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## DOMA: An Unconstitutional Establishment of Fundamental Christianity

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# DOMA: AN UNCONSTITUTIONAL ESTABLISHMENT OF FUNDAMENTALIST CHRISTIANITY

*James M. Donovan\**

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This Article is dedicated to the memory of my late husband, Jorge M. Vázquez. We would have welcomed the social symbolism of a legal marriage. I therefore take this opportunity to extend special and heartfelt thanks to my sister, Colleen Carboni. While the rest of my family liked Jorge well enough, only she accepted our relationship for what it was—a marriage.

The editors of this Article have spared the reader much confusion and needless digression; they should be thanked by all parties.

*Senator Robert Byrd (D-W. Virginia) called the idea of same-sex marriages "absurd," and read from the Bible to buttress his argument that such marriages flew "in the face of the thousands of years of experience about the societal stability that traditional marriage has afforded human civilization."<sup>1</sup>*

## INTRODUCTION

President Clinton signed the Defense of Marriage Act (DOMA),<sup>2</sup> into law on September 21, 1996, at 12:50 a.m., less than six weeks before the November general elections.<sup>3</sup> The timing suggests that Congress passed DOMA before other more legitimate legislation in order to raise an issue which could influence that election's outcome.<sup>4</sup> The early hour was transparently Clinton's "attempt to lessen media coverage [of] and political fallout"<sup>5</sup> from his unavoidable capitulation to religious conservatives.<sup>6</sup> These strained circumstances are in keeping

1. 142 CONG. REC. S10,108-09 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).
2. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).
3. See Kim A. Lawton, *Clinton Signs Law Backing Heterosexual Marriage*, CHRISTIANITY TODAY, Oct. 28, 1996, at 80, 80.
4. See e.g., 142 CONG. REC. S10,579-80 (daily ed. Sept. 16, 1996) (statement of Sen. Pell). In a statement explaining his decision to oppose DOMA, Sen. Pell said:

[I]t is clear to me that this legislation is politically motivated. By making this unnecessary bill a priority of this Congress, while failing to act on numerous other measures of much more immediate importance, the Republican leadership has made clear its desire to try to embarrass those who have traditionally supported equal rights for all Americans, including gays and lesbians.

- 142 CONG. REC. S10,580 (daily ed. Sept. 16, 1996) (statement of Sen. Pell).
5. Lawton, *supra* note 3, at 80.
  6. DOMA's advocates intended either to compel Clinton to commit a damningly liberal deed by vetoing it or to alienate Clinton from a solid constituency by signing it, all before the upcoming November elections. Those with even the slightest amount of political acumen knew that once DOMA had gone as far as it had, Clinton could not veto it without endangering his chances for re-election. See John Gallagher, *Speak Now: Searching for a Popular Election-Year Wedge Issue, Congressional Republicans Launch an Attack on Gay Marriage*, ADVOCATE, June 11, 1996, at 20. To veto DOMA, Clinton would have had to set aside his personal objections to same-sex marriage in the interest of others' civil liberties. See J. Jennings Moss, *Wedding Bell Blues: Clinton's Stated Opposition to Same-Sex Marriage Places the President Squarely on the Horns of a Political Dilemma*, ADVOCATE, May 14, 1996, at 20. Conflicted by these competing interests, Clinton sought the path of minimal cost, and thus in the thick of night with no one watching, he signed DOMA into law. Without this pres-

with DOMA's character *ab initio* as an unusually complex piece of legislation.

Whatever its faults, DOMA has the virtue of brevity. Section 2, entitled "Powers Reserved to the States," authorizes states to ignore the Full Faith and Credit Clause of the United States Constitution when it comes to the issue of same-sex marriages:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>7</sup>

Section 3 of DOMA is both less abstract than Section 2 and more controversial. Entitled "Definition of Marriage," this passage states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>8</sup>

Despite their advertised simplicity,<sup>9</sup> both sections pack constitutional wallops.

Most analyses of DOMA direct their attentions to the constitutionality of the *effects* of this legislation: Does it violate the Equal Protection Clause of the Constitution? Does it transgress the Constitutional requirements of Due Process? Does DOMA grant states a

thick of night with no one watching, he signed DOMA into law. Without this pressure from the political right, Clinton would have acted in keeping with his long-held policy of supporting gays and lesbians, and vetoed DOMA.

7. Defense of Marriage Act § 2(a), 28 U.S.C.A. § 1738C (West Supp. 1997).

8. Defense of Marriage Act § 3(a), 1 U.S.C.A. § 7 (West 1997).

9. *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *House Hearing*] (statement of Rep. Canady) ("[T]he Act simply restates the current and long-established understanding [of what] marriage means.").

power they did not already possess, namely, the power to ignore extraterritorial marriages?<sup>10</sup>

This Article, however, takes a different approach and scrutinizes the constitutionality of the *intent* of DOMA. According to the text of the Act, DOMA's purposes are "to define and protect the institution of marriage,"<sup>11</sup> where marriage is defined to exclude same-sex partners. To be constitutionally valid under the Establishment Clause, this notion that heterosexual marriages require "protection" from gay and lesbian persons must spring from a secular and not religious source. This Article posits that DOMA has crossed this forbidden line between the secular and the religious. DOMA, motivated and supported by fundamentalist Christian ideology,<sup>12</sup> and lacking any genuine secular goals or justifications, betrays the Establishment Clause of the U.S. Constitution.

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10. These questions, and much of the earlier literature considering them, are reviewed and summarized by MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997). Strasser does not consider the implications of the Establishment Clause for DOMA.

11. Defense of Marriage Act, Pub: L. No. 104-199, 110 Stat. 2419 (1996).

12. The group of antigay advocates supporting DOMA will consistently be glossed herein as "fundamentalist Christians," although many pro-DOMA individuals would not so label themselves. Technically, "fundamentalism" refers to:

the belief that there is one set of religious teachings that clearly contains the fundamental, basic, intrinsic, essential, inerrant truth about humanity and deity; that this essential truth is fundamentally opposed by forces of evil which must be vigorously fought; that this truth must be followed today according to the fundamental, unchangeable practices of the past; and that those who believe and follow these fundamental teachings have a special relationship with the deity.

RALPH W. HOOD, JR. ET AL., *THE PSYCHOLOGY OF RELIGION: AN EMPIRICAL APPROACH* 366 (2d ed. 1996) (quoting B. Altemeyer & B. Hunsberger, *Authoritarianism, Religious Fundamentalism, Quest, and Prejudice*, 2 INT'L J. FOR PSYCHOL. RELIGION 113, 118 (1992)); see also RONALD B. FLOWERS, *THAT GODLESS COURT?* 93 (1994). Fundamentalism in America is overwhelmingly Christian, although Islamic and Jewish fundamentalists are common in other cultures. Most Catholics fall outside this technical "fundamentalist" definition, since on the whole they are open to the amending of scriptural authority by papal decree and other current events. However, on the particular issue of homosexuality the Catholic Church has not demonstrated this willingness to reinterpret the few relevant Biblical references. This Article therefore embraces Catholics within the "Fundamentalist Christian" concept.

The tools to evaluate DOMA are provided by *Lemon v. Kurtzman*<sup>13</sup> and *Edwards v. Aguillard*.<sup>14</sup> In these cases, the Supreme Court has synthesized and systematized its thinking on the Establishment Clause, and the criteria by which a court may determine if it has been transgressed. Part I reviews the development of Establishment Clause jurisprudence through the articulation of the *Lemon* test.<sup>15</sup> Part II describes the instructions the Supreme Court provided in *Edwards v. Aguillard*<sup>16</sup> for applying the *Lemon* test. Part III submits DOMA to a

13. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For discussion of *Lemon* see *infra* notes 27–32 and accompanying text. This Article assumes that *Lemon* provides the proper standard by which DOMA should be evaluated. However, the *Lemon* test is uniformly neither appreciated nor applied by the Court. The evolving consensus is that the test is not ideally tailored to all fact situations. Cf. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 156–59 (2d ed. rev. 1994) (stating that while *Lemon* is adequate in itself, it fails as a one-size-fits-all tool for Establishment Clause analysis). A broader selection of more tightly specific rules would generate more sensible and consistent outcomes. Justice O'Connor, for instance, has been particularly vocal about calling for a reconsideration of the place of *Lemon* in constitutional jurisprudence. See *Wallace v. Jaffree*, 472 U.S. 38, 67–70 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 687–93 (1984) (O'Connor, J., concurring).

Justice Scalia, on the other hand, reasons that the purpose prong of *Lemon* is impermissible because a purpose inquiry is “almost always an impossible task.” *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (arguing that the purpose prong of the *Lemon* test should be abandoned); see also *Epperson v. Arkansas*, 393 U.S. 97, 112–13 (1968) (Black, J., concurring) (finding the Arkansas anti-evolution statute unconstitutional for its vagueness, not its religiosity, because the search for motives was “too difficult”—although only religious motives were expressed). Swayed by Scalia’s arguments, at least one commentator has called for the elimination of the purpose prong, stating that it “present[s] a test too difficult to apply . . . [since the] sources which reveal such intent can be ‘contrived and sanitized, favorable media coverage orchestrated, and post-enactment [sic] recollections conveniently distorted.’” Jeffrey S. Theuer, Comment, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 *Ky. L.J.* 1061, 1072–73 (1987–88) (footnote omitted) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting)).

Despite these expressed misgivings, the *Lemon* test is still the official standard when seeking to adjudicate appeals to the Constitution’s Establishment Clause. *But cf.* *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that because the Founding Fathers, who wrote the First Amendment, approved of legislative chaplains, Nebraska Legislature’s chaplaincy practice did not violate the Establishment Clause). Thus, this Article uses the purpose prong of the *Lemon* test to analyze the constitutionality of DOMA.

14. *Edwards v. Aguillard*, 482 U.S. 578 (1987). For discussion of *Aguillard* see *infra* Part II.
15. *Lemon*, 403 U.S. at 612–13.
16. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

*Lemon* analysis as interpreted by *Aguillard*, examining DOMA's legislative history as well as the current and historical contexts from which it arises.

## I. THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

The Religion Clauses of the Constitution's First Amendment read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>17</sup> This passage contains both the non-Establishment and the Free Exercise guarantees; our attention focuses on the former.<sup>18</sup> The Establishment Clause forbids the federal and state governments to prefer one religion over another.<sup>19</sup> This Part reviews Supreme Court jurisprudence considering laws that exhibited this preference.

*Epperson v. Arkansas*<sup>20</sup> was an early effort to articulate which laws violate the Establishment Clause. In *Epperson*, the Supreme Court struck an Arkansas statute which outlawed the teaching of evolution. The Court held the law to be an unusually blatant attempt to legislate fundamentalist Christian theology:

The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.<sup>21</sup>

In reaching its unequivocal conclusion "that fundamentalist sectarian conviction was and is the law's reason for existence,"<sup>22</sup> the Court established two precedents. First, the Court found that "the religious views of some of its citizens"<sup>23</sup> provided the *only* justification for the Arkansas statute. Even if the Court had been predisposed to

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17. U.S. CONST. amend. I.

