE & FAM. 943, 943 (November 2004) (stating “American families have been in transition for as long as there have been American families (Coontz 1992) . . . nonmarital cohabitation is being practiced more visibly and more widely . . . births that occur outside marriage has increased dramatically . . . people marry later in life . . . divorce has settled at a higher rate.”).

<sup>305</sup> See generally Alex Walker, *A Symposium on Marriage and its Future*, 66 J. OF MARRIAGE & FAM. 843, 843 (November 2004).

<sup>306</sup> Orthner, *supra* note 299, at 26.

<sup>307</sup> *Id.*

outdated ones? Such questions are reflective of the split between the conservative and liberal legal scholars.

Same-sex couples have gained the ability to live more open and fuller lives than ever. Having attained this, same-sex couples desire to share in the traditional values, rewards, benefits, and fulfillment that married family life brings.<sup>308</sup> Granting recognition to same-sex couples in marriage, then, would only be another step in the continuing transition of family and be reflective of the fact that the concept of family is subject to widespread social change.<sup>309</sup>

Traditional institutions and customs normally reflect the human experience that accumulates over generations.<sup>310</sup> As a result, what is considered ‘traditional’ evolves over time.<sup>311</sup> As Orthner points out, however, “[w]henver social institutions shift their functions and structure, the usual perception is of decay.”<sup>312</sup>

## 2. The traditional family as obsolete

Another viewpoint contends that the traditional family is obsolete.<sup>313</sup> This viewpoint challenges those who idealize the “traditional” nuclear family.<sup>314</sup> It is argued that while the traditional family worked well a century ago, it no longer works in light of people living much longer than they used to, the ease of divorces, and the increased mobility of modern life.<sup>315</sup> This view recognizes that the religious values driving the notion that relationships should be “‘til death do us part” are in collision with the notion that shorter relationships are healthier.<sup>316</sup> Even with a return to “traditional values” the divorce rate has remained constant.<sup>317</sup> As of 1992, the nuclear family had not become any more successful, maintaining a constant divorce rate of one in two marriages.<sup>318</sup>

Acknowledging the pre-existing troubles of the traditional family, this viewpoint does not support the notion that same-sex marriage threatens traditional marriage. Rather, it reinforces that the institution of marriage has been subject to social change, making the “tradi-

<sup>308</sup> Sparling, *supra* note 239, at 188-89.

<sup>309</sup> Orthner, *supra* note 299, at 26-27.

<sup>310</sup> Wax, *supra* note 164, at 1066.

<sup>311</sup> *Id.*

<sup>312</sup> Orthner, *supra* note 299, at 28.

<sup>313</sup> Diane Fassel, *The Traditional Family is Obsolete*, in *FAMILY IN AMERICA: OPPOSING VIEWPOINTS* 25, 33-39 (David L. Bender & Bruno Leone eds., 1992).

<sup>314</sup> *Id.* at 33.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 34.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

tional” marriage more of an ideal than a reality. Under this view, same-sex marriage could not possibly be a threat to the tradition and history of marriage because marriage, as we know it today, is already evolved away from what marriage used to be.

### 3. Protecting the traditional family as a valid basis

It is well established that social forces have impacted the institution of traditional marriage over the years, forcing a transition and evolution of the family. But one has to search long and hard for literature discussing ‘protecting the traditional family,’ because this argument is rarely advanced on its own merit. Rather, it latches on to other purposes. For example, in Maine, the purpose of the marriage statute is to preserve the traditional family for “support of harmonious families and the physical and mental health of children . . . nurture, sustain and protect the traditional monogamous family unit in Maine society, its moral imperatives, its economic function and its unique contribution to the rearing of healthy children.”<sup>319</sup> In this example, the preservation of the traditional family provides a foundation for establishing moral imperatives, economic functions, and a setting for raising healthy children.

Similarly, in a Florida case, the purpose of maintaining traditional marriage was to “encourag[e] [the] creation of stable relationships that facilitate the rearing of children by both their biological parents.”<sup>320</sup> In this case, preserving the traditional family is the foundation for what is perceived to be the type of stable relationship that can facilitate child rearing by both biological parents. The validity of protecting the traditional family as a basis to prohibit same-sex marriage, then, fully depends on the validity of the premise for which the traditional family serves as a foundation.

Perhaps the traditionalist conservative argument for protecting the traditional family by not allowing same-sex marriage is the closest this basis gets to standing on its own merits. The traditionalist view is rooted in the fear of uncertainty.<sup>321</sup> Traditionalist conservatives “warn that sanctioning same-sex marriage will inevitably lead to the legalization of other suspect forms of conduct, including polygamy, group

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<sup>319</sup> 19-A-2 ME. REV. STAT. ANN., § 650 (2000).

<sup>320</sup> *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (“foster development of relationships optimal for procreation, thereby encouraging the ‘stable generational continuity of the United States’” and “encouraging creation of stable relationships that facilitate the rearing of children by both their biological parents” as bases for the federal DOMA law in a lawsuit by two lesbians married in Massachusetts).

<sup>321</sup> *Wax, supra* note 164, at 1081.

marriage, incest, and bestiality.”<sup>322</sup> The argument is that legalizing same-sex marriage will act as a “slippery slope,” which will in turn lead to socially undesirable forms of marriage.<sup>323</sup> The essence of the slippery slope argument is that “if we allow gay marriage, we’ll have to allow [policy X] that would unquestionably be bad.”<sup>324</sup> The traditionalist conservative view essentially promotes staying with the traditional family definition to serve the purpose of harm avoidance.

This is an appealing argument because it looks like gays are not being attacked since the purpose is not to inhibit gay rights, but to prevent social harms.<sup>325</sup> The slippery slope argument is an argument of last resort that is used when other arguments have failed.<sup>326</sup> For example, a last ditch effort argument could be made that proponents of polygamy would piggyback on the same-sex marriage legalization by analogy.<sup>327</sup> An equally plausible argument, however, could be made that while legalizing same-sex marriage “liberalize[s] a marriage entrance rule . . . it is not necessarily a call to open marriage to anyone and everyone anymore than the fight against antimiscegenation laws was a call to open marriage to anyone and everyone.”<sup>328</sup> Logically, there is no reason allowing a new form of monogamous marriage should lead to the legalization of polygamous marriage.<sup>329</sup>

In sum, the slippery slope argument is weak at best. It is a last resort argument that relies on the unknown to substantiate its premise. In light of the fact that protecting the traditional family all these years has not improved the traditional family, nor made it more successful,<sup>330</sup> this basis has little merit of its own. The ‘protecting the traditional family’ argument is at its strongest when it serves as a foundation to another premise, such as procreation, or child rearing. But when it does, then it relies on the validity of the premise it latches on to and supports.

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Carpenter, *supra* note 247, at 34.

<sup>325</sup> *Id.* at 35.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 37.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 38.

<sup>330</sup> See generally Cherlin, *supra* note 275 (discussing the evolution of marriage: decrease in rate of marriage and increase in rate of cohabitation, higher incidences of out-of-wedlock births, increase in divorces, etc.).

## E. Promoting the Welfare of Children

Many states assert being raised in a household by opposite-sex parents is in the best interest of the child.<sup>331</sup> Some of the cases imply traditional families are viewed as stronger than same-sex parented families.<sup>332</sup> Indeed, some states have even adopted the more rigid view that being raised by same-sex parents is either damaging to, or not in the best interest of, the child, or both.<sup>333</sup> As we have seen, some states openly promote the “welfare of children” issue as one related to moral judgment. Others believe that being raised by same-sex parents simply does not provide an optimal environment for the child. The relevant question, then, is whether there are any factors that distinguish same-sex couples from opposite-sex couples. If so, do these differences affect the welfare and stability of children raised by same-sex parents?

### 1. Longitudinal study of opposite-sex and same-sex couples

One twelve-year longitudinal study asked whether opposite-sex couples and same-sex couples are different in their relationship functioning.<sup>334</sup> The purpose of the study was to look at the same-sex marriage controversy from an empirical perspective.<sup>335</sup> The study evaluated five areas of relationship functioning including: psychological adjustment, personality traits, relationship styles, conflict resolution, and social support.<sup>336</sup> These are discussed below.

It should be noted that the author of the study makes no claims to the sample being representative, and acknowledges that same-sex couples with children were not studied, the study was open to the biases associated with self-reporting by participants, and that the couples from each group were not demographically matched.<sup>337</sup> The issues addressed in this comparative longitudinal study have seldom been addressed, even in married heterosexual couples.<sup>338</sup>

<sup>331</sup> See, e.g., *supra* note 56: 19-A-2 ME. REV. STAT. ANN., § 650 (2000); MICH. COMP. LAWS ANN. § 551.1.1 (2006). See also, e.g., cases and parentheticals at *supra* note 57: Baehr v. Lewin, 852 P.2d 44, 52 (Haw. 1993); Baehr v. Miike, 1996 WL 694235, \*3 (Haw. Cir. Ct. 1996); *Morrison v. Sadler*, 2003 WL 23119998, at \*4-6.