18. For a discussion of the historical and social context of the Establishment Clause, see LEVY, *supra* note 13.

19. A question exists regarding whether the government can prefer all religions over non-religion, if such a thing is possible. See LEVY, *supra* note 13, at xvi–xxii. But this debate need not concern us here, since the present issue clearly centers on one particular religion, fundamentalist Christianity, to the exclusion of others.

20. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

21. *Epperson*, 393 U.S. at 103.

22. *Epperson*, 393 U.S. at 108.

23. *Epperson*, 393 U.S. at 107.

accept some nonreligious rationale for the criminalization of the teaching of Darwinian evolution, the record reflected no such alternative explanation for the statute. As a result, the court held that any law wholly without secular purpose is a law presumptively motivated by religion, and thereby forbidden by the First Amendment.<sup>24</sup>

The second precedent from *Epperson* relates to the lineage of a contested law. Although the Arkansas statute did not explicitly claim that its purpose was to further fundamentalist Christianity, its text was modeled on a Tennessee statute which did include such language.<sup>25</sup> Given the Arkansas adoption of this Tennessee law, the Court sensibly analogized from the one to the other, concluding without a doubt that "the motivation for the [Arkansas] law was the same."<sup>26</sup> Thus, the Court looked beyond explicit claims into the unspoken social and political contexts which may have also influenced the legislative process. Even if overt language of the law is inoffensive, *Epperson* instructs that knowledge of the specific social, intellectual, and philosophical pedigree of a statute may suffice to find constitutional insult.

The influence of *Epperson* was particularly important in 1971 when the Supreme Court created an actual "test" to determine when a law violated the Establishment Clause. *Lemon v. Kurtzman*<sup>27</sup> involved a Rhode Island plan to offer supplemental pay to nonpublic school teachers who teach only classes also taught in public schools and use only approved public school materials.<sup>28</sup> The sole beneficiaries of the extra payments were 250 teachers in Roman Catholic schools. Because parochial schools play a critical role in the religious functioning of the Catholic Church, the question was whether these payments were unconstitutional establishments.

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24. See *Epperson*, 393 U.S. at 107–08 (holding that "[i]t is clear that fundamentalist sectarian conviction was and is the law's reason for existence" because "[n]o suggestion ha[d] been made that Arkansas' law may be justified by considerations of state policy" (emphasis added)). In a later case, *Wallace v. Jaffree*, the Court reasoned that all new legislation should be presumed to be an attempt to change existing law, and hence not pointless. See *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

25. See *Epperson*, 393 U.S. at 98 ("The Arkansas statute was an adaptation of the famous Tennessee 'monkey law' . . ." (citing TENN. CODE ANN. § 49-1922 (1966 Repl. Vol.))). This law was the focus of the *Scopes* trial. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

26. *Epperson*, 393 U.S. at 109.

27. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

28. See *id.* at 607–08. *Lemon* also included consideration of a similarly-themed Pennsylvania plan, which is not discussed here. *Lemon*, 403 U.S. at 609–11.



The Court articulated three criteria to ascertain whether religion impermissibly motivated a government action. These criteria have become known as the "*Lemon* test." A law is unconstitutional if it transgresses any of these three standards: "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>29</sup>

Nine years after establishing this test, the Supreme Court invoked the first standard, otherwise known as the purpose prong of *Lemon*, in *Stone v. Graham*.<sup>30</sup> In *Stone*, the Court considered a Kentucky statute which required the public schools to post the Ten Commandments in each classroom. Although the state asserted an "avowed" secular purpose—highlighting the decalogue's role in the formation of Western Civilization—the Court ruled that an "'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment," and that "no legislative recitation of a supposed secular purpose can blind [the Court] to" the "plainly religious" nature of the Ten Commandments.<sup>31</sup> Therefore the Court held that the Kentucky statute "violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution."<sup>32</sup> In essence, the enduring precedent from *Stone* extends the lesson learned earlier in *Epperson*: The Court is not bound to accept without scrutiny the legislature's routine assurances that a law was not impermissibly religiously motivated. Rather, the Court is free to look deeper into relevant evidence, such as religious pedigree.

In *Wallace v. Jaffree*,<sup>33</sup> another significant purpose prong case, the Supreme Court found that religious concerns were the sole motivation for an Alabama statute requiring a minute of silence in public schools

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29. *Lemon*, 403 U.S. at 612–13 (citation omitted) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). The development and treatment of the *Lemon* test is briefly reviewed in *Levy*, *supra* note 13, at 157–59.

30. *Stone v. Graham*, 449 U.S. 39 (1980).

31. *Stone*, 449 U.S. at 41.

32. *Stone*, 449 U.S. at 43. With an eye toward the eventual adjudication of DOMA, it is worthwhile to note that now-Chief Justice Rehnquist dissented from this result banning the required posting of the Ten Commandments. See *Stone*, 449 U.S. at 43–47 (Rehnquist, J., dissenting).

33. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

for meditation or voluntary prayer.<sup>34</sup> Alabama already had a required moment of silence in which those who were so inclined could silently pray if they chose; the new law amended the previous statutes to encourage the use of that time specifically for voluntary *prayer* as opposed to meditation or quiet reflection, for instance. As this was the only change to the law's text, and as new legislation is presumed to be an attempt to change existing law,<sup>35</sup> the Court construed the change as the manifestation of the State's intent "to characterize prayer as a favored practice."<sup>36</sup> The Alabama statute thus failed the purpose prong of the *Lemon* test, and therefore violated the First Amendment of the Constitution.<sup>37</sup>

The fact that the challenged law permitted no new actions cued the Court to the exclusively religious purpose of the Alabama statute. School children in that state already had the right to a moment of silence for use in whatever manner they chose. Adding "voluntary prayer" to the list of possible uses did not make that use suddenly and newly available, but only underscored the state's approval and encouragement of the moment of silence for that use. By this example, if a law grants no *new* powers or abilities, that law is likely a symbol of support for some cause which may or may not be appropriate, and thus warrants close scrutiny.

In summary, the purpose prong of the *Lemon* test focuses on what the legislators could reasonably be presumed to have been thinking when they enacted the new law.<sup>38</sup> The inquiries it authorizes include: Did they know, or could they reasonably be presumed to have known, that a piece of legislation had emerged from a wellspring of religious mandate? Was this knowledge just one of many influences on their decision to enact the law, or was it the sole or primary factor?

Under *Stone*, the purpose for the law must be *primarily* and not superficially secular.<sup>39</sup> Any law with primarily religious motivation is

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34. *See id.* at 56–57 (finding that the bill's sponsor admitted to the religious motivation of the Alabama statute).

35. *See Wallace*, 472 U.S. at 59 & n.48.

36. *Wallace*, 472 U.S. at 60.

37. Again with an eye toward eventual judgment on DOMA's constitutionality, we observe that now-Chief Justice Rehnquist dissented from *Wallace* as he did from *Stone*. *See Wallace*, 472 U.S. at 97 (Rehnquist, J., dissenting); *Stone*, 449 U.S. at 43. Chief Justice Rehnquist is apparently not well-disposed to claims that legislation advancing religious causes, and only religious causes, are necessarily suspect.

38. *See Lemon*, 403 U.S. at 613.

39. *See Stone*, 449 U.S. at 41–43.

to be treated as though it were motivated *wholly* by religion.<sup>40</sup> In turn, any law stemming wholly from religious concerns transgresses the Establishment Clause and is to be struck down as unconstitutional.<sup>41</sup> Clues to the hidden religious motivations of a law may be found in the intellectual lineage of the text (*Epperson, Stone*), or in the failure of the law to grant new powers or abilities (*Wallace*).

In two of the reviewed cases, *Epperson* and *Wallace*, it was not difficult for the Court to discover the legislative intent at work because in neither case was a secular reason offered for the statutes at issue. When the record is more complex, as in the case of DOMA, some direction is needed as to where to look for this intent. The Supreme Court's 1987 decision in *Edwards v. Aguillard* offers this direction.

## II. *EDWARDS V. AGUILLARD*: INSTRUCTIONS TO APPLY *LEMON V. KURTZMAN*

*Edwards v. Aguillard*<sup>42</sup> addresses the same subject matter treated by *Epperson*: an anti-evolution statute.<sup>43</sup> Louisiana's "Balanced Treatment Act"<sup>44</sup> compelled the schools to teach Genesis-inspired creationism whenever Darwinian evolutionary theory was introduced into the classroom. Although welcome to ignore both "theor[ies]," the law forbade teachers to introduce the one without the other.<sup>45</sup>

*Aguillard* struck the Balanced Treatment Act, finding it furthered a primarily religious, and therefore unconstitutional, purpose.<sup>46</sup> The

40. This conclusion derives from contrasting O'Connor's depiction of *Stone* in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (finding that in *Stone* there was only an incidental secular justification for displaying the Ten Commandments), with the *Lynch* majority's characterization of the case as one which the Court found to be "motivated wholly by religious considerations." *Id.* at 680.

41. See *Lynch*, 465 U.S. at 680.

42. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

43. For a review of the case history on this topic, see Judith A. Villarreal, Note and Comment, *God and Darwin in the Classroom: The Creation/Evolution Controversy*, 64 CHI.-KENT L. REV. 335 (1988).

44. LA. REV. STAT. ANN. §§ 17:286.1-7 (West 1982).

45. LA. REV. STAT. ANN. § 17:286.4(A) (West 1982).

46. See *Aguillard*, 482 U.S. at 585-94. The *Aguillard* court stated:

[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the [Balanced Treatment] Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

Supreme Court agreed with and cited the Court of Appeals' finding that the legislature's "actual intent was 'to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief.'"<sup>47</sup>

In reaching this result, the Court first had to evaluate and ultimately dismiss a purported secular legislative purpose which would justify the Act. While the first prong of the *Lemon* test required that the legislative purpose be secular and not religious, the *Aguillard* Court explicitly required that "the statement of such purpose be sincere and not a sham."<sup>48</sup> In other words, where *Lemon* directs the courts toward the crucial question—what is the purpose of the law?—*Aguillard* ultimately guides the courts through the kinds of information which they can consult to arrive at a proper answer. The Court identified six areas of permissible inquiry which would facilitate this evaluation of purpose: (1) whether the legislative history contains overt religious justification for the law, especially from the sponsor;<sup>49</sup> (2) whether the law functions solely symbolically by failing to authorize any new authority;<sup>50</sup> (3) the extent to which the law's operation is underinclusive relative to its stated purpose;<sup>51</sup> (4) the history behind the topic and its prior ties to religion;<sup>52</sup> (5) the current social and po-

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*Aguillard*, 482 U.S. at 594.

47. *Aguillard*, 482 U.S. at 582 (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985)). For an impressively effective articulation of the differences between religion and science, concluding that creationism is necessarily a religious dogma despite its attempts to repackage itself as an alternative scientific theory, see Andrew D. Bing, Note, *Evolution, Creationism and the Religion Clauses*, 46 ALB. L. REV. 897, 926-32 (1982). Summed into one sentence, the difference is that creation-science "is not a scientific theory about nature in search of inconsistent data, . . . but a faith in a Creator in search of consistent data." Edward J. Larson, *A Spectator's Guide to Aguillard v. Edwards: Part II—Textbooks, Judges, and Science*, 17 CUMB. L. REV. 116, 133 (1986) (quoting the ACLU brief, Brief of Appellees at 26-27, *Edwards v. Aguillard* (U.S. 1986) (No. 85-1513)).