<sup>332</sup> See, e.g., the following case and parenthetical at *supra* note 57: Andersen v. King County, 2004 WL 1738447, 7-9 (Wash. Super.).

<sup>333</sup> See, e.g., *supra* note 57: Castle v. State, 2004 WL 1985215. See also, e.g., the following statute and parenthetical at *supra* note 56: WIS. STAT. ANN. § 765.001 (1) (2).

<sup>334</sup> Laurence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880, 894 (2004).

<sup>335</sup> *Id.* at 895.

<sup>336</sup> *Id.* at 886-91.

<sup>337</sup> *Id.* at 895. See also *id.* at 882-86 (for description of methodology used).

<sup>338</sup> Kurdek, *supra* note 334, at 895.

The first domain studied was *Psychological Adjustment*.<sup>339</sup> The measures used tested for “*global severity of distress and life satisfaction*,” taking into account multiple factors such as somatic complaints, obsessions/compulsions, interpersonal sensitivity, depression, and anxiety.<sup>340</sup> Partners from same-sex couples did not differ from their opposite-sex counterparts in terms of psychological adjustment. Kurdek, the author of the study, noted that this seemed inconsistent with findings by other scholars that gay men and lesbians report more psychological adjustment problems than heterosexual couples.<sup>341</sup> It has been speculated by other researchers that the difference in psychological distress is likely the result of the “stigma, prejudice, and discrimination associated with homosexuality [which] creates a stressful social environment.”<sup>342</sup> Kurdek concludes that since being a member of a couple provides a psychological health advantage, it is plausible that the gay men and lesbians studied did not show a differential because they were coupled gay men and lesbians.<sup>343</sup> Alternatively, Kurdek posits that aspects of couplehood, such as the social support received from the partner and other same-sex couples, can act as a shield from the “negative effects of minority stress” for same-sex couples.<sup>344</sup>

The second domain studied was *Personality Traits*.<sup>345</sup> Kurdek studied five traits: neuroticism, extraversion, openness, agreeableness, and conscientiousness.<sup>346</sup> *Neuroticism* represented how the person responds to psychological distress, their level of inability to control urges, how prone they are to unrealistic ideas, and their level of inability to cope with stress.<sup>347</sup> There was no significant difference between the same-sex and heterosexual couples in regards to neuroticism.<sup>348</sup> *Extraversion* looked to the disposition of the person toward positive emotions, their sociability, high activity, agency, and self-efficacy.<sup>349</sup> Here, lesbians were slightly more extroverted than the heterosexual women. Kurdek attributed this to the difference in personality traits differential that are inherent between lesbians and heterosexual women.<sup>350</sup> For example, the lesbian identifies with more masculine

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<sup>339</sup> *Id.* at 886-88.

<sup>340</sup> *Id.* at 886-87.

<sup>341</sup> *Id.* at 887-88.

<sup>342</sup> *Id.* at 888.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 888-89.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 889.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

attributes, being more tomboyish, where the heterosexual counterpart may have more feminine qualities.<sup>351</sup> *Openness* represented inclination toward variety, intellectual curiosity, and aesthetic (physical appearance) sensitivity.<sup>352</sup> Gay men and lesbians had higher scores than their heterosexual counterparts.<sup>353</sup> Kurdek posits that this may be due to the same-sex couples' need to explore ways to define roles in their relationships independent of biological gender, which generally defines roles in heterosexual relationships.<sup>354</sup> *Agreeableness* represented "an inclination toward interpersonal trust and consideration of others," and *Conscientiousness* represented a "tendency toward persistence, industriousness, and organization."<sup>355</sup> Partners from same-sex couples did not differ from their heterosexual counterparts in either *Agreeableness* or *Conscientiousness*.<sup>356</sup> Kurdek notes that having higher levels of extraversion and openness does not make same-sex couples particularly susceptible to relationship distress.<sup>357</sup>

The third domain studied was *Relationship Styles*.<sup>358</sup> This measured levels of intimacy, autonomy, and equality within the relationship.<sup>359</sup> Same-sex partners had higher levels of autonomy and equality.<sup>360</sup> This means that same-sex partners had *more positive* working models for their relationships than heterosexual couples.<sup>361</sup> Kurdek believes this could be attributed to the fact that the same-sex couples did not live with children.<sup>362</sup> Consistent with this theory is that the heterosexual couples who did not have children reported higher levels of autonomy and equality as well.<sup>363</sup> This may support the theory that parenting stress can "spill over into marital stress."<sup>364</sup>

A fourth domain studied was *Conflict Resolution*.<sup>365</sup> This assessed the level of ineffectiveness in arguing communication patterns. In studying arguing, Kurdek concluded that the same-sex partners had less "demand and withdraw" type arguments – where the arguments are left unresolved – and more symmetrical arguments that use posi-

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 890.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*



tive communication.<sup>366</sup> The findings indicate that same-sex couples are better at conflict resolution than their heterosexual counterpart.<sup>367</sup> Same-sex partners are also more likely to present and receive information in a positive manner.<sup>368</sup> Kurdek notes, however, that heterosexual non-parents use the demand and withdraw method of conflict resolution less frequently than heterosexual parents did, indicating that the parenting stressor may translate into marital stressors for heterosexual parents.<sup>369</sup>

The fifth domain studied was *Social Support*.<sup>370</sup> This rated the participants' overall satisfaction with perceived social supports, perceived support from their relationship, and other supports such as family and friends.<sup>371</sup> Same-sex couples perceived less family support from both their own family and their partner's family for their relationships than their heterosexual counterparts.<sup>372</sup> However, lesbian partners perceived more support from their relationship and their own friends than their heterosexual counterparts. There was no significant differential between parent and non-parent heterosexual couples on any of the social support variables.<sup>373</sup> Kurdek found that lesbians' finding more support from their friends and relationships is consistent with previous studies that women are socialized to prize their connections with others.<sup>374</sup> Problems with social support from family members are especially salient for same-sex couples.<sup>375</sup>

In sum, in the first four of these five domains, no significant differences were found.<sup>376</sup> The only domain that showed somewhat significant variance was the 'social support' domain.<sup>377</sup> This differential was based on the fact that same-sex couples received less support from their family for their relationship than opposite-sex couples did.<sup>378</sup> It was concluded that "the processes that regulate relationships functioning generalize across gay, lesbian, and heterosexual couples."<sup>379</sup> The rate of decline in quality was higher for opposite-sex couples in

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* Kurdek suggested future studies that separate parent from non-parent couples to address this hypothesis.

<sup>370</sup> *Id.* at 890-91.

<sup>371</sup> *Id.* at 890.

<sup>372</sup> *Id.* at 891.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 895-97.

<sup>377</sup> *Id.* at 896.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 880.

the study, but the factors leading to dissolution of the relationship were similar for both opposite-sex and same-sex couples.<sup>380</sup> The same-sex couples functioned slightly better than their opposite-sex counterparts overall.<sup>381</sup> An analysis of the differentials between same-sex couples and non-parent heterosexual couples show similar coping patterns and relationship styles, however, leaving no significant differential in any of the categories except social support from family. This is an area of support that, arguably, is likely to resolve itself if same-sex marriages were to be legalized, thereby reducing the social stigma of being in a same-sex relationship.

The author of the longitudinal study concluded, “the findings reported here *can* be taken as a basis for claiming that gay men and lesbians are entitled to legal recognition of their relationship not only because, as gay and lesbian citizens, they deserve the same rights and privileges as heterosexual citizens, but also because the processes that regulate their relationships are the same as those that regulate the relationships of [opposite-sex] partners.”<sup>382</sup> The indicators are that same-sex couples are as able to parent children properly and provide for their welfare as opposite-sex couples. The issue would not lie on the same-sex couple’s ability to parent, based on this study, but on the effect it would have on a child to be parented by a same-sex couple.

## 2. Same-sex parents and child welfare

A 1992 survey analyzed the available sources on gay men and lesbian parented families concluded that “[t]here is no evidence to suggest that psychological development among children of gay men or lesbians is compromised in any respect relative to that among offsprings of heterosexual parents . . . . Not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect.”<sup>383</sup>

Studies *have* shown that same-sex parents are often *perceived* as more emotionally unstable and are often *perceived* as more likely to foster a dangerous environment for children.<sup>384</sup> But these fears are not

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<sup>380</sup> *Id.* at 895.

<sup>381</sup> *Id.* at 891.

<sup>382</sup> *Id.* at 897.

<sup>383</sup> Roni Berger, *Gay Stepfamilies: A Triple Stigmatized Group*, FAMILIES IN SOCIETY 81, 504, 508 (2000).

<sup>384</sup> *Id.*

substantiated by evidence.<sup>385</sup> Studies do not support the conclusion that being raised by same-sex couples is detrimental to children.<sup>386</sup>

The dissenting literature on the issue “seems limited to the observation that some daughters of lesbian couples are more likely to engage in activities typically thought of as male, and vice versa for sons of such couples.”<sup>387</sup> While this shows that children may pick up attributes of their same-sex parents (*i.e.* girls having a tendency toward masculine attributes and boys having a tendency toward feminine attributes when raised by their gay mother), it does not show that this is damaging to the welfare of these children. A strong showing that same-sex marriage harms children has not yet been demonstrated.<sup>388</sup> In further support of the premise that being raised by same-sex parents is not harmful to children, a 1992 survey of thirty-five studies addressing homosexual parents showed that the parents’ sexual orientation did not have any harmful effect on the welfare of their children.<sup>389</sup>

In contrast, Hayton, a family counselor, argues that homosexual relationships are abnormal and unstable and harm the stability of the traditional family.<sup>390</sup> He posits that “homosexuals do not reproduce their lifestyle by having children, but by converting heterosexuals and youth to become homosexual.”<sup>391</sup> He further states that homosexual promiscuity acts as a model for children in immoral behavior that “every culture around the world throughout all of history has punished either civilly or criminally.”<sup>392</sup> Hayton makes very broad statements in his piece that reflect harsh attitudes toward same-sex couples. His allegations can hardly be taken seriously when he fails to validate *any* of his harsh propositions with a scholarly source cited in support.<sup>393</sup> Hayton’s unfounded conservative approach is explained in

<sup>385</sup> *Id.*

<sup>386</sup> Culhane, *supra* note 236, at 1197 (referencing Charlotte Patterson, *Children of Lesbian and Gay Parents: Summary of Research Findings*, in *LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS* (1995), reprinted in *SAME-SEX MARRIAGE: PRO AND CON* (Andrew Sullivan ed., 1997)).

<sup>387</sup> Culhane, *supra* note 236, at 1197 (referencing Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children’s Sexual and Social Functioning*, 20 *J. DIVORCE AND REMARRIAGE* 105 (1993)).

<sup>388</sup> Culhane, *supra* note 236, at 1197. (Use *Id.* Citation for this footnote). Culhane also notes that in *Romer*, the state withdrew its argument that “Amendment 2 was somehow justified by the need to protect children. *Id.* at 1197 n. 366.

<sup>389</sup> Brent Hartinger, *Homosexual Partners are Changing the Family*, in *FAMILY IN AMERICA: OPPOSING VIEWPOINTS* 25, 55-62, 58 (David L. Bender & Bruno Leone eds., 1992).

<sup>390</sup> *Id.* at 63.

<sup>391</sup> *Id.* at 65.

<sup>392</sup> *Id.* at 66.

<sup>393</sup> See generally, *id.* at 63-70 (noting that not one source is cited within his work).

light of the fact that he was a research analyst for Focus on the Family, a Colorado based conservative social policy organization.<sup>394</sup>

Studies do show, however, that being raised in a well functioning two-parent family is good for children.<sup>395</sup> Since the scholarly literature shows no support for the contention that being raised by same-sex parents harms children, it is quite plausible then that allowing same-sex couples to marry would benefit the welfare of the children parented by same-sex couples. One case exemplifies the proposition that being raised by same-sex parents can be a healthier alternative to being raised by a heterosexual parent. *Weigand v. Houghton*<sup>396</sup> stands for the premise that child welfare should not be decided based solely on sexual orientation.

*Weigand* was a child custody case involving a gay father and mother, the child living with the mother, and the father seeking custody.<sup>397</sup> The father admitted being gay and being active sexually and was denied custody by the lower courts as a result.<sup>398</sup> The mother, who had custody of the child, lived with her new husband who was a very abusive stepfather often prone to violence toward the child.<sup>399</sup> The state Supreme Court found that the lower courts' decision had been based more on condemnation of the father's lifestyle, as a gay person, than on the son's best interest.<sup>400</sup>

Reversing the lower court, the state Supreme Court found that the decision to leave the child with the mother left the child vulnerable to both psychological and physical harm.<sup>401</sup> The Court further found that in deciding the custody issue, the lower court – *swayed by the father's sexual orientation* – had ignored that the stepfather was prone to violence, that he was a convicted felon, that he had been arrested for hitting the mother in the face and swelling her eye while the child was in the home, that he had knocked out a car window in a drunken stupor, that he had threatened to kill the child, and that the child had requested to live with his father after calling 911.<sup>402</sup>

The states that use 'promotion of child welfare' as the basis for their prohibition of same-sex marriage also fail to take into account the damage that is done to children, who live in same-sex parent families or same-sex parented step families, as a result of the secrecy that is

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<sup>394</sup> *Id.* at 63.

<sup>395</sup> Walker, *supra* note 305, at 843.

<sup>396</sup> See generally *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999).

<sup>397</sup> *Id.* at 582.

<sup>398</sup> *Id.* at 584.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 588.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 588-89.

often forced upon them because of homophobic stereotypes and prejudices toward gay people.<sup>403</sup> And, as one scholar points out, “[t]o the extent that marriage is regarded as a social and legal institution, conferring the right of marriage to gay men and lesbians might actually defend their relationships [and, inherently, protect their children] against the stresses that plague any couple in the early critical stages of the relationship, stresses that may lead to dissolution.”<sup>404</sup>

While there seems to be a consensus that children raised in two-parent households seem to fare better,<sup>405</sup> the evidence does not support that this would need to be a family of opposite-sex parents.

#### F. Promoting a Political Purpose

One state, within its case law, claimed “Ensuring Consistency with Federal Law and Other States” as a basis.<sup>406</sup> This state adopted its rationale from the Federal Defense of Marriage Act, which provides that “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 . . . .”<sup>407</sup>

In brief, the argument posits that a prohibition of same-sex marriage is justified to ensure consistency with other states and federal laws in order to promote political cohesiveness. This argument appears to be circular in reasoning because it seems to rely on its own premise to prove itself. In fact it does not, because it does not rely on its own intrastate laws to prove itself but puts forth a valid state interest of seeking to maintain interstate cohesiveness to protect interstate political relations. Since all other states currently prohibit same-sex marriage, except for Massachusetts and California, the goal of seeking to maintain consistency with other state laws appears to square as a valid state purpose. Notably, however, by denying same-sex marriage on this basis, states that use this basis inherently fail to square with the marriage laws of Massachusetts and California—which seems to counter the purpose of promoting political cohesiveness (arguably exposing a logical flaw in reasoning). The flawed nature of this basis seems further unveiled when the analysis is taken a step further: what if all the states adjusted their laws to prohibit same-sex marriage in order to ‘ensure consistency with other states as a basis’? There

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<sup>403</sup> Berger, *supra* note 383, at 507-09 (for a discussion on the effect of stigmatization by the dominant culture).

<sup>404</sup> Kurdek, *supra* note 334, at 896.

<sup>405</sup> Walker, *supra* note 305, at 843.

<sup>406</sup> *Hernandez v. Robles*, 794 N.Y.S.2d 579, 599 (2005).

<sup>407</sup> *Id.* (quoting 28 U.S.C. § 1738(c)).

would then be no reason to stall the legalization of same-sex marriage since the legalization in all states would remove the issue of every state needing to square with other state jurisdictions on the issue of same-sex marriage.

In essence, if the only reason for all the states denying same-sex marriage were to maintain consistency with other states, then the argument would be circular reasoning and invalid because it would rely on its own premise to sustain itself. But if only a few states use it, and other states prohibit same-sex marriage based on other grounds, then the argument gains validity because it no longer relies on its premise to sustain itself. Although, the basis seems flawed at least to the extent that it fails to promote cohesiveness with the two states that currently allow same-sex marriage. At this time, it appears that only one state uses this premise to prohibit same-sex marriage. All other jurisdictions that prohibit same-sex marriage do so on grounds other than political consistency. Although flawed, this basis appears to have some validity for the state that uses it to the degree that it promotes political cohesiveness with a majority of the remaining states.