48. *Aguillard*, 482 U.S. at 586-87.

49. See *Aguillard*, 482 U.S. at 586-87, 591-92.

50. See *Aguillard*, 482 U.S. at 587 ("The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it.")

51. See *Aguillard*, 482 U.S. at 588 ("If the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind.")

52. See *Aguillard*, 482 U.S. at 595.

litical context from which the law emerged;<sup>53</sup> and (6) whether the explicit text of the law expresses a religious purpose.<sup>54</sup>

The Balanced Treatment Act presented problems on all inquiries save the last.<sup>55</sup> While the advocates of the Balanced Treatment Act offered the secular reason of advancing academic freedom,<sup>56</sup> the sponsor of the Act, Senator Keith, intended to narrow the science curriculum, "My preference would be that neither [creationism nor evolution] be taught."<sup>57</sup> The Court found this attitude unexpected if the goal truly was to advance academic freedom, and thus the legislative history revealed the secular reason to be a sham.

The Court further rebutted the sincerity of the purported purpose of advancing academic freedom because "[t]he Act [did] not grant teachers a flexibility that they did not already possess . . . . The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it."<sup>58</sup> This failure to grant new authority to the teachers led the Court to conclude that despite protests to the contrary, "[t]he Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose."<sup>59</sup>

The *Aguillard* Court also argued that the Act was underinclusive, which thus made the sincerity of the "academic freedom" purpose

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53. See *Aguillard*, 482 U.S. at 594–95.

54. See *Aguillard*, 482 U.S. at 594–95.

55. The majority opinion does not evaluate the Balanced Treatment Act relative to its overt text. However, the concurring opinion by Justice Powell does, concluding that "[f]rom the face of the statute, a purpose to advance a religious belief is apparent." *Aguillard*, 482 U.S. at 599 (Powell, J., concurring).

56. See *Aguillard*, 482 U.S. at 581. Bing, *supra* note 47, at 900–11, summarizes arguments that the Balanced Treatment Act—this time, the one in Arkansas, which was genetically related to the similarly titled act in Louisiana—is required by the Free Exercise Clause. Bing ultimately finds that "the state generally has no legitimate interest in protecting any or all religions from views distasteful to their adherents." Bing, *supra* note 47, at 909; see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (examining whether the government creates an unconstitutional burden on the free exercise of religion by requiring exposure to questionable ideas).

57. *Aguillard*, 482 U.S. at 587 (alteration in original).

58. *Aguillard*, 482 U.S. at 587. The Court analogizes this lack of new authority from the Balanced Treatment Act with the meditation law struck by *Wallace v. Jaffree*, 472 U.S. 38 (1985). The law in *Wallace* similarly failed to enable new abilities or powers, instead serving only to indicate the state's approval and encouragement of prayer during that moment of silence. See *Aguillard*, 482 U.S. at 587.

59. *Aguillard*, 482 U.S. at 597.

suspect.<sup>60</sup> The Court noted that if by such freedom they mean to encourage the fair “teaching [of] all of the evidence,”<sup>61</sup> the Act displays a “discriminatory preference for the teaching of creation science and against the teaching of evolution”<sup>62</sup> which belies the claim of promoting fairness.

Because alternatives were available which aligned more closely with the espoused goal of “fairness,”<sup>63</sup> the Court rejects the sincerity of “academic freedom” as the purpose of the Balanced Treatment Act.<sup>64</sup> Thus, the Balanced Treatment Act’s significant underinclusion in practice relative to its stated purpose flags the Act for further Establishment Clause scrutiny.

The *Aguillard* Court also noted a historical “link between the teachings of certain religious denominations and the teaching of evolution” which was reviewed in *Epperson*.<sup>65</sup> This history supported the Court’s conclusion that “the term ‘creation science,’ as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind.”<sup>66</sup> Finding that the antagonistic link between creation science and evolution is not only historic, but “contemporaneous,”<sup>67</sup> the Court also examined present day influences. In this process, the Court found that the Senator’s religious views impacted the passage of the Act: “The state senator [Senator Keith] repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious

60. See *Aguillard*, 482 U.S. at 586, 588.

61. *Aguillard*, 482 U.S. at 586 (quoting the Transcript of Oral Argument at 60).

62. *Aguillard*, 482 U.S. at 588 (noting that the Act requires the development of curriculum guides, the availability of resource services, and the protection against discrimination for creation scientists *only*).

63. For example, the Act could have “encouraged the teaching of all scientific theories about the origins of humankind.” *Aguillard*, 482 U.S. at 588.

64. *Aguillard*, 482 U.S. at 593 (stating that “[o]ut of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects”).

65. *Aguillard*, 482 U.S. at 590. The court also notes that “[t]he[ ] same historic . . . antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case” as they were in *Epperson v. Arkansas*, 393 U.S. 97 (1968). *Aguillard*, 482 U.S. at 590–91.

66. *Aguillard*, 482 U.S. at 592.

67. *Aguillard*, 482 U.S. at 590, 591.

beliefs antithetical to his own.”<sup>68</sup> Thus, “because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.”<sup>69</sup>

Given that the Balanced Treatment Act violated five of the six inquiries, the Court judged the Act’s stated purpose of promoting academic freedom or basic educational fairness to be a sham intended to hide the fundamentally religious nature of the law.<sup>70</sup>

### III. APPLYING *LEMON* À LA *AGUILLARD* TO DOMA

The Supreme Court’s dissection of the Balanced Treatment Act in *Aguillard* provides a clear model to evaluate any other law relative to the Establishment Clause. Part III applies this model point-by-point to DOMA. This Part concludes by noting that the facts imputing DOMA’s violation of the Establishment Clause are at least as strong as those implicating the Balanced Treatment Act, and are often even less ambivalent. Consequently, as the *Aguillard* analysis found

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68. *Aguillard*, 482 U.S. at 592. Based on my personal experience of living in Louisiana, it further seems that the Senator’s views reflected broad social trends in Louisiana.
69. *Aguillard*, 482 U.S. at 594. Finally, *Aguillard*, also specified that “[t]he plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose.” *Aguillard*, 482 U.S. at 594. Unfortunately, some jurisdictions, such as Louisiana, actually have very poor legislative histories. The Louisiana legislature publishes no legislative history other than its calendar. Committee meetings are tape-recorded. Tapes are archived from the House only from 1976, however, and the Senate keeps only the last two years, although minutes (but not transcripts) are available for earlier years. Even this level of documentation is not afforded to general floor discussion, which leaves a trail in neither print nor audiotape. The *Aguillard* dissent notes the lack of significant legislative history behind the Balanced Treatment Act. See *Aguillard*, 482 U.S. at 619 (Scalia, J., dissenting).
70. See *Aguillard*, 482 U.S. at 588–91. The Balanced Treatment Act violated only five of the six inquiries because it did not appear to have a religious purpose on its face. Legislatures have become very sophisticated in their drafting of bills, however; even when they fully intend to impose a religious dogma upon the electorate, they rarely state this end in the bill itself. In neither the Balanced Treatment Act nor DOMA does the text itself discuss religious purpose. They contain no clause such as, “In order to hasten the arrival of Christ’s Kingdom on earth we enact the following . . .” *Aguillard* therefore does not dwell on the surface text in its analysis, although the “plain meaning of the statute’s words” is rightly identified as a proper place to look. *Aguillard*, 482 U.S. at 594. Instead the Court devotes itself to laying bare the more subtle connotations and ancestry of the text. This Article’s application of *Aguillard* to DOMA likewise will not discuss the surface text.

the Balanced Treatment Act to be an unconstitutional establishment, so it must also find DOMA.

### *A. Legislative History of DOMA*

We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. . . . 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 [sic] want, as long as it feels good and does not hurt others.

When one State wants to move towards the recognition of same-sex marriages, it is wrong. . . . We as a Federal Government have a responsibility to act, and we will act.<sup>71</sup>

The *Aguillard* Court first directed the inquiry into the sincerity of a claimed legislative purpose toward the legislative history of the bill, in that case the Balanced Treatment Act. Some statements by the Act's sponsor, for instance, expressed views antithetical to the stated goal of the Act, while others plainly revealed his religious objections to evolution. Additionally, the Court in *Stone v. Graham* ruled that the "plainly religious" nature of the Ten Commandments overwhelmed any ostensibly secular purpose for their required posting.<sup>72</sup>

The legislative history of DOMA shows it is similarly "plainly religious" in both scope and purpose in the mind of the sponsor, and the combined impact of these rulings compel the judgment that DOMA transgresses the Establishment Clause. This section catalogs statements from the record which took the form of either a positive assertion that the American marriage tradition is a divine revelation, or a Biblically-inspired condemnation of homosexuality.

The very definition of "marriage" that DOMA seeks to defend comes from the fundamentalist Christian tradition. DOMA supporters clearly envision marriage as a religious practice, and often go so far as to deny any credible role of government in its regulation at all. As

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71. 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer).

72. *Stone v. Graham*, 449 U.S. 39, 41-42 (1980).



such, DOMA's goal to protect marriage is transparently an effort to foster one particular religious perspective on families.

House speakers on behalf of DOMA do not leave any doubt whence comes this institution of marriage. Representative Sensenbrenner notes that "[t]raditional heterosexual marriage . . . has been the preferred alternative by every religious tradition in recorded history."<sup>73</sup> The central issue is the authority by which marriages are formed. Representative Hutchinson from Arkansas believes "that marriage is a covenant established by God."<sup>74</sup> Representative Talent from Missouri agrees: "[T]he institution of marriage is *not* a creation of the State. . . . [Rather, i]t has been sanctified by all the great monotheistic religions and, in particular, by the Judeo-Christian religion which is the underpinning of our culture."<sup>75</sup>

Only twice in the record from the House does anyone protest this infusion of religious dogma into the process of law-making. Representative Jackson of Illinois warned that "religious groups may not govern who receives a civil marriage license. . . . [W]hen I came to Congress, I placed my hand on the Bible and swore to uphold the Constitution; now, I am being asked to place my hand on the Constitution and uphold the Bible."<sup>76</sup> Representative Frank, who organized and led an admirable fight against DOMA, objected to the characterization of marriage as a sacrament. "We have no power to give anyone any sacraments. We are not in the business of dispensing sacraments, and I hope we never get there."<sup>77</sup>

Similar appeals to religious teaching as the source of the marriage tradition warranting DOMA protections were voiced in the Senate.

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73. *House hearing, supra* note 9, at 33 (statement of Rep. Sensenbrenner).

74. 142 CONG. REC. H7442 (daily ed. July 11, 1996) (statement of Rep. Hutchinson). DOMA's sponsor, Representative Canady, stated a similar view when he opined, "the traditional family structure . . . comports with nature and with our Judeo-Christian moral tradition." 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady).

75. 142 CONG. REC. H7446 (daily ed. July 11, 1996) (statement of Rep. Talent) (emphasis added). Similar denials of a role for human government in the creation and management of marriage are found in a piece by James Q. Wilson, *Against Homosexual Marriage*, which states that "thinking of laws about marriage as documents that confer or withhold rights is itself an error of fundamental importance." James Q. Wilson, *Against Homosexual Marriage*, in *SAME-SEX MARRIAGE: THE LEGAL AND MORAL DEBATE* 137, 144 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter *DEBATE*].