In sum, there is social science scholarship representing and arguing both sides of the issue. Of the scholarship reviewed, however, the scholarship disfavoring same-sex marriage seemed relatively weak and, at times, provided unsupported assumptions. In contrast, the scholarship favoring same-sex marriage advanced stronger rationale and better scientific support for its arguments.

#### IV. SAME-SEX MARRIAGE AND THE ESTABLISHMENT CLAUSE

Legislators have made comments that bring into question the basis for their legislating, or ruling, against same-sex marriage. In discussion regarding the passage of DOMA, for example, a number of Congressmen made comments that expressly established the basis of their vote as being religious.<sup>408</sup>

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<sup>408</sup> See, e.g., Walen, *supra* note 20, at 623-24 (quoting 142 CONG. REC. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderbunk)) (“If you are a devout Christian or Jew, or merely someone who believes homosexuality is immoral and harmful, and the law declares homosexuality a protected status, then your personal beliefs are now outside civil law . . . . Businessmen would have to subsidize homosexuality or face legal sanctions; schoolchildren will have to be taught homosexuality is the equivalent of marital love; and religious people will be told their beliefs are no longer valid.”); *id.* at 625 (quoting 142 CONG. REC. S10, 103 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles)) (“The definitions of [the DOMA] are based on common understanding rooted in our Nation’s [Judeo-Christian] history, our statutes, and our case law. They merely reaffirm what Americans have meant for 200 years when using the words marriage and spouse.”); *id.* at 625-26 (quoting 142 CONG. REC. S10, 105-06 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm)) (“(T)he traditional family has stood for 5,000 years. . . . In every major religion in history, from the early Greek myths of the ‘Illiad’ and the ‘Odyssey’ to the

When legislators are stating an express religious basis for passing the Act, it begs the question: Are legislators making a law simply to allow states the right not to recognize other states' same-sex marriages? Or, are they legislating their religious morality under the guise of a secular purpose?

#### A. *Edwards v. Aguillard*

The U.S. Supreme Court held in *Edwards v. Aguillard*, an Establishment Clause case that dealt with a separation of Church and State issue, that “[w]hile the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”<sup>409</sup> Under the standard of the *Edwards* Court, the sincerity of the stated purpose of federal legislators in passing DOMA should be seriously questioned.

In *Edwards*, the United States Supreme Court considered an Establishment Clause argument in a case that challenged the constitutionality of a legislative Act that forbid teaching evolution unless the school also taught creationism.<sup>410</sup> The challenge was on the basis that creationism was a religious driven belief and that the Act was a violation of the separation of church and state because its primary effect was that the government advanced the belief of a particular religion by forbidding the teaching of evolution unless the school also taught

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oldest writings of the Bible to the oldest teachings of civilization, governments have recognized the traditional family as the foundation of prosperity and happiness.”); *id.* at 627 (quoting 142 CONG. REC. H7442 (daily ed. July 11, 1996) (statement of Rep. Hutchinson)) (“(M)arriage is a covenant established by God wherein one man and one woman are united for the purpose of founding and maintaining a family.”); *id.* (quoting 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady)) (“I believe that the traditional family structure-centered on a lawful union between one man and one woman-comports with . . . our Judeo-Christian moral tradition.”); *id.* at 629 (quoting 142 CONG. REC. S4947 (daily ed. May 9, 1996) (statement of Sen. Coats)) (“The definition of marriage is not created by politicians and judges [inferring divine origins], and it cannot be changed by them. . . . It is the union of one man and one woman. This fact can be respected, or it can be resented, but it cannot be altered.”); *id.* at 630 (quoting 142 CONG. REC. S10, 109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd)) (“The purpose of this kind of union (marriage) between human beings of opposite gender . . . (is to) bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large . . . of course, children do not always result from marriages as we have traditionally known them. But out of same-sex relationships, no children can result.”); *id.* at 636-37 (quoting 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr)) (“The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit.”); *id.* at 637 (quoting 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer)) (“There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they want as long as it feels good and does not hurt others.”).

<sup>409</sup> *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

<sup>410</sup> *Id.*



the religious belief of ‘creationism.’<sup>411</sup> The Court, in reviewing the state of Louisiana’s secular basis for the Act, acknowledged that it is extremely deferential to a state’s secular purpose, but that such a purpose must be sincere and cannot be a “sham.”<sup>412</sup> The intent of this rule is to ensure that the government does not intentionally endorse a religion or religious practice by purporting a secular purpose for the legislation while actually passing the legislation for a purpose which endorses a religion or religious practice.<sup>413</sup>

On the issue of same-sex marriage, the validity of the federal DOMA and of some courts’ rulings against same-sex marriage based on reasons other than religion is brought into question on examination of the statements of so many Congressman that expressly show a religious basis for their vote on the Defense of Marriage Act.<sup>414</sup> Since these legislators are representing the interests of the various states in Congress, statements that expressly state a religious ground for voting on a law such as DOMA arguably bring into question the validity of the states’ *alleged* secular bases for the ongoing prohibition against same-sex marriage. Given that at least thirty-eight states have followed suit and enacted their own defense of marriage laws, the impact of DOMA has been widespread. The domino effect DOMA had on states is even more reason why an examination of the basis of the DOMA warrants scrutiny.

In addition, there are inconsistencies in the case law that are suspicious and bring the validity some of the state’s alleged bases for denying same-sex marriage into question as well. Arizona, for example, has a case that advances a basis against same-sex marriage that is different from the basis stated in its law.<sup>415</sup> Similarly, the following states have different cases filed that show different ‘state bases’ from case to case for prohibiting same-sex marriage: California, Hawaii, New York, and Washington.<sup>416</sup> And, in at least three of the jurisdictions, D.C., Indiana, and New Jersey, the same case shows a different basis for arguing against same-sex marriage in the lower court and the upper court.<sup>417</sup> The fact that the secular basis for prohibiting same-sex marriage changes from case to case, or from court to court, brings into question the validity of the claimed basis for prohibiting same-sex

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<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 587.

<sup>414</sup> *See, e.g., supra* note 408 (for religiously based comments in passing DOMA).

<sup>415</sup> *See supra* note 60 and accompanying text.

<sup>416</sup> *See supra* the cases for these states in note 57.

<sup>417</sup> *See supra* note 62.

marriage as it gives the appearance that these states are ‘fishing’ for a ‘winning reason.’

Arguably, a valid state basis should stand on its own merit and not be subject to change from case to case, or from court to court. The very changing nature of such “state secular bases” brings into question the legitimacy of these states’ policy intent in prohibiting same-sex marriage. In light of these legal inconsistencies, and the heavily stacked sociological evidence that greatly weaken the validity of the bases the states have used to maintain the prohibition of same-sex marriage, it would not be unreasonable to suspect that the reasons provided by the states to support the prohibition of same-sex marriage are sham.

In light of these facts, an argument that the true purpose of the states’ bases for prohibiting same-sex marriage not only lacks a secular basis, but also serves to advance the religious beliefs of the moral majority can meritoriously be advanced. This plausible argument should not be brushed off lightly.

## B. Laws Informed by Religious Moral Premises and the Establishment Clause

Justice O’Connor has stated, “[i]t is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws.”<sup>418</sup> But, is a law being informed by religious ideology and purposes sufficient to create an Establishment Clause issue? Must a law be 100% secular to pass muster? The answer is in the negative. For if laws had to be completely secular to pass constitutional muster, then crimes such as murder could not be criminally regulated. The *SCOTUS* has made clear in more than one decision that some religious basis will not invalidate a law.<sup>419</sup>

### 1. The “Purpose” Prong

Arguing that religiously informed laws do not violate the Establishment Clause just because they are religiously informed, one scholar points out that the “secular purpose” hurdle of the *Lemon test* is low, and it can be easily satisfied.<sup>420</sup> A religious purpose in the law can

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<sup>418</sup> *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985).

<sup>419</sup> See *supra* notes 107-43 and accompanying text (Establishment Clause discussion).

<sup>420</sup> Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL’Y 1, 11 (2002) (relying on federal appellate decisions to establish this premise).

stand so long as it is neither preeminent nor exclusive.<sup>421</sup> The Supreme Court has found in the past that a statute may pass the *Lemon test* so long as its purpose is not entirely religious.<sup>422</sup> A test requiring the government to have exclusively secular purposes would be over inclusive and invalidate much legislation.<sup>423</sup>

When addressing the validity of a statute under the Establishment Clause, the analysis begins with a presumption that any given law possesses a valid secular purpose.<sup>424</sup> The burden is on the challenger of the statute to show that the statute is wholly motivated by religious considerations.<sup>425</sup> In *Wallace v. Jaffree*, the plaintiff met this burden and a statute that called for a moment of silence in public schools was held to violate the Establishment Clause.<sup>426</sup> This was because Senator Holmes expressly stated the religious basis of the statute.<sup>427</sup> The State of Alabama, however, did not put forth any evidence of a secular purpose.<sup>428</sup> Arguably, based on *Lynch*, any evidence on the part of the state of Alabama that the statute had a “clearly secular purpose”<sup>429</sup> and was not “motivated wholly by religious considerations” would have passed constitutional muster.<sup>430</sup> In *Wallace*, the presumption of constitutionality was not overcome because the State of Alabama failed to enumerate a valid secular purpose after the statute’s objective had been successfully challenged. This is because “[o]nly if the challenger can meaningfully call into question the statute’s objectives, and only if the government cannot then either identify an enumerated secular purpose or articulate a secular purpose in litigation, will the presumption of constitutionality be removed.”<sup>431</sup>

Unlike the state of Alabama in *Wallace*, some states declared secular, non-religious purposes, either within their statute or within their case law, to support their marriage laws and their prohibition against same-sex marriage.<sup>432</sup> These declared secular purposes are likely suffi-

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<sup>421</sup> *Id.*; see also *id.* n.49 (“As Professor Greene explains, ‘government may enact legislation with a predominantly secular justification, but it may not enact legislation with a predominantly religious justification.’”).

<sup>422</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

<sup>423</sup> *Idleman*, *supra* note 420, at 11-12 (quoting *Lynch*, 465 U.S. at 681 n.6).

<sup>424</sup> *Id.* at 12 (referencing *Cohen v. City Des Plaines*, 8 F.3d 484, 489-90 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)).

<sup>425</sup> *Id.*

<sup>426</sup> *Wallace v. Jaffree*, 472 U.S. 38, 65 (1985).

<sup>427</sup> *Id.* at 57.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 43.

<sup>430</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

<sup>431</sup> *Idleman*, *supra* note 420, at 13.

<sup>432</sup> See *supra* notes 56 and 57 (for enumeration of states’ secular purposes in statutes and case law).

cient to overcome the low hurdle of the purpose prong of *Lemon*. It is true that when looking at the scholarship that examines the states' bases for prohibiting same-sex marriage, the scholarship against same-sex marriage seems to have weaker scientific basis for its propositions than the scholarship that lends support to the legalization of same-sex marriage. The fact remains, however, that the scholarship *is* divided. In light of this division, the very enumeration of a secular purpose is likely to be enough to overcome the low hurdle imposed on the states to have a secular purpose.

The first prong of *Lemon*, "alternatively formulated . . . also prohibits laws which have the [primary] *purpose* of advancing or inhibiting religion."<sup>433</sup> In light of the Judeo-Christian history of marriage laws, there is little room to argue that the original *purpose* of the prohibition of same-sex marriage served to advance the Judeo-Christian ideal of marriage. The question, then, is whether the prohibition's original purpose being rooted in religion represents an inherent successful challenge to the present-day constitutionality of the prohibition. It does not. "An examination of the case law . . . reveals that [the same-sex marriage prohibition's] original purposes are not necessarily dispositive to an assessment of its present day constitutionality."<sup>434</sup> This is a sensible premise since in the absence of such a rule, arguably all marriage laws would be constitutionally void given their Judeo-Christian roots and heritage. Indeed, a rule of law once grounded in religious premises may become secularized over time.

Moreover, if a law being rooted in religious morality were to be construed as having a purpose to advance religion, an alternative formulation could be argued that a law rooted in secular morality could be construed as having a purpose to inhibit religion.<sup>435</sup> This argument, obviously, is absurd since it would invalidate virtually all laws based on an Establishment Clause argument.<sup>436</sup> Second, to have such a rule would "effectively disenfranchise[] or disable[] the religious voice in the public square. . . . Under such a rule, religious citizens [could] interject their deepest beliefs into the legislative process, but [could not] be manifestly successful."<sup>437</sup> This, in essence, would result in the inequality of the religious voice in our Democracy; and, a rule that inhibits "participatory equality" stands against established principles of

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<sup>433</sup> Idleman, *supra* note 420, at 21 (emphasis added).

<sup>434</sup> *Id.* at 14.

<sup>435</sup> *Id.* at 23.

<sup>436</sup> *See id.*

<sup>437</sup> *Id.*

democracy and should be rejected even if it appears to be of “superficially sound construction.”<sup>438</sup>

Voter lobbying and legislative enactment, however, should be distinguished. Arguably, passing a law prohibiting same-sex marriage because a majority of the state’s constituents petitioned for such a law would be a valid secular purpose even if the voter’s desire for the law were to promote religious advancement. However, the State is simply serving its constituents in such a case. Thus, I propose that the state constitutional amendments that were passed based on the votes of the constituents of the state have a valid secular purpose underlying them, since the legislators acted based on the desires of their constituents. The opinions of the legislators are no longer at stake, since it is the voters who approve constitutional amendments. Therefore, a constitutional amendment banning same-sex marriage is passed for the *purpose* of serving the desires of the state’s constituents, rendering what the legislators’ actual purpose may have been irrelevant.

Even if every voter in the state voted based on religious reasons to prohibit same-sex marriage, an argument that the legislators ‘constructively adopted’ their religious constituents’ religious basis would be weak at best because, as previously discussed, it would effectively disenfranchise this constituency. Also, it would hardly be reasonable to expect a legislator to poll his constituency for the moral basis of their vote. To trigger an Establishment Clause issue under the purpose prong of *Lemon*, it would take a legislative enactment that is written in such a way as to give the unmistakable impression that a specific religious belief drives it.<sup>439</sup>

In sum, where states have declared a secular basis for their prohibition either within the statutes or in litigation, a presumption of the statute’s constitutionality remains unless the statute’s secular purpose is successfully challenged. While a challenge that the purposes of legislators who expressly declare a religious basis for voting a same-sex marriage prohibition law into being would appear as a sham on its face – when the declared state purpose differs – it is unlikely that such a challenge, although meritorious in its own right, would succeed in light of the low hurdle set by the *SCOTUS*. “Deference” to the presumption of validity “ought not be confused with blind reliance,” however.<sup>440</sup> As such, the “avowed purposes” of laws prohibiting same-sex marriage, which are voted on based on the legislators’ expressed religious grounds or where the state has engaged in a fishing expedi-

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<sup>438</sup> *Id.* at 71-72.

<sup>439</sup> *Id.* at 30.

<sup>440</sup> *Id.* at 13 n.59 (quoting *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000)).

tion from case to case or court to court, should be carefully examined “to ensure that the purpose is sincere and not a sham,”<sup>441</sup> and that the “government's actual purpose is [not] to endorse or disapprove of religion.”<sup>442</sup>

## 2. The “effect” prong

The next prong of the *Lemon test*, the effect prong, requires that the *effect* of the law neither advances nor inhibits religion.<sup>443</sup> This is distinguished from the alternative formula of the purpose prong since a law that does not have the *purpose* of advancing or inhibiting religion could still have the *primary effect* of advancing or inhibiting religion. Under Justice O'Connor's alternative construction of this *Lemon* prong, however, a statute that has the primary effect of advancing or inhibiting religion could still pass muster.<sup>444</sup> Justice O'Connor's primary concern is that the government's practice should not have the “effect of communicating a message of government endorsement or disapproval of religion.”<sup>445</sup> Whether the government practice has the effect of communicating government endorsement or disapproval of religion is determined on the “basis of judicial interpretation of social facts.”<sup>446</sup>

Whether Justice O'Connor's framework increases or lowers the bar for this prong could be argued both ways. Conceivably, a situation where the effect is not advancement or inhibition of religion, but where the government may present the appearance of endorsing a religion is plausible. For example, imagine a city government in a city with a large Orthodox Jewish community. For this city to close on major Jewish holy days would not in effect advance the religion because Orthodox Jews who are highly observant would take these holy days as days off work anyway. It could, however, give the appearance of endorsement by the city government. In contrast, one could conceive of a situation where the appearance may not be one of government endorsement, but the primary effect of the law would be to advance or inhibit a religion. As a crude example, imagine the same community where a statute is passed that says, “any city employee missing more than five days of work per year will be fired.” Conceivably, this would not provide the appearance of government favoring one religion over another on its face because it applies to all em-

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<sup>441</sup> *Id.*

<sup>442</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (O'Connor, J., concurring).

<sup>443</sup> *Lemon*, 403 U.S. at 612 (O'Connor, J., concurring).

<sup>444</sup> *See Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring).

<sup>445</sup> *Id.* at 692.