76. 142 CONG. REC. H7496 (daily ed. July 12, 1996) (statement of Rep. Jackson).

77. 142 CONG. REC. H7500 (daily ed. July 12, 1996) (statement of Rep. Frank).

Senator Byrd of West Virginia led the charge against same-sex marriage. After quoting from his family Bible, he intoned this warning: "Woe betide that society, Mr. President, that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning."<sup>78</sup> Senator Coats of Indiana repeats the argument made in the House that marriage is not a civil institution. "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."<sup>79</sup> Senator Burns likewise refers to the "holy estate of matrimony" and "the sanctity of marriage,"<sup>80</sup> while Senator Bradley from New Jersey "believe[s] marriage is, first of all, a predominantly religious institution."<sup>81</sup> Only Senator Robb contradicted these gentlemen, reminding them that "at its core marriage is a legal institution officially sanctioned by society through its Government."<sup>82</sup>

These statements suffice to demonstrate that the tradition of marriage as depicted throughout the DOMA debate derives from religious doctrine. The fact that many speakers would deprive civil government of any genuine authority to legislate in this area argues that this tradition is intended still to retain its religious character.

Further proof of the influence of religion on DOMA is that both sides brought witnesses who represented religious bodies before the House Committee. Their mere presence flags the debate as one of sectarian concern. Rabbi David Saperstein spoke against DOMA on behalf of the Religious Action Center of Reform Judaism, saying that "The love that God calls us to, the love that binds two people together in a loving and devoted commitment, is accessible to all God's children. Let the state acknowledge that."<sup>83</sup> Jay Alan Sekulow, Chief Counsel for the fundamentalist Christian American Center for Law and Justice, defended DOMA by asserting the Full Faith and Credit canard.<sup>84</sup> He pointedly identifies the religious issues at stake, however, when he states his belief that "the family [is] the primary social and

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78. 142 CONG. REC. S10,110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

79. 142 CONG. REC. S10,113 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

80. 142 CONG. REC. S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Burns).

81. 142 CONG. REC. S10,125 (daily ed. Sept. 10, 1996) (statement of Sen. Bradley).

82. 142 CONG. REC. S10,122 (daily ed. Sept. 10, 1996) (statement of Sen. Robb).

83. *House Hearing, supra* note 9, at 211 (testimony of Rabbi David Saperstein).

84. As discussed *infra* Part III.B., Section 2 of DOMA responds to the fear that this constitutional provision could force all states to recognize same-sex marriages solemnized elsewhere. Complete review, however, shows this fear to be unfounded.

religious institution of a just society,” that “‘the family is the first church,’” and that as such his sect was adamant that the definition of “family” not be expanded or changed in any way.<sup>85</sup>

Radio talk show host Dennis Prager, also a witness at the House hearing, gives his spin on theology this way:

[T]he Bible maintained that in order to become fully human, male and female must join. In the words of Genesis, ‘God created the human . . . male and female He created them.’ The union of male and female is not merely some lovely ideal; it is the essence of the Jewish and Christian outlooks on the human experience.<sup>86</sup>

In addition to these religious takes on marriage, the House record reveals a deep, religious disapproval of homosexuality. Representative Coburn of Oklahoma claims to represent a district with “very profound beliefs that homosexuality is wrong. . . . They base that belief on what they believe God says about homosexuality.”<sup>87</sup> Representative Funderburk cites the Christian fundamentalist Family Research Council for his information that homosexuality “is inherently wrong and harmful to individuals, families, and societies.”<sup>88</sup> Representative Studds suggests that comments made in the aisle are even more provocative than those which actually made it into the written record, and included use of such terms as “promiscuity, perversion, hedonism, narcissism . . . depravity and sin.”<sup>89</sup> He likens the mood to “some kind of revival meeting” whereat he was “about to be preached at from Leviticus.”<sup>90</sup> Indeed, a witness before the Senate, David Zwiebel of

85. *House Hearing*, *supra* note 9, at 216–17 (testimony of Jay Alan Sekulow) (quoting Keith Fournier, the American Center for Law and Justice’s Executive Director).

86. *House Hearing*, *supra* note 9, at 131 (prepared statement of Dennis Prager) (omission in original) (citation omitted).

87. 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

88. 142 CONG. REC. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderburk).

89. 142 CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Studds).

90. 142 CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Studds). Rep. Studds notes that since the very next Levitical prohibition is against the eating of shellfish, his district would probably not appreciate this standard. How, indeed, “do the faithful determine which Levitical traditions ought to be compromised?” WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 101 (1996). My conclusion, arrived at through observing the devout, is simple: If the prohibition burdens *other* people, it is to be strictly enforced; if it burdens *your own* conduct, it is “outmoded” and may be ignored. “Christians have prescribed crosses for others while exalting themselves.” Roger L. Shinn, *Homosexuality: Christian Conviction and Inquiry*, in *HOMOSEXUALITY AND ETHICS* 3, 6 (Edward Batchelor ed., 1980).

Agudath Israel of America, gives life to Studd's fears when he asserts that "*Leviticus* is not irrelevant"<sup>91</sup> to secular law-making.

Representative Canady of Florida, sponsor of DOMA, unabashedly proclaims his disgust for homosexuals, "I hope that many can be rescued from that lifestyle and returned to where they can have a happy lifestyle, because I think it's inherently destructive."<sup>92</sup> Canady's later comments further demonstrate antigay bias, and grounds this bias in his religious faith: "the traditional family structure . . . comports with nature and with our Judeo-Christian moral tradition. . . . Our law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based."<sup>93</sup>

The sponsor of DOMA speaks in religious tones even more striking than did the sponsor of the Balanced Treatment Act. If the Court in *Aguillard* judged this moderate language to impugn the sincerity of a purported secular purpose, so must DOMA's more overtly religious self-justification prove a violation of the Establishment Clause. Moreover, similar statements by other Congress members demonstrate that Canady's understanding of the religious purposes of DOMA was neither isolated nor idiosyncratic, but instead reflected the explicit opinion of a substantial percentage of representatives and senators. The Balanced Treatment Act breached the Establishment Clause even without such corroboration. The legislative history of DOMA clearly marks this law as constitutionally offensive.

91. *The Defense of Marriage Act: Hearing in S. 1740 Before the Senate Comm. on the Judiciary*, 64th Cong. 53 (1996) [hereinafter *Senate Hearing*] (prepared statement of David Zwiebel).

92. *House Hearing*, *supra* note 9, at 237.

93. 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady). He tries to defend himself against charges of utter bigotry by spreading the blame around:

[Seventy] percent [of the American people] or more oppose same-sex marriages. Seventy percent of the American people are not bigots. Seventy percent of the American people are not prejudiced. Seventy percent of the American people are not mean-spirited, cruel, and hateful. It is a slander against the American people to assert that they are.

142 CONG. REC. H7447 (daily ed. July 11, 1996) (statement of Rep. Canady). "Surely," it has been observed, "unreason cannot be so widespread." *McGowan v. Maryland*, 366 U.S. 420, 536 (1961) (Frankfurter, J., concurring). If that were true, of course, there would have been no slavery. Popular acclaim does not make something *right*.

### B. DOMA Confers No New Powers

The statute at issue in *Aguillard*, the Balanced Treatment Act, opened itself up to suspicion of unconstitutionally imparting religious messages via state law because it failed to bestow any new power or authority upon the teachers.

Any law which is ineffective, which does not change legal reality, must still be presumed to be “doing” something. If it is not working in the usual sense, that is, if legal reality has not been changed, such a law is perhaps serving merely as a *symbol*.<sup>94</sup> This law is expressive of some vision or ideal. Not all symbolic laws are inappropriate. However, once an enactment has been identified as a symbolic law instead of an effective law, the door opens for further inquiry into what kind of symbol the law embodies. Specifically, is it a *religious* symbol? Had the law been effective as well as symbolic, perhaps it might have escaped this extra scrutiny.

The ineffectiveness of DOMA has been particularly well developed relative to Section 2. Section 2 of DOMA provides an exemption for states from any Full Faith and Credit obligations to recognize extraterritorial same-sex marriage. Professor Strasser argues, however, that no such obligation exists:

The history of choice of law in the context of the recognition of interracial marriages makes clear that states can assure that they will not have to recognize same-sex marriages, even if validly contracted in another state, as long as that intent is made explicit. Unless or until the Supreme Court rules that states may not preclude same-sex partners from marrying, states can take certain explicit measures to assure that they will not be forced to recognize same-sex marriages.<sup>95</sup>

In other words, states already have all the power and authority they need to resolve this problem. Section 2 of DOMA gives them nothing they do not already possess. “[B]ecause Congress apparently did not understand the current system” of marriage recognition,<sup>96</sup> Section 2 of DOMA is poorly drafted relative to this problem. Consequently, “those states given the option by DOMA to refuse to recognize same-sex marriages already have that option [through well-

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94. See *Wallace v. Jaffree*, 472 U.S. 38, 59–61 (1985).

95. STRASSER, *supra* note 10, at 117.

96. STRASSER, *supra* note 10, at 126.

established principles of choice of law public policy exceptions], and those states not having that option will not have suddenly acquired it through DOMA."<sup>97</sup>

*Aguillard* does not consider it relevant to ask whether the law-makers *believed* the laws would authorize new authority. For the Court all that mattered was that the law in actual practice had no such effect.<sup>98</sup> Like the law at issue in *Aguillard*, Section 2 of DOMA grants no new powers, and hence this part at least may be impermissibly symbolic.<sup>99</sup>

97. STRASSER, *supra* note 10, at 132. This fact has not dissuaded Republicans from advertising DOMA as *strengthening* states' rights. As Representative Frank observed, however, "there is [not] any principle . . . more frequently enunciated and less frequently followed than States' rights from the Republicans." 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Frank). Frank is certainly right that the spirit of DOMA runs against the espoused concerns of conservatives to devolve power from Washington back to the states. This principle seems to be appropriate only for economic issues. For matters of social and cultural concern, Republicans are only too eager for Washington to issue mandates in their favor, such as when they seek constitutional bans on abortions. Scholars have noted this internal philosophical contradiction before:

What was jarring in the light of history was the willingness of fundamentalists, whose general conservatism on government social policies could be explained by their traditional fears of the state, were ready to entertain strong state action to criminalize and stigmatize homosexuals who did not belong to the Southern Baptist Convention, whose practices posed no threat to public order, and whose own religion placed faith in a God who did not reject them because of their sexual preferences. A state that can ban homosexuals solely because of their purported deviation from religiously grounded moral law and the Scriptures of a particular religious tradition, however widely that tradition is shared, can ban Jews and can ban Baptists.

ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 129 (1996). "When the Moral Majority and the Reaganites speak of rights and freedoms they almost always use these words to mean their right to interfere with the lives of others." DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA, AMERICANIZATION OF THE HOMOSEXUAL* 218 (1982).

98. *Aguillard*, for example, reaches its conclusion that the Balanced Treatment Act does not further its stated purpose based upon what the Act does or does not "provide" or "grant." *Aguillard*, 482 U.S. at 587. At no point does the Court weigh what the Act was *intended* or *believed* to "provide" or "grant."

99. Section 3 of DOMA may also fail to survive scrutiny by this standard. The denial of federal benefits to same-sex marriages is without effect since no such couples exist. But since such marriages may occur at some time in the future, Section 3 analysis by the "no new powers" criterion would be more difficult and less certain than the Section 2 analysis.

### C. Underinclusivity

*Aguillard* faults the Balanced Treatment Act for failing to operate in a manner commensurate with its articulated purpose. Allegedly intended by its authors to foster educational fairness, it instead favored creation science. This operational underinclusivity relative to its stated purpose contributed to the Act's transgression of the Establishment Clause. DOMA is similarly underinclusive relative to its claimed goals.

The legislative history for Section 3 of DOMA introduces only one secular reason for its passage: the economic burden upon federal benefit programs. Federal acceptance of same-sex marriages, even state-validated ones, would allegedly overtax current programs which allow for spousal benefits. The immediate problem with this reason lies with the untrue claim that "a whole new group of beneficiaries" would be created if same-sex marriages were recognized. Senator Gramm claimed, for example:

A failure to pass this bill, if the Hawaii court rules in favor of same-sex marriages, will create . . . a whole group of new beneficiaries—no one knows what the number would be—tens of thousands, hundreds of thousands, potentially more—who will be beneficiaries of newly created survivor benefits under Social Security, Federal retirement plans, and military retirement plans. It will trigger a whole group of new benefits under Federal health plans. And not only will it trigger these benefits for the Federal Government, but under the full faith and credit provision of the Constitution, it will impose—through teacher retirement plans, State retirement plans, State medical plans, and even railroad retirement plans—a whole new set of benefits and expenses which have not been planned or budgeted for under current law.<sup>100</sup>

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100. 142 CONG. REC. S10,106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm). The State of Hawaii appeals to this same reasoning in its attempt to prevent the court from permitting same-sex marriages:

The [present] marriage law furthers the compelling state interest in protecting the public fisc from the reasonably foreseeable effects of approval of same-sex marriage. This concern results from the reallocation of fiscal resources to a greatly expanded group of persons and the potential destruction of the rational basis for the definition of the class of persons entitled to such benefits. If procreation is not a class limitation, then the

As phrased in more polemical rantings, “if you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear. . . .”<sup>101</sup>

This argument is clearly a red herring. Consider a man, Don, who has paid into Social Security all his working life, and is thereby entitled to spousal and other benefits for himself and his wife. But suppose another man, John, who likewise contributes to the Social Security program, never marries. The system may perhaps enjoy a windfall from never having to pay spousal benefits on John’s behalf, payments for which it is otherwise liable, as in the case of Don. But the fact remains that John is entitled to make the claim for spousal benefits by virtue of his own contributions, and the system had better be structured so as to be able to handle his claim should he later choose to marry and exercise his rights. The *sex* of the spouse is independent of the financial obligations of the system; if it cannot afford to pay for John’s male spouse, it is unclear how it would suddenly have the money to pay for his female spouse. Either the money is there, or it is not.

Authorizing same-sex marriages will therefore *not* be creating a “new class of beneficiaries.” Rather, it would allow citizens already contributing to the social security program to direct the benefits, to which *they are already entitled* and for which *the program is already liable*, toward persons of their own choosing. If the benefit programs cannot handle these legitimate claims, then that is indicative of mismanagement of the programs, and not a ground to deny contributors their rights.

Assume, however, that DOMA proponents are correct, that “new beneficiaries” would be created. What is the likely impact upon the

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system of laws allocating benefits will fail. The entire system of laws governing domestic relations and marital benefits will have to be totally restructured.

In addition, same-sex couples will have cause to permanently relocate to Hawaii to avoid the non-recognition of their unions in their home states. This may impose unique and potentially disproportionate burdens on private and public resources in Hawaii. Such an increase in the population could distort the job and housing markets, increase demand for government and private services, and tax the natural resources of the State.

Defendant State of Hawaii’s Pre-Trial Memorandum at 4–5, *Baehr v. Miike*, 1996 WL 94235 (Haw. Cir. Ct. 1996)(No. 91-1394-05).

101. 142 CONG. REC. H7488 (daily ed. July 12, 1996) (statement of Rep. Barr).



programs they fear would be harmed? Probably very little. Senator Kerrey of Nebraska reasonably finds that at most only two percent of the population would be impacted,<sup>102</sup> a number surely too small to seriously cripple the identified programs. We should examine this objection, however, in its best possible light. Under Establishment Clause analysis, Congress retains the privilege of being wrong so long as it is sincere. Does the record reflect this worry about fiscal impact as genuine? Does Congress behave in the way we would expect a legislating body to behave when seriously addressing a true problem? The answer would seem to be, "No."

Despite the expressed worries of the Republican majority, no study was conducted to ascertain the likely impact upon federal and state benefit programs from recognizing same-sex unions. In fact, the House explicitly turned back an amendment to DOMA which would have commissioned a General Accounting Office study of these and related questions.<sup>103</sup> Did they suspect that the details would not support their nebulous but fear-mongering accusations? The answer to that we may never know; but we can safely conclude that ignorance of the relevant details was demonstrably willful. This negligence undermines the claim that concern about impact upon benefit programs is a sincere motivation to enact DOMA. That which is not important enough for study is certainly not important enough to spur discriminatory legislation. In any event, if the excuse of saving money has already been rejected as sufficient reason "for federal law to displace state law,"<sup>104</sup> it is unlikely that this same reason will justify federal denial of civil liberties to the individual.

More pointedly, the fit between this fear of fiscal depletion and the scope of Section 3 of DOMA is so poor as to render it fatally underinclusive. For instance, Representative Schroeder's proposed amendment, which was defeated, would have denied federal benefits to subsequent marriages "until the person who left that marriage ha[d] dealt with the first one in a property settlement based on fault. [According to Schroeder, such a process] . . . would save us gazillions of dollars in welfare and child support and all sorts of things."<sup>105</sup> This

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102. See 142 CONG. REC. S10,124 (daily ed. Sept. 10, 1996) (statement of Rep. Kerrey).

103. See 142 CONG. REC. H7503-05 (daily ed. July 12, 1996).

104. STRASSER, *supra* note 10, at 150-51 (referring to *United States v. Yazell*, 382 U.S. 341, 348-49 (1966)).

105. 142 CONG. REC. H7273 (daily ed. July 11, 1996) (statement of Rep. Schroeder). Her suggestion is reminiscent of the Wisconsin statute struck down by *Zablocki v.*

proposal would seem far more in keeping with DOMA's putative goal to preserve the family unit by making divorce more costly and less easy. The proposal would also better protect benefit programs from excessive claims by limiting benefits to subsequent spouses until the prior spouse received an equitable settlement.<sup>106</sup>

DOMA is underinclusive in other respects as well. Besides rejecting Representative Schroeder's amendment, the House denied other amendments which would have protected marriage from problems at least as pressing as the temptation to turn queer. For instance, Rep. Packard explicitly includes "monogamy" as part of that "traditional" understanding of marriage.<sup>107</sup> However, Congress rejected attempts "to include the words non-adulterous and monogamous to the definition of marriage" in DOMA.<sup>108</sup> Moreover, other issues which clearly impact heterosexual unions more seriously than the counterexample of same-sex marriages, such as spousal abuse, substance abuse, and easy divorce are hardly mentioned. In light of these problems, if indeed the true goal of DOMA is to "defend marriage," the question must be raised why it needs defense *only* from gay men and lesbians entering into their own loving relationships.

The irony of DOMA is that its goal to foster stable heterosexual unions would be better met if it permitted same-sex marriages, gay and otherwise. Because gays and lesbians are not allowed an honorable social bond with their preferred mates, many of them try to force themselves into the only tolerated coupling, the heterosexual one. But most of these unions fail or are otherwise suboptimal, built as they are upon the frustration and repression of fundamental desires of at least one partner.<sup>109</sup> The first gay-themed mainstream motion picture, *Making Love*,<sup>110</sup> depicts just this story of a seemingly perfect marriage collapsing as the husband discovers his true sexual orientation. One

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*Redhail*, 434 U.S. 374 (1978). That law sought to forbid remarriage to noncustodial parents until they demonstrated that they were current in court-ordered support payments and that the children could be reasonably expected not to be added to the welfare rolls in the near future. See *Zablocki*, 434 U.S. at 375. The difference is that while Wisconsin would have precluded remarriage, Rep. Schroeder's amendment would have permitted remarriage but without federal benefits. Compare *Zablocki*, 434 U.S. at 375, with 142 CONG. REC. H7273 (daily ed. July 11, 1996) (statement of Rep. Schroeder).

106. For a similar conclusion, see ESKRIDGE, *supra* note 90, at 107.

107. 142 CONG. REC. H7449 (daily ed. July 11, 1996) (statement of Rep. Packard).

108. 142 CONG. REC. H7448 (daily ed. July 11, 1996) (statement of Rep. Jackson-Lee).

109. See MICHAEL W. ROSS, *THE MARRIED HOMOSEXUAL MAN* (1983).

110. *MAKING LOVE* (20th Century-Fox, 1982).

woman living in Selma, Alabama, said that all the gay men she knew except for one had been married at some point, although none of the lesbians of her acquaintance had gone this route.<sup>111</sup> Neil Miller reports that similar marriage rates among gay men in Bismarck, North Dakota, led residents to fear that "AIDS would hit [heterosexual] families in the state, not the gay population."<sup>112</sup> Some goodly percentage of divorces must be attributed to the conservatives' attempt at funneling all persons into an institution intended only for the truly and happily heterosexual.<sup>113</sup> DOMA continues to force those homosexuals unwilling to "buck" the system into heterosexual marriages, leading to further divorces and unfulfilled lives, and thereby undermining and devaluing the institution it seeks to protect.

The gap between what DOMA claims to do and what it actually does is so great that the explicit secular purposes of DOMA are not obviously sincere. The claim that an expanded definition of marriage would adversely impact federal benefit programs fails utterly as a convincing rationale for DOMA because no new liabilities are incurred by the programs. DOMA advocates even forbade study of the issue to ascertain whether the concerns were valid or not. Finally, DOMA is suspiciously underinclusive relative to its stated goal of preserving marriages, since it burdens only gays and lesbians but not adulterers or wife-beaters, who *also* and more obviously undermine the tradition of monogamous, non-adulterous heterosexual marriage for life. Thus, DOMA fails the *Aguillard* inquiry into whether there exists an appropriate fit between a law's purpose and its operation. This result further bolsters the likelihood that DOMA's purported purpose is not sincere, but is instead a sham.

#### *D. Historical Background of DOMA*

*Aguillard* directs that the search for true legislative intent can extend into the historical background against which DOMA was enacted. Relevant investigations reveal that strong religious undercurrents set the tone for the sole previous instance of federal legislation

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111. See NEIL MILLER, IN SEARCH OF GAY AMERICA 18 (1989).

112. MILLER, *supra* note 111, at 92.

113. See Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 268 (1995); James B. Nelson, *Gayness and Homosexuality: Issues for the Church*, in *HOMOSEXUALITY AND ETHICS* 186, 197 (Edward Batchelor ed., 1980).

upon marriage form: Congressional prohibition of Mormon polygamy.