<sup>446</sup> *Id.* at 693-94.

ployees. Yet, the primary effect in a city that is, say, ninety-five percent Orthodox Jewish, would be the large scale inhibition of the practice of that faith of all those who work within that city. While these examples are rather simplistic, they illustrate the point that Justice O'Connor's framework of the effect prong does not, *per se*, raise or lower the bar for that prong.

As one scholar points out, however, "to the extent that a law does derive its moral premises from religious traditions, either directly or as reflected in public opinion, one could very well conclude that the government is in a sense endorsing or at least looking favorably upon the underlying religious beliefs."<sup>447</sup> Such a position would over broaden the reach of the effect prong, however. This renders the application of the proposition impracticable. Rather, the questions to be asked, in the case of same-sex marriage prohibition, are whether the statute advances or inhibits religion, and whether a reasonable observer would conclude that the government is endorsing or disapproving of religion.

These questions raise a potpourri of arguments because the religious beliefs held by some are not the religious beliefs held by all. There are churches that acknowledge and perform same-sex marriage in spite of the fact that they are not legally recognized. For example, a number of Christian denominations, including Metropolitan Community Church,<sup>448</sup> the United Church of Christ,<sup>449</sup> and some Episcopal churches<sup>450</sup> allow same-sex marriage. Several Jewish organizations also endorse same-sex marriage.<sup>451</sup> And other religious organizations, such as the Unitarian Universalist Churches, also support same-sex marriage.<sup>452</sup> Ultimately, because there are religions that are both for and against same-sex marriage, a statute prohibiting same-sex marriages would advance the religious interests of some, while inhibiting the interests of others.

One scholar argues that to "trigger the [government] endorsement [of religion] prohibition, a legal enactment probably has to be

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<sup>447</sup> Idleman, *supra* note 420, at 28.

<sup>448</sup> See Metropolitan Community Church web-site, <http://www.mcccchurch.org//AM/Template.cfm?Section=Home> (website for Metropolitan Community Church explains that they support same-sex relationships).

<sup>449</sup> Shaila Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. TIMES.COM, July 5, 2005, <http://www.nytimes.com/2005/07/05/national/05church.html?ex=127-8216000&en=6022a35b8a0ed284&ei=5090&partner=rssuserland&emc=rss>.

<sup>450</sup> *Vermont's Episcopal Diocese Writes Gay-Marriage Liturgy*, FOX NEWS.COM, June 18, 2004, <http://www.foxnews.com/story/0,2933,123066,00.html>.

<sup>451</sup> *Jewish Group OK's Same-Sex Marriage*, BOSTON GLOBE, Jan. 16, 2004, [http://www.boston.com/news/local/articles/2004/01/16/jewish\\_group\\_oks\\_sa-me\\_sex\\_marriage/](http://www.boston.com/news/local/articles/2004/01/16/jewish_group_oks_sa-me_sex_marriage/).

<sup>452</sup> See <http://www.uua.org/obgltc/> (the Unitarian Universalist website for The Office of Bisexual, Gay Lesbian and Transgender Support).



written in such a way as to give the unmistakable impression that a specific religious belief, let alone a specific practice or denominational position, constituted the very essence of the enactment.”<sup>453</sup> I would argue, however, that in light of the numerous religiously based statements against same-sex marriage made by legislators and judges, advancing an argument that a reasonable observer would see a prohibition of same-sex marriage as government endorsement of some religions would be reasonable, even if it is not written.

Granted, the religious statements I enumerated in this paper are primarily those of Senators and Representatives in the passage of DOMA. However, this is significant in light of the fact that the federal Defense of Marriage Act was the catalyst for the many states that followed suit and passed their own laws prohibiting same-sex marriage. Unless there were statements rooted in religious premises that established a vote based on religious purposes within each respective state, however, this argument would likely not fly because the voice of the federal legislators in passing DOMA (a federal Act) could not, based on notions of state supremacy, be the basis upon which to question and evaluate the effect of the actions of state legislators.

### 3. The excessive entanglement prong

Under this prong, a law “violate[s] the Establishment Clause if it fosters an excessive entanglement of government and religion.”<sup>454</sup> There are different types of entanglements. In doctrinal entanglement, the government decides issues of religious doctrine or ecclesiastical law.<sup>455</sup> While in political entanglements, the government grants civil power to religious institutions or authorities.<sup>456</sup> The religious motivations of legislators, in passing a law prohibiting same-sex marriage, is significant to the issue of doctrinal entanglement.<sup>457</sup>

There are two issues implicated in doctrinal entanglement: “first, the degree to which the legislature translates the religious sources in the process of deriving statutory premises, and second, the degree to which legislature necessarily or actually relies upon these premises.”<sup>458</sup> It is more likely that a court would find an entanglement issue where there is little translation of religious sources and there is greater actual

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<sup>453</sup> Idleman, *supra* note 420, at 30.

<sup>454</sup> *Id.* at 35.

<sup>455</sup> *Id.* at 36.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 18-19 (stating that the “religious motives of legislators who enacted the law . . . may be relevant to the question of doctrinal entanglement”).

<sup>458</sup> *Id.* at 38.

reliance on religious premises.<sup>459</sup> In addition, even if the court were to find there was an entanglement, the court would then have to find that the entanglement is constitutionally excessive.<sup>460</sup> Therefore, the analysis is a question of degree that “depends on all the circumstances of a particular relationship.”<sup>461</sup> Absent evidence that a majority of the legislative votes on a law prohibiting same-sex marriage were religiously based, however, and in light of the fact that to date courts have found valid secular bases for prohibiting same-sex marriage, it is unlikely that a court would weigh the analysis in favor of finding an entanglement issue.<sup>462</sup>

In sum, plausible and meritorious arguments could certainly be advanced that an Establishment Clause issue does in fact exist. However, whether the argument would succeed doctrinally under current Establishment Clause jurisprudence is another story. Whether based on their complexity or on the legal sufficiency of the merits, the judiciary has largely declined to take on and decide these issues.<sup>463</sup>

### C. Religious and Secular Morality – Can They Be Separated?

Michael Perry, a constitutional scholar, has written much on the issue of morality, religion, and the law.<sup>464</sup> Perry posits, in regards to the same-sex marriage issue, that the Establishment Clause “does not stand in the way of . . . legislators or other policymakers banning or otherwise disfavoring conduct on the basis of a religiously grounded belief that the conduct is immoral, *even if it lacks plausible, independent secular grounding.*”<sup>465</sup> Perry believes that the *SCOTUS* Justices are so divided in regards to the application of Establishment Clause perimeters that a firm “nonestablishment norm” does not exist.<sup>466</sup> The

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.* (quoting *Lemon*, 403 U.S. at 614).

<sup>462</sup> *Id.* at 43 (discussing degree of legislative reliance involves “measur[ing] the extent to which a law can be logically or conceptually justified apart from its religious premises, that is, whether at least in theory there is an adequate secular basis for the law. . . . measur[ing] the extent to which the law would not have been enacted in the absence of these premises, that is, whether as a matter of fact the religious premises effected the law’s enactment”).

<sup>463</sup> *Id.* at 38.

<sup>464</sup> See, e.g., Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663 (2001) [hereinafter *Political Reliance*]; Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217 (2001); Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449 (2001) [hereinafter *Christians*]; Michael J. Perry, *What Is ‘Morality’ Anyway?*, 45 VILL. L. REV. 69 (2000) [hereinafter *What Is Morality*]; MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* (Oxford University Press, 1997).

<sup>465</sup> *Political Reliance*, *supra* note 464, at 683 (emphasis added).

<sup>466</sup> *Id.* at 669-70.

essence of this posture rests on the difficulty of separating religious morality from secular morality.<sup>467</sup> This is because for every moral norm that can be legislated, the grounds for support of such legislation would be inherently religious for some, while non-religious for others.<sup>468</sup> This is inevitable. A good example of this is a law that criminalizes murder. Many will believe such a law is necessary because murder is against the Ten Commandments. However, many would also support it just because they feel murder is wrong, independent of any religious ground for their belief. Perry, then, goes beyond *McGowan* – which said that a law would not be invalidated simply because it harmonizes with religious tenets<sup>469</sup> and points to a deeper issue, which is the difficulty that presents itself when one tries to separate religious and political morality.