The polygamy issue provides a clear precedent for federal legislation that seeks to impose one version of Christian-based marriage upon all Americans. This history taints any contemporary claim that Congress was not acting under a similar impetus when it again legislated upon this topic.

DOMA proponents repeatedly attempted to link same-sex marriages with plural marriages, arguing that to condone the first removes any consistent rationale to continue to forbid the second.<sup>114</sup> The arguments of religious fundamentalists and political conservatives invoke both polygamy and homosexuality as examples of obvious undesirables, if not outright evils.<sup>115</sup> For instance, they are both on the list of clearly "proscribable" activities according to our "unquestionable constitutional tradition."<sup>116</sup> The State of Georgia, in its brief for *Bowers v. Hardwick*,<sup>117</sup> moaned that if the Court ruled that it could not prohibit sodomy, it would not be able to forbid plural marriage.<sup>118</sup>

The federal government may legitimately legislate in the area of domestic relations in those jurisdictions over which it has authority, such as the District of Columbia and other territories. While federal government has an obvious interest in defining the terms of its legal codes, it does not have the authority to usurp powers delegated to the

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114. See Cal Thomas, *Marriage from God, Not Courts*, in DEBATE, *supra* note 75, at 42, 43 ("If gay 'marriage' becomes possible, then there is nothing stopping polygamists, or anyone else, seeking redress of unique grievances."); see also Hadley Arkes, *The Closet Straight*, in SAME-SEX MARRIAGE PRO AND CON 154, 157-58 (Andrew Sullivan ed., 1997) [hereinafter SAME-SEX MARRIAGE]; William Bennett, *Leave Marriage Alone*, in SAME-SEX MARRIAGE, *supra*, at 274, 275; Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, in DEBATE, *supra* note 75, at 108, 115.

115. In an ironic twist, the Mormon church was an aggressive opponent during the Hawaiian debate over same-sex marriage. Feeling that the state would argue a weak case against same-sex marriage, they asked to be allowed to intervene. See Baehr v. Miike, 910 P.2d 112 (Haw. 1996). "But the church's notorious, if now repudiated, support for unusual marital arrangements—such as polygamy—made it look hypocritical. To many Hawaiians, especially women, the practice of men taking more than one wife seemed at least as offensive as homosexuality." JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990s* 206 (1996).

116. *Planned Parenthood v. Casey*, 505 U.S. 833, 984 (1992).

117. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

118. Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 32-33, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

states, such as regulating marriage, even in the interests of “defining” its terms. As Strasser states, “[b]ecause domestic relations law is usually left to the states, Congress must establish that it has a very important reason if it is justifiably to displace state law. Because Congress has not met its heavy burden of justification, Section 3 of DOMA involves an unconstitutional overreaching by Congress.”<sup>119</sup> In the mid-to-late nineteenth century, Congress in fact legislated marriage form for the Utah territory. The following statutes serve as the sole precedent for federal law-making on this topic.

Congress criminalized Mormon polygamy in the United States territories by a series of acts including the Morrill Act of 1862,<sup>120</sup> the Edmunds Act of 1882,<sup>121</sup> and the Edmunds-Tucker Act of 1887.<sup>122</sup> That polygamy was almost universally deemed a moral depravity is taken largely as a given. As few presumably needed convincing on the point, the record for the Morrill Act, for instance, reveals surprisingly little discussion as to *why* polygamy is so evil.<sup>123</sup> In keeping with this social consensus, moreover, some judges, such as James B. McKean, Chief Justice of the Utah Territorial Supreme Court from 1870 to 1875, regarded “cleansing the country of polygamy” as some “sort of religious cause.”<sup>124</sup>

The Supreme Court agreed with the Utah Supreme Court in *Reynolds v. United States*<sup>125</sup> and held that George Reynolds had violated the 1862 Morrill Act. The Court rejected Reynolds’ argument that because polygamy was mandated by Mormon theology, the practice should be granted First Amendment protections. The opinion reviews the widespread condemnation of polygamy in Western civilization, and accepts this opprobrium as determinative for the instant

119. STRASSER, *supra* note 10, at 147.

120. Morrill Act, ch. 126, §§ 1–3, 12 Stat. 501–02 (1862).

121. Edmunds Act, ch. 47, §§ 1–9, 22 Stat. 30–32 (1882) (amended 1887, repealed 1909).

122. Edmunds-Tucker Act, ch. 397, §§ 1–2, 24 Stat. 635 (1887).

123. The legislative and judicial history of antipolygamy efforts is exhaustively recorded in a two-part law review article by Orma Linford. Orma Linford, *The Mormons and the Law: The Polygamy Cases* (pts. 1 & 2), 9 UTAH L. REV. 308 (1964), 9 UTAH L. REV. 543 (1965).

124. Linford, (pt. 1), *supra* note 123, at 330 n.103. There is some evidence that Justice Waite, author of the *Reynolds v. United States*, 98 U.S. 145 (1878), decision, viewed his duties similarly and referred to *Reynolds* as his “sermon on the religion of polygamy.” Linford, (pt. 1), *supra* note 123, at 340 n.144.

125. *Reynolds v. United States*, 98 U.S. 145 (1878).

case, but does not overtly consider how Western civilization came to hold this opinion.

Where the Court was cautious and circumspect, Congress was more forthright, and it is of course what was in Congress' mind which is determinative under *Aguillard* analysis. The legislative history of the Morrill Act reveals that religious umbrage clearly played a major role, if it was not the originating factor, in the congressional proscription of Mormon polygamy. The rise of Mormonism brought "our holy religion into contempt, [defied] the opinions of the civilized world, and [invoked] the vengeance of Heaven by a new Sodom and a new Gomorrah to attract its lightnings and appease its wrath."<sup>126</sup> Congress concluded that the Morrill Act "was a law respecting an establishment of religion, but only 'if the odious and execrable heresy of Mormonism can be honored with the name of religion.'"<sup>127</sup> Quotes of Congressional representatives at the time are revealing:

Polygamy has been declared a criminal offense by every state and territory in the Union, and is regarded by the civilized world as opposed to law and order, decency and Christianity, and the prosperity of the state. Polygamy has gone hand and hand with murder, idolatry, and every secret abomination. Misery, wretchedness, and woe have always marked its path. Instead of a being a holy principle, receiving the sanction of Heaven, it is an institution founded in lustful and unbridled passions of men, devised by Satan himself to destroy purity and authorize whoredom.<sup>128</sup>

Religious issues were clearly central to the legislators' purpose when they outlawed polygamy. This fact is obvious even if, in the pre-*Lemon* setting of the *Reynolds* decision, the Supreme Court failed to weigh this consideration.

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126. See Linford, (pt. 1), *supra* note 123, at 314 n.24 (quoting H.R. REP. NO. 83-36 (1860)).

127. Linford, (pt. 1), *supra* note 123, at 329 (quoting H.R. REP. NO. 83-36, at 4 (1860)). Congress actually got it backwards here. Whether or not a law is an establishment is determined by the values embedded in the law itself, not by the religious nature of its target. The Congressional statement more accurately depicts the body's spurning of any Free Exercise complaints.

128. PHILIP L. KILBRIDE, *PLURAL MARRIAGES FOR OUR TIMES: A REINVENTED OPTION?* 70 (1994) (quoting nineteenth century Congressman Shelby Cullom from Illinois who had introduced an antipolygamy bill in 1870).

The background of the Morrill Act particularly illustrates that when the federal government has legislated on marriage form in the past, the principle purpose was to achieve religious conformity. One would not be unreasonably cynical to suspect that Congress' motives with DOMA were similarly religious. To the extent that historical precedence and background carries influence—and *Aguillard* holds that this extent is great—the religious furor over polygamy casts a constitutional shadow over DOMA.<sup>129</sup>

### *E. Contemporaneous Context of DOMA*

Finally, *Aguillard* encourages and demonstrates an examination into the social milieu that generated a challenged statute. The Balanced Treatment Act gave voice to a broad sectarian fervor within Louisiana. Because the Act could not extricate itself convincingly from these illegitimate roots, it fell before the Establishment Clause. The religious context of DOMA is at least as pervasive, and consequently it should meet a similar demise.

#### 1. *Baehr v. Lewin*<sup>130</sup>

Today, the contempt formerly reserved for polygamists is shown towards homosexuals, as demonstrated by DOMA. The Hawaii Supreme Court seems poised to recognize gay and lesbian marriages. Therefore, in anticipation, the United States Congress passed DOMA to prevent the spread of legally recognized same-sex marriages.

In *Baehr v. Lewin*, three couples challenged Hawaii's refusal to provide marriage licenses to same-sex couples under section 572-1 of the Hawaii Revised Statutes, which restricts marital relations to a male and a female. When the Hawaii Supreme Court heard the case, the justices ruled that because Hawaii's constitution forbids discrimina-

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129. The point bears repeating that the history relevant to the *Aguillard* analysis at this point is *not* the lineage of the bill. The text of the anti-evolution law in *Aguillard* was not based on the anti-evolution law struck in *Epperson*. Rather, the history relevant to the analysis is the history of society's treatment of the topic. In *Aguillard's* case, that was the history of anti-evolution sentiment on the part of the Christian fundamentalists. In DOMA's case, the relevant history is the same Christian fundamentalists' ongoing attempts to bring civil marriage into line with religious union.

130. *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

tion on the basis of sex, Hawaii could justify section 572-1 only by showing a compelling state interest in barring same-sex marriage that is narrowly drawn to achieve those ends.<sup>131</sup> On remand to the Circuit Court of Hawaii, Judge Kevin Chang ruled decisively in favor of the plaintiffs.<sup>132</sup> The final outcome awaits the return appeal to the Hawaii Supreme Court.

DOMA proponents fear that waves of gay and lesbian residents from other states will junket to Hawaii and get married. Upon their return the newly wedded couples will sue for recognition of their marriages and those state benefits deriving from their legal marriage in Hawaii. The anticipated tool for these judicial challenges would be the section of the federal constitution that states that “[f]ull [f]aith and [c]redit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.”<sup>133</sup> Many states have passed legislation explicitly forbidding the recognition of extrajurisdictional same-sex marriages.<sup>134</sup>

Technically, DOMA forbids “same-sex marriages,” gay or otherwise. Two same-sex heterosexuals are equally barred by DOMA from marriage. In practice, however, the majority of the beneficiaries of the right to same-sex marriage would be homosexuals. “Gay marriage” subsequently becomes focal, with the attitudes toward homosexuals thereby emerging as the predominant issue.

DOMA advocates gave free voice to their hatred for gays and lesbians, and pointed to their private religious faiths as the source and fount of that hatred.<sup>135</sup> If religiosity supports oppression of homosexuals, then antigay legislation such as DOMA can presumptively be assumed to be a reflection of or a response to that religious undercur-

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131. See *Lewin*, 852 P.2d at 67 (holding “that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples’ constitutional rights”).

132. See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996).

133. U.S. CONST. art. IV, § 1.

134. According to the National Gay and Lesbian Task Force, as of the end of 1996, sixteen states had anti-same-sex marriage laws on the books, with one state pending. Twenty others had defeated or withdrawn such legislation, and in only thirteen states had the question not been raised. National Gay and Lesbian Task Force, *Capital Gains and Losses: A State-by-State Review of Gay-Related Legislation in 1996*, at 2.