Given the inherent mixing of religious and nonreligious premises for legislating virtually any given moral thing, to have to separate a religious from a non-religious premise is problematic.<sup>470</sup> And, enforcing a policy that would call for the separation of religious and secular morality also raises concerns of reasonable uniformity between the states.<sup>471</sup> For example, one state could strike down as unconstitutional a law prohibiting same-sex marriage because the court finds that the legislators voted in the law based on religious moral convictions. While another state, with a virtually verbatim worded law could maintain it if the court found that the legislators did not vote based on religious moral convictions, but rather on a personal belief that such marriages do not serve the interests of the state.<sup>472</sup>

What is morally permissible and what is legally permissible are often at odds with each other.<sup>473</sup> While not everyone who believes that something is immoral will inherently want the conduct banned, the fact that something is immoral is often at the center of controversy when a group seeks to get conduct legally banned.<sup>474</sup> As Perry points out, morality may have different points of origin: some may ground their morality on religious premises, for example, while others who do not believe in God do believe in, and live by, secular moral stan-

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<sup>467</sup> See generally *Political Reliance*, *supra* note 464 (discusses the complexities of secular and religious morality).

<sup>468</sup> *Id.* at 673.

<sup>469</sup> *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

<sup>470</sup> *Political Reliance*, *supra* note 464, at 672.

<sup>471</sup> See *id.*

<sup>472</sup> See *id.* (providing a similar example using abortion as the issue).

<sup>473</sup> *What Is Morality*, *supra* note 464, at 70.

<sup>474</sup> *Id.* at 70-71.

dards,<sup>475</sup> perhaps relying on such things as their conscience to guide their personal sense of right and wrong.

Perry posits that there are three bases for moral argument. First, moral argument is used to dictate which person we should care about. Second, moral argument is used to dictate what is good and what is bad for those whom we should care about. And third, moral argument is used to determine how we should resolve conflicts when what is good for one person we care about conflicts with what is good for another person we care about.<sup>476</sup> Perry states that these are not religious premises but simply moral premises.<sup>477</sup>

However, for the religious moralists (those whose moral fiber is grounded in religiously driven beliefs), no answer to these questions would be plausible unless it were religiously grounded.<sup>478</sup> Thus, Perry believes that for some, religious faith and fundamental moral judgments are inextricably connected.<sup>479</sup> And, he implies that in a society where 95% believe in God and 70% attend church or synagogue, a separation of religious and secular morality is implausible.<sup>480</sup> Based on this, Perry does not believe that the Establishment Clause stands in the way of citizens, legislators, or other policymakers disfavoring conduct on the grounds that they believe the conduct is immoral, even if the beliefs that the conduct is immoral lacks plausible, independent secular grounding.<sup>481</sup>

Applying Perry's notion of the religious moralist to the traditional historical Judeo-Christian position on same-sex marriage, then, it goes like this: The Bible says that same-gendered people should not marry, and the Bible can never be wrong, therefore anyone who says marriage between same-gendered people is allowable takes an erroneous and heretical position.<sup>482</sup> The problem with the formulation, however, is that not all religious people share the same moral convictions. Recognizing this, Perry admits that while he believes the Bible to be an absolute source of truth, it may well be open to interpretation since its words may at times be abstruse and may 'say' things that are quite different from its literal text.<sup>483</sup> Based on this, he puts forth an

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<sup>475</sup> *See id.* at 85.

<sup>476</sup> *Id.* at 98-100.

<sup>477</sup> *Political Reliance*, *supra* note 464, at 677.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.* at 679.

<sup>480</sup> *See id.* (discussing that for many faith and morality are inextricably woven together); Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407 (1996) (95% believe in God, 70% attend church or synagogue).

<sup>481</sup> *Political Reliance*, *supra* note 464, at 683.

<sup>482</sup> *Christians*, *supra* note 464, 449-50.

<sup>483</sup> *Id.* at 450.

argument that calls for political self-restraint, arguing that “Christians, in deciding whether to favor or disfavor same-sex unions, have good reason to forswear reliance on the biblically grounded belief that homosexual conduct is always immoral.”<sup>484</sup>

Perry also believes that it would be implausible for a loving God to create in a human being a nature that allows the occurrence of deeply fulfilling same-sex relationships only to bar such people from ever entering into such a relationship.<sup>485</sup> Thus, Perry recognizes that while many Christians believe that same-sex sexual relationships are always sinful based on the text of the Bible (namely Genesis 19:1-29, Leviticus 18:22 & 20:13, Romans 1:18-32, 1 Corinthians 6:9, and 1 Timothy 1:10), others believe that proper interpretation of the Bible does not teach that it is always immoral to engage in same-sex sexual relationships.<sup>486</sup> Thus, there are many competing scriptural arguments on the polar positions on the issue of Christian morality and same-sex relationships.

In sum, Perry does not believe that the Establishment Clause should forbid policymaking based on religious grounds because our society is predominantly a religion-based community, and for many in the religious community, religious faith and fundamental morality are inextricably woven, preventing a separation of religious and secular morality. But, Perry does recognize that there are philosophical differences between religious faiths and interpretative differences within the same faiths. Based on these recognized differences, he advocates that religious people should consider basing their position on grounds other than their religious morality.

I respectfully disagree with these propositions for two reasons. First, it seems that asking religious fundamentalists to practice political self-restraint is like pleading for them to do something which they are inherently unable to do. If in fact their faith were inextricably woven into their religious morality, they would have to act against their very moral fiber to practice political tolerance. This would mean that they would have to vote in a way that would allow conduct they believe to be inherently harmful. The likelihood that widespread self-restraint would take place is tenuous at best. And second, absent widespread self-restraint, the essence of the proposition Perry puts forth serves to allow the will of the religious moral majority to be forced upon the moral minority, unless the moral minority’s position happens to coincide with that of the majority.

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<sup>484</sup> *Id.* at 449.

<sup>485</sup> *Id.* at 454-55.

<sup>486</sup> *Id.* at 456.

I do not believe the solution lies in abandoning the constitutional protection intended by the enactment of the first amendment simply because the issue of same-sex marriage is a difficult one to sort, or because, arguably, religious morality and secular morality cannot be easily separated.

## V. IS THERE A SOLUTION?

One could argue that maintaining the traditional institution of marriage to be between one man and one woman does not discriminate against gays because gay people could choose to marry a person of the opposite sex, availing themselves of all the benefits of ‘traditional marriage.’ This, of course, presumes that gay people have a *choice* in their sexual orientation. This is a very heterosexually based premise that is no more logical to many gay people than to say that one can choose one’s race, or that heterosexual people have a choice in their inherent attraction to the opposite sex. This belief – that a gay person has a choice in their sexual orientation – is also at the very root of the religious belief that same-sex sexual practices are immoral and that same-sex sexual orientation can be changed.

Arguably, whether homosexuality is a choice should not even be at the heart of the debate. Why would the notion of choice have anything to do with whether same-sex marriage should be legalized? The very notion of arguing choice when addressing legalization of same-sex marriage only serves to lay the foundation for a morality argument, implying that choosing to be homosexual would be a less moral choice than choosing not to be. However, the fact that something is considered immoral by religious institutions should not, under a Constitution that advocates the separation of Church and State, drive the law. While some areas of secular morality inevitably will intersect with religious morality, such as in the case of murder, there are areas that clearly do not, and should not, intersect. One example is that legislatures do not impose sanctions for cursing with God’s name. As a matter of fact, such expression would arguably be protected as free speech.

In his *Lawrence* dissent,<sup>487</sup> Justice Scalia openly admitted that the majority failed to take into account that “[m]any Americans do not want persons who . . . engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”<sup>488</sup> While accusing the Supreme Court of taking sides in a “culture war,” Justice Scalia goes

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<sup>487</sup> *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

<sup>488</sup> *Id.*

on to recognize that these people see holding gays at a distance as necessary for the protection of themselves and their families.<sup>489</sup> Justice Scalia's assertions are not only quite perplexing, but border on outrageous given the fact that, after all, there was a time in the not so distant past when white people did not want black persons as partners in their business, as scoutmasters for their children, as teachers in their children's schools, and as boarders in their homes. And, those people also saw holding at a distance the black person as necessary for the protection of themselves and their families. Just as these are not proper basis for segregation, neither should they be proper basis for prohibiting same-sex marriage—'marriage' being a legal right that grants legal benefits touching virtually every area of one's life including wills and trusts to property, contracts, survivorship benefits, health insurance benefits, and more. The rights of a group should not be impeded based on the fears or prejudices of the majority.

If same-sex marriage had been prohibited absent the religiously based comments of legislators and judges when passing and ruling on laws prohibiting same-sex marriage, the Establishment Clause issue would be much weaker. But, as previously discussed, legislators *have* passed legislation based on expressly declared religious ideology and beliefs. And, judges *have* ruled in cases involving same-sex couples based on religious ideology and belief. It is these many religious comments, coupled with the fact that a number of states have gone on 'fishing expeditions' looking for the secular purpose that would stick in court from case to case, or from court to court, that raises a valid flag of suspicion as to the validity of the states' claimed secular purposes. And, where the social science scholarship in support of the prohibition appears relatively weak scientifically in contrast with the scholarship that supports same-sex marriage, the proposition that the states currently base their prohibition on valid secular purposes is even more diminished.