135. See discussion *supra* Part III.A. (presenting the religiously-oriented comments entered into the official legislative history by DOMA advocates).



rent. The next section therefore more closely studies the relationship between Christian fundamentalism and homosexuality.

## 2. Religion and the Homosexual

Even the most shallow review<sup>136</sup> must conclude that gays and lesbians are pariahs in the eyes of many members of modern American society.<sup>137</sup> The question at issue here is how much of this oppression and bigotry can be lain at the feet of institutional Christianity. Enough has been said in prior sections easily to conclude that fundamentalist Christianity often expresses strong antigay opinions; it is important to distinguish whether these statements merely reflect or actually generate societal homophobia.

For those who have a conception of Christianity as the source of things tolerant and good-hearted, an early conundrum of social psychology is a devastating self-revelation. Gordon Allport and J. Michael Ross reviewed and amplified the findings that regular church attendance was a reliable positive indicator of racial prejudice.<sup>138</sup> Based

136. A more-than-shallow history of the early gay movement, and a description of social and political conditions before and after the watershed event of June 27–29, 1969, at Stonewall, is given by TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* (1981). A review of just one year's worth of institutional antigay activity is collected in *PEOPLE FOR THE AMERICAN WAY, HOSTILE CLIMATE 1995: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* (1995).

137. See e.g., JOHN GERASSI, *THE BOYS OF BOISE* (1966); JOHN MITZEL, *THE BOSTON SEX SCANDAL* (1980) (documenting dramatic instances of literal witch-hunts); Dennis Prager, *Homosexuality, the Bible, and Us—A Jewish Perspective*, in *SAME-SEX MARRIAGE*, *supra* note 114, at 61, 65 (claiming that “[i]n order to become fully human, male and female must join,” and because homosexuals are therefore less than human, a laundry list of oppressions is justified if not a moral imperative). In October of 1992, U.S. sailor Allen Schindler was beaten to death, battered beyond recognition by his shipmates because he was gay. See Mark Schoofs, *Life after Death*, *ADVOCATE*, July 13, 1993, at 32. While such blatant episodes of actual efforts to eradicate homosexuality if not homosexuals are rare, the *fear* of being caught up in one is not unfounded, and haunts the daily life of most gays and lesbians. Homosexuals live under a sword of Damocles held aloft only by the thin thread of tacit heterosexual tolerance which can be withdrawn at any time, as was demonstrated by Colorado's attempts to remove fundamental political remedies from its homosexual citizens in its ill-fated Amendment 2. See *Romer v. Evans*, 116 S. Ct. 1620 (1996). What more need be said than to point out that, in his dissent to *Romer*, Justice Scalia argues that Coloradans are not merely constitutionally *permitted* to despise homosexuals, rather, they “are, as I say, *entitled* to be hostile.” *Romer*, 116 S. Ct. at 1633.

138. Gordon W. Allport & J. Michael Ross, *Personal Religious Orientation and Prejudice*, 5 *J. PERSONALITY & SOC. PSYCHOL.* 432 (1967).

upon a self-report questionnaire, the authors identified four "orientations," or styles of being religious. These religious styles interacted differently with racial prejudice.<sup>139</sup> While the intrinsically religious are less prejudiced than the extrinsically religious, the most prejudiced of all are those they termed "indiscriminately proreligious."<sup>140</sup> And although the "good" or intrinsically religious churchgoers are less prejudiced than the other types, they constitute a minority of church attendees overall.<sup>141</sup>

People who are racial bigots tend to hold prejudicial views on other groups as well.<sup>142</sup> Consequently, church attendance should also predict homophobia, or dislike for homosexuals. Empirical studies support this link.<sup>143</sup> In one study, there was a regular step-wise progression between the frequency of church attendance and the score on a homophobia test. While those who "never" went to church averaged 55.08 on the homophobia test, each increasing category of frequency scored higher until those who attended "weekly" earned an increased homophobia score of 66.19 on the test.<sup>144</sup>

The simple fact of exposure to religious stimuli, therefore, increases the likelihood of becoming more homophobic. Since religious folk are reliably more homophobic than nonreligious individuals, any

139. See Allport & Ross, *supra* note 138.

140. Intrinsic are those we would characterize as being sincerely religious: they go to church to worship God. Extrinsic are those who go to church mainly for social reasons, such as to network for business opportunities or to cultivate social prestige. See Allport & Ross, *supra* note 138, at 434. The "indiscriminately proreligious" are those who "persist in endorsing any or all items [on the self-report questionnaire] that to them seem favorable to religion in any sense." Allport & Ross, *supra* note 138, at 437 (emphasis added).

141. See Allport & Ross, *supra* note 138, at 432-34.

142. See Margaret M. Bierly, *Prejudice Toward Contemporary Outgroups as a Generalized Attitude*, 15 J. APPLIED SOC. PSYCHOL. 189, 198 (1985) ("[P]rejudice is indiscriminate, not being limited to particular groups that may share some commonalities but extending to groups that are quite different.").

143. Cf. Sung-Mook Hong, *Sex, Religion and Factor Analytically Derived Attitudes Towards Homosexuality*, 4 AUSTL. J. SEX MARRIAGE & FAM. 142, 142 (1983) ("As church attendance increased, the [subjects'] attitude on both dimensions of homosexuality became less liberal."); Knud S. Larsen et al., *Anti-black Attitudes, Religious Orthodoxy, Permissiveness, and Sexual Information: A Study of the Attitudes of Heterosexuals Toward Homosexuality*, 19 J. SEX RES. 105, 111-12 (1983) ("Religious orthodoxy, another component in the syndrome of conservative positiveness, is also significantly related to attitudes toward homosexuality.").

144. See Lynn E. Kunkel & Lori L. Temple, *Attitudes Towards AIDS and Homosexuals: Gender, Marital Status, and Religion*, 22 J. APPLIED SOC. PSYCHOL. 1030, 1037 tbl.4 (1992).

overt expression of homophobia, such as DOMA, could derive from religious influences. Moreover, when the category of the "religious" is parsed into the distinctive denominations, not all sects are equivalent. Doctrines which are "fundamentalist" or "orthodox" (such as those which adopt a literal as opposed to an interpretive approach to the Bible) are regularly demonstrated to be particularly homophobic.<sup>145</sup>

The relationship between homophobia and religion, fundamentalist Christianity, is clear, pervasive and reliable. In itself this relationship could open the door to interpreting expressions of homophobia as religiously based. But the final constitutional bar is more pertinently directed at causal, and not simply correlational relationships. So while there is no question that homophobia *correlates* with religion, is there any evidence that religion *causes* homophobia?<sup>146</sup>

These seemingly sweeping generalizations about the nurturing effect of Christian fundamentalism upon homophobia are buttressed by simply paying attention to what religious leaders actually do. Consider how a Mormon official in 1976 encouraged "young men to

145. See Bierly, *supra* note 142, at 193 ("[Fundamentalist] Christians were more prejudiced toward homosexuals than were Catholics or those with no religion."); Larsen et al., *supra* note 143, at 111 (stating a significant relationship between religious orthodoxy and a negative attitude towards homosexuality); Stephen M. Maret, *Attitudes of Fundamentalists Toward Homosexuality*, 55 PSYCHOL. REP. 205 (1984) ("[F]undamentalists showed more disapproval of homosexuality than nonfundamentalists . . .").

This relationship apparently holds true regardless of whether the fundamentalist sect is Christian. See Bruce Hunsberger, *Religious Fundamentalism, Right-Wing Authoritarianism, and Hostility Toward Homosexuals in Non-Christian Religious Groups*, 6 INT'L J. FOR PSYCHOL. RELIGION 39 (1996).

146. Such a question cannot of course be answered definitively. All social phenomena are determined by multiple variables. Just as no single cause can explain all cases of murder or philanthropy, no single cause or source of homophobia should be expected to be identified. Thus religion cannot be the only source of antigay furor.

If religion is a cause of homophobia, it can be expected to be a preponderant one. In fact, many writers accuse religion of overtly cultivating an atmosphere of homosexual oppression. For example, one writer concluded that "Judeo-Christianity has . . . encouraged homophobia in society, thereby fostering antigay oppression which dehumanizes gay individuals. . . ." J. Michael Clark et al., *Institutional Religion and Gay/Lesbian Oppression*, 14 MARRIAGE & FAM. REV. 265 (1989) (emphasis added). Bawer has said that "[o]f all prejudices, homophobia is the only one whose spread has been fostered by a widespread belief that good Christian values require it." BRUCE BAWER, *A PLACE AT THE TABLE* 88 (1993) (emphasis added). Finally, Dennis Altman, a gay scholar, concluded that "homophobia of organized religion is not merely a matter of ideology, it is an essential basis for its continued existence." ALT-MAN, *supra* note 97, at 63.

physically assault any male" who appeared to be sexually interested in them.<sup>147</sup> This Mormon instruction is not distinguishable in spirit from the assertion by Reverend Walter Alexander of Reno, Nevada's First Baptist Church, "who has said that 'we should do what the Bible says and cut their [homosexuals'] throats.'<sup>148</sup> Reverend Moon (of the "Moonies") is somewhat more lenient; rather than slitting their throats, he would merely "hit [them] on the head with a baseball bat."<sup>149</sup> One theologian argues that "even a monogamous lesbian couple who contributed mightily to the larger community by caring for the homeless should be imprisoned or possibly even executed for their sexual sins."<sup>150</sup>

Not only should homosexuals be the object of religiously inspired violence, but they should actually "enjoy getting beaten up by 'homophobes.'<sup>151</sup> This, at least, is the conclusion of Idaho Citizens Alliance, an organization supported by the Christian Coalition.<sup>152</sup> Having gone this far, it is not at all surprising to read that Reverend Lou Sheldon of the Traditional Values Coalition, approvingly repeated a notoriously antigay psychoanalyst's opinion that gay youngsters are right to commit suicide "because they know within themselves that it is not normal."<sup>153</sup>

147. D. MICHAEL QUINN, *SAME-SEX DYNAMICS AMONG NINETEENTH-CENTURY AMERICANS: A MORMON EXAMPLE* 382 (1996). The author's history ends at this point, and he does not say whether the Mormon Church later dissociated itself from this response to homosexual interest.

148. BAWER, *supra* note 146, at 27-28.

149. MILLER, *supra* note 111, at 252.

150. GALLAGHER & BULL, *supra* note 115, at 272.

151. GALLAGHER & BULL, *supra* note 115, at 243.

152. GALLAGHER & BULL, *supra* note 115, at 243.

153. GALLAGHER & BULL, *supra* note 115, at 256. One such teen wrote to advice columnist Ann Landers, expressing his anguish unto suicide over his certainty that he is gay. *Teen Considers Suicide over His Gender Identity*, *TIMES-PICAYUNE (NEW ORLEANS)*, May 25, 1997, E6. One should note that, despite the title to the column, the boy is not lamenting his gender identity, but rather his sexual orientation. To confuse the two is to assume that male homosexuals are "really" women. Unfortunately, psychoanalysts and sociologists have confused the two both historically and currently. See LEO BERSANI, *HOMOS* 129-51 (1995) (stating that the confusion is at the root of Proustian sociology and afflicts old-school Freudian psychoanalysts); *Report of the Hawaii Commission on Sexual Orientation and the Law*, reprinted in *DEBATE*, *supra* note 75, at 211, 222 (stating that the dissenting minority conclusion supported their claim that the state had a compelling interest in preventing such unions by quoting Dr. Socarides: "The families of homosexual patients I have treated are markedly deficient in carrying out many of the functions necessary for the development of an integrated heterosexual child. Distorting influences are very profound in families in

Televangelist Pat Robertson, of the *700 Club*, equates Nazism with homosexuality saying, "Many of those people involved with Adolf Hitler were satanists. Many of them were homosexuals. The two seem to go together."<sup>154</sup> But if Christian religious leaders believe homosexuality to be as bad as all this, causing both Satanism and genocide, it becomes less puzzling to hear the African-American Reverend James Sykes concede that he would join with the Ku Klux Klan in its antigay efforts declaring, "For all the bad the Klan does, they are right about gays."<sup>155</sup>

The catalog of only slightly less outrageous injuries is even heftier. The Christian Scientists had a reporter at the *Christian Science Monitor* fired because she declined to submit to church rituals to "heal

which the child is not helped to develop the appropriate gender-identity."); *He's in and He's out*, *ADVOCATE*, July 9, 1996, at 11, 11-12 (noting that the psychoanalyst receiving Rev. Sheldon's beaming approval is Charles Socarides, whose gay son Richard Socarides became President Clinton's liaison to the gay and lesbian community).

Despite the mental health professions having removed homosexuality as an illness almost twenty years ago, see RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 193 (1981), regressive views such as Socarides' are neither rare nor restricted to older practitioners. An entire new generation has arisen to continue to malign gays and lesbians. A columnist peddling fluff psychology, "Dr. Laura" Schlessinger, hesitates not at all to diagnose homosexuality as "a biological faux pas," "an error in proper brain development." *Let's Remember the Value of Heterosexual Parents*, *TIMES-PICAYUNE (NEW ORLEANS)*, May 25, 1997, E5.

From "error" it is but a short step to correction, and thus we find Joseph Nicolosi marketing his method of "reparative therapy." JOSEPH NICOLOSI, *HEALING HOMOSEXUALITY* 211-23 (1993). In response to this regressive trend, at its 1997 meeting the members of the American Psychological Association passed a resolution stating, in part, that "psychologists will breach ethical guidelines if they tell potential clients that there is effective 'reparative' or 'conversion' therapy for the treatment of homosexuality." Jamie Talan, *Psychologists Censure Gay 'Therapy'*, *TIMES-PICAYUNE (NEW ORLEANS)*, August 15, 1997, A8.

154. GALLAGHER & BULL, *supra* note 115, at 276. Robertson seems blissfully inattentive to the details of history. Aside from specific individuals, homosexuals, instead of being the cozy collaborators in Hitler's bid for world domination, were among the groups of "deviants," which included also Jews and gypsies, selected for systematic extermination in the concentration camps. See, e.g., HEINZ HEGER, *THE MEN WITH THE PINK TRIANGLE* 7-18 (David Fernbach trans., 1980); IAN YOUNG, *GAY RESISTANCE* (1985).

Other fundamentalists express opinions similar to Robertson's. For instance, Kevin Abrams, co-author of *The Pink Swastika: Homosexuality in the Nazi Party*, defends the thesis that "gays were the perpetrators, not the victims, of Nazi terrorism." *PEOPLE FOR THE AMERICAN WAY*, *supra* note 136, at 25.

155. GALLAGHER & BULL, *supra* note 115, at 171.

herself of her homosexuality."<sup>156</sup> The Universal Fellowship of Metropolitan Community Churches, a denomination founded to minister to gays and lesbians ostracized by other Christian denominations,<sup>157</sup> repeatedly fails in its bid to join the National Council of Churches.<sup>158</sup> The Southern Baptist Conference expelled two congregations for being insufficiently condemnatory towards homosexuals.<sup>159</sup> This same body recently called for a boycott of all Disney businesses because the company was too gay-friendly, offering domestic partner benefits to their employees, and owning ABC, which highlighted the coming-out of *Ellen*.<sup>160</sup> Meanwhile, the question of ordaining "practicing" homosexuals may cause a schism in the Presbyterian Church.<sup>161</sup>

Finally, the Roman Catholic Church issued a document which "condones discrimination against gays and lesbians and that urges bishops to take an active position against nondiscrimination laws."<sup>162</sup> The highest ranking Roman Catholic official in Brooklyn labeled homosexuality "a basic human disorder."<sup>163</sup>

The list of wrongs perpetrated would be even longer if it included those which arise not just from the "homosexuality" issue, but also those which emerge from fears and misinformation about AIDS.<sup>164</sup>

156. Chris Bull, *Blindsided by Christian Science: Monitor Radio Suspends Two Newsmen over AIDS Story*, *ADVOCATE*, Sept. 8, 1992, at 21, 21.

157. For the history of the Metropolitan Community Churches, see TROY D. PERRY, *DON'T BE AFRAID ANYMORE* (1990). This book is the autobiography of the church's founder, the Reverend Troy Perry.

158. See John Gallagher, *Is God Gay?*, *ADVOCATE*, Dec. 13, 1994, at 40, 41.

159. See BAWER, *supra* note 146, at 56-57. The American Baptist Churches of the West similarly sanctioned several of its own congregations for accepting gay and lesbian members. *PEOPLE FOR THE AMERICAN WAY*, *supra* note 136, at 33.

160. See David Heitz, *Baptists take on Hercules*, *ADVOCATE*, July 22, 1997, at 42, 42.

161. See Jeffery L. Sheler, *Sex and the Single Protestant*, *U.S. NEWS & WORLD REP.*, June 9, 1997, at 61. Similarly, the "University Baptist Church of Austin was expelled from the Austin Baptist Association for ordaining a gay man as a deacon in 1994." *PEOPLE FOR THE AMERICAN WAY*, *supra* note 136, at 99 (emphasis omitted).

162. John Gallagher, *Vatican Statement Condonos Antigay Discrimination*, *ADVOCATE*, Aug. 25, 1992, at 21, 21. The document, issued by the Vatican's Congregation for the Doctrine of the Faith, is entitled "Some Considerations Concerning the Catholic Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons." Gallagher, *supra*, at 21.

163. *News in Brief: New York*, *ADVOCATE*, Feb. 9, 1993, at 24.

164. The virulent overlay of AIDS hysteria upon a basic homosexual animosity is chronicled in RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC*, xxi-xxiii, *passim* (1987). Eleven percent of nurses at the Beth Israel Medical Center in New York City, for instance, "agreed that AIDS is God's punish-

But perhaps enough has been presented to underscore the point: a climate of overt oppression and marginalization of gays and lesbians pervades the American social milieu, and this climate is rooted in fundamentalist Christian ideology.<sup>165</sup> The litany of evils given above were not perpetrated by renegades, but by church *leaders* of major religious denominations; the list would be endless if it included also fringe sects or idiosyncratic acts committed by individuals.<sup>166</sup>

Religion is not merely correlated with homophobia. Rather, religion is responsible for cultivating and encouraging a large portion of our society's homophobia. As Randall Terry, the founder of Operation Rescue, preached, "I want you to let a wave of intolerance wash over you. Our goal is a Christian nation. We have a biblical duty, we are called by God, to conquer this country. We don't want equal time. We don't want pluralism."<sup>167</sup> Simply stated, these Christians don't want homosexuals.

DOMA found life within this broth of religiously-fueled antigay propaganda. "It is difficult to imagine what explanation could be offered for DOMA other than that of animus."<sup>168</sup> This animus is predominantly a religious prejudice, just as *Aguillard* found the opposition to evolution to be. "Antigay measures in the United States are, at their heart, orthodox Christian measures. Arguably, when they be-

ment to homosexuals." Joel J. Wallack, *AIDS Anxiety among Health Care Professionals*, 40 HOSP. & COMMUNITY PSYCHIATRY 507, 509 (1989). Discomfort in treating homosexual patients was especially common among Protestant nurses (30%), but, at the other extreme, did not appear at all among Jewish nurses. Wallack, *supra*, at 508.

165. In fairness, I do not mean to suggest that all religions are necessarily homophobic. Not every religion invests emotional and social capital in demonizing gay men and women. Unitarians and Quakers are notable exceptions. See generally DONNA SCALCIONE-CONTI, *A VOICE FOR LESBIAN AND GAY HUMAN RIGHTS: UNITARIAN UNIVERSALISM* (n.d.) (pamphlet); William A. Percy, *Protestantism*, in *ENCYCLOPEDIA OF HOMOSEXUALITY* 1058, 1061 (Wayne R. Dynes ed., 1990) ("Quakers have been in the forefront of homosexual toleration."). Some religions which currently burden homosexuals with harsh recriminations have not always done so. Roman Catholicism, for instance, has been revealed to have found antigay oppression in the thirteenth century, relatively late in its institutional history. See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980). The dispassionate student can hope that such oppressive practices are not inherent and unchangeable dogma.
166. For instance, Fred Phelps has made a name for himself picketing funerals of AIDS victims. A disbarred lawyer, Phelps is pastor of a Baptist sect whose members are limited largely to members of his own family. See Chris Bull, *Us vs. Them: Fred Phelps*, *ADVOCATE*, Nov. 2, 1993, at 42, 43-44.
167. URVASHI VAID, *VIRTUAL EQUALITY* 308 (1995).
168. STRASSER, *supra* note 10, at 139.

come legislation, the establishment clause is violated."<sup>169</sup> This fact casts DOMA in the light of a religiously-inspired antigay statute. DOMA therefore becomes susceptible to charges of being an unconstitutional establishment of religion.

### CONCLUSION

It will probably be a very long time before any court rules on the constitutionality of DOMA. In most contexts of constitutional law, to have standing to bring suit one must have suffered personal harm. Since as yet no one can marry a same-sex partner in any state, the provisions of DOMA do not impact a single individual. Only after at least one state legalizes gay unions, and after members of those unions are denied federal benefits or recognition in other states, could one imagine a first complaint being filed.

If an Establishment Clause claim against DOMA were brought, a court would have to apply the standard established by *Lemon* and *Aguillard*; DOMA must have a primary and sincere secular purpose. Further, *Aguillard* indicated six places where one must look to ascertain that purpose, including the text of the statute, its legislative history, and the historical and social context which nurtured and generated the statute.

DOMA has *no* secular purpose that is primary and sincere. DOMA stands as a *symbol* of legislative support for fundamentalist Christianity. Indeed, the legislative history records the blatant religious urgency of the bill's sponsor and supporters. Moreover, while Section 2 of DOMA grants no new powers and thus functions solely as a religious symbol, the operation of Section 3 of DOMA is fatally underinclusive relative to its alleged secular goals. Because the only other exercise of Congressional authority over marriage form evolved into an expression of religious prejudice, Congress cannot be presumed to have been free of such impermissible influences when it passed DOMA. Finally, antigay animosity, of which DOMA is an undeniable manifestation, and religious fundamentalism are so tightly intertwined that the one implicates the other. Failing as it does the *Aguillard* inquiry, DOMA's purposes are demonstrably a "sham." DOMA is an unconstitutional establishment of fundamentalist Christianity. ✻

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169. DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 168 (1997).