Perry suggests a very valid point throughout his essays on morality, however. Namely that it is highly unlikely that a separation of religious morality and secular morality at the individual level could be accomplished because the moral fiber of religious moralists tends to be so inextricably woven into their religious beliefs. What I propose is that a separation of religious and secular morality be accomplished at the government level. In his Gettysburg address, Abraham Lincoln referred to our government, as being a "government of the people, by

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<sup>489</sup> *Id.*



the people, for the people."<sup>490</sup> Government, then, should separate notions of religious morality and secular morality to serve the interests of all of its people, where this is possible.

While the religious voice cannot constitutionally control law making, neither should the religious voice be so completely ignored that it loses representation in the public square, however. It must be remembered that while the government must preserve civil liberties from religious interference, it must also preserve religious liberty from civil interference.<sup>491</sup> Thus, a balance has to be achieved that neither advances nor inhibits religious interests, or impedes civil liberties.

I propose that a viable, if not the best, solution that can achieve this balance is a total separation of Church and State, insofar as marriage is concerned, accomplished by separating the institution of civil marriage from the institution of religious marriage. Such a separation, done properly, would protect the rights of same-sex couples, while at the same time protecting the religious interests of those institutions that are against same-sex marriage. Can this be done effectively? We need only look to our northern neighbor, Canada, to answer this question.

In Canada, historically, marriage had been defined as the "union of one man and one woman to the exclusion of all others" through the common law, with Quebec eventually including this common law definition within their code.<sup>492</sup> It has been settled law for some time, however, that exclusive jurisdiction to regulate who has the capacity to enter into marriage belonged to the Canadian Parliament, while the provinces regulate the formalities of marriage.<sup>493</sup>

Just as the issue discussed in this paper is about Constitutional Rights under the Establishment Clause, similarly the Prime Minister of Canada recognized that the "vote [on same-sex marriage in Canada] is about the Charter of Rights."<sup>494</sup> And, just as the United States is a nation of minorities, the United States government should recognize, as Canada's Prime Minister did, that we too are "a nation of minori-

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<sup>490</sup> President Abraham Lincoln, *Gettysburg Address*, (Nov. 19, 1863), available at <http://www.americanrhetoric.com/speeches/gettysburgaddress.htm> (last visited 5/26/2008).

<sup>491</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (quoting *Watson v. Jones*, 80 U.S. 679, 730 (1872)).

<sup>492</sup> MARRIAGE AND LEGAL RECOGNITION OF SAME-SEX MARRIAGE A DISCUSSION PAPER, DEPT. OF JUSTICE CANADA (2002), available at <http://www.justice.gc.ca/eng/dept-min/pub/mar/mar.pdf>.

<sup>493</sup> The Civil Marriage Act, 2005 S.C., ch. 33 (Can), available at [http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=38&Ses=1&Mode=1&Pub=Bill&Doc=C-38\\_4&File=29#1](http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=38&Ses=1&Mode=1&Pub=Bill&Doc=C-38_4&File=29#1) (last visited 5/26/08).

<sup>494</sup> *Same-Sex Marriage Law Passes 158-133*, CBC NEWS, June 29, 2005, available at <http://www.cbc.ca/story/canada/national/2005/06/28/samesex050628.html> (last visited 5/26/2008).

ties and in a nation of minorities you don't cherry-pick rights."<sup>495</sup> The result in Canada was the passing of Federal Bill C-38,<sup>496</sup> which says that "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."<sup>497</sup> Bill C-38 is titled "The Civil Marriage Act."<sup>498</sup>

The Act effectively separated the institutions of Civil and Religious Marriage through Clause 3.1 of Bill C-38.<sup>499</sup> Clause 3.1 recognized that religious officials could refuse to perform marriages that are at odds with their religious beliefs and provided that the practice of their religious faith, in so refusing, would be protected from penalty when it stated that:

no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same-sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and a woman to the exclusion of all others based on that guaranteed freedom.<sup>500</sup>

Through the passing of Bill C-38, then, Canada reached a position that neither deprived the rights of the minority voice based on the religious moral majority, nor deprived the religious moral majority of their freedom to freely exercise their religion.

The United States, however, could not pass such legislation at the federal level because it is not within its enumerated constitutional powers to regulate marriage.<sup>501</sup> Thus, since the power is "not delegated to the United States by the Constitution, nor prohibited by it to the States, [it is] reserved to the States respectively."<sup>502</sup> So, for such legislation to take place in the United States, either the states would have to enact the legislation within their respective jurisdictions or it would have to pass by amendment to the federal Constitution.

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Re Same-Sex Marriage* [2004] 3 S.C.R. 689, available at <http://scc.lexum.unmontreal.ca/en/2004scc79.pdf>.

<sup>498</sup> See The Civil Marriage Act, *supra* note 493.

<sup>499</sup> See *id.* at 3.1 ("Freedom of conscience and religion and expression of beliefs").

<sup>500</sup> *Id.*

<sup>501</sup> See generally U.S. CONST. art. I (for the absence of an enumerated power to regulate marriage).

<sup>502</sup> U.S. CONST. amend. X.

## VI. CONCLUSION

A separation of the definitions of civil and religious marriage would effectively resolve the Establishment Clause issue that currently exists. It would provide same-sex couples with equal access to hundreds of government protections that come with marriage, in areas ranging from taxes, to property ownership, to the right to make medical decisions for – and inherit from – one’s spouse under the law. That this would harm the institution of marriage is unlikely. As one lawyer practitioner put it:

[T]he idealized and fictional marriage that the opposition is fighting so hard to protect simply does not exist. Make no mistake about it, civil marriage is available to anyone over the age of eighteen who passes a syphilis test and is marrying someone of the opposite sex – that’s it! The marriage that the opposition is protecting and all of this discussion about children, love, devotion, procreation, and exalted relationship in every way; it is not required by any state statute. To get a marriage license, one must be eighteen years old – that’s all! You do not have to prove that you are fertile; you do not have to prove that you are able to have children; you do not have to prove that you are not getting married just for the health insurance or the tax benefits; and, you do not automatically lose your license if you fail to produce children or stop loving each other. Just as importantly, the state does not step in to remove your children if you are a single parent or divorced or force you to be sterilized if you are disabled or impaired. Under the law, two people can marry for any reason at all, so long as they are of the opposite sex, or for no reason at all, or for any reason that many people would believe are bad reasons. But the important point here is that the state does not ask. Your church may ask, your family may ask, your friends may ask, but not the government. And this is all gay people are asking for; the right to marry without these questions being asked of them.<sup>503</sup>

Some may argue that the marriage they are seeking to protect is a myth because marriage has evolved, divorce rates have gone up, there are no requirements to prove ability to procreate, the family has

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<sup>503</sup> Gretchen Van Ness, *The Inevitability of Gay Marriage*, 38 NEW ENG. L. REV. 563, 566 (2004).

evolved into more non-traditional forms of ‘family’, etc. The flip side of the argument, however, is that the many changes marriage has suffered are exactly the reasons why such protection of traditional marriage is warranted. The issues are so complex, and so two-sided, that sorting them out on the merits of an Establishment Clause argument would arguably inherently create either a *purpose, effect, or entanglement* issue for one side or the other of the argument under *Lemon*.

However, in light of all the social science scholarship that supports same-sex couples’ ability to procreate through alternative means, that same-sex couples – like their heterosexual counterparts – also desire to have children and raise families, that same-sex couples are as stable in all major areas of functioning as their heterosexual counterparts, that not only is the welfare of same-sex parented children not adversely affected – but that denying equal status to these parents may in fact promote a prejudice that fosters secretiveness – which does harm children, a separation of civil and religious marriage appears to be a viable option. Not only is it a viable option, but also one that would not adversely affect states’ alleged interests in marriage, while at the same time resolving all Establishment Clause issues.

A separation of civil and religious marriage would allow equal access to marriage to all people, while not forcing religious institutions to recognize these marriages. It would effectively remove any government entanglement from the institution of marriage and neither advance nor inhibit any given religion because religious institutions could still chose to refuse to perform same-sex marriages.

We cannot change the history of our laws. However, while the spirit of the common law upon which our laws are founded advocates that “[w]e are a religious people whose institutions presuppose a Supreme Being,” Justice Douglas, however, notably adds that “*if and when God is going to be served, [it] will not be motivated by coercive measures of government.*”<sup>504</sup>

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<sup>504</sup> *McGowan*, 366 U.S. at 563 (Douglas, J., dissenting) (emphasis added).