University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 10 | Issue 2 Article 3

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AND THE BAN PLAYS ON . . . FOR NOW: WHY COURTS MUST CONSIDER RELIGION IN MARRIAGE EQUALITY CASES

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> "[These states], in righteous indignation, have blocked the possibility of two people affirming and legalizing their love for each other. There will come a time when we will look back upon these actions for the shame it is."[1]

I. INTRODUCTION

The gay marriage ban is one of the most controversial issues in politics, in society, in religion, and in law today.[2] It is debated in political forums and considered in legislative chambers; it is discussed over the morning paper and argued about on the car ride home from work; it is preached about in Sunday sermons and mentioned at church picnics; it is scrutinized in countless law school classrooms across the country and analyzed in just as many courtrooms. In each venue, anything goes, everyone has an opinion, and the result is rarely consistent. Over and over again, same-sex marriage bans with the same or similar language have been litigated in the states' highest courts, and over and over again, those courts have either upheld the statutes that ban same-sex marriage or overturned them just as easily.[3] The decisions may be different, but the claimants' arguments are

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1. Reverend F. Russell Baker, United Church of Christ, Benton Harbor, Michigan (Mar. 29, 2005) *available at* http://www.buddybuddy.com/quotes-2.html (last visited Dec. 16, 2010).

2. Louis Thorson, Comment, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony*, 92 MARQ. L. REV. 617 (2009).

3. *Compare* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 961 (Mass. 2003) (holding that a ban on same-sex marriages violates the equal protection clause of the Massachusetts Constitution) *with* Dean v. Conaway, 932 A.2d 571, 635 (Md. 2007) (holding that a ban on same-sex marriages does not violate the equal protection clause of the Maryland Constitution Declaration of Rights, despite its overt similarities with the Massachusetts constitutional provisions).

usually the same–banning same-sex marriage denies same-sex couples equal protection under the law.[4]

Surprisingly, one exceedingly relevant issue to the same-sex marriage debate is almost never considered: religion. It is the pink elephant in the marriage equality courtroom, yet it is extremely rare for same-sex marriage bans to receive a First Amendment religious rights-based inquiry.[5] In 2009, the Supreme Court of Iowa changed all that. In *Varnum v. Brien*,[6] Iowa's highest court attacked the issue of religious freedom.[7] In holding Iowa's same-sex marriage ban unconstitutional, the Court stated that religious opposition to same-sex marriage cannot be used to justify a same-sex marriage ban.[8] The Iowa court was the first court in seventeen years to consider the issue,[9] and the decision to do so will likely have lasting effects on the same-sex marriage debate. By considering religion's place in the same-sex marriage debate, the court opened the door for future courts to consider the reverse: is religious opposition to same-sex marriage sufficient to overturn a same-sex marriage ban under the establishment clause of the First Amendment? This article explores that very issue.

Because the debate over same-sex marriage would not exist without the revolution that came before it, this article will first examine the history of gay rights and same-sex marriage in America.[10] It will focus primarily on the marriage equality decisions of Massachusetts[11] and Iowa[12]–two states at the heart of the same-sex marriage debate. While this oft-argued issue is fodder for varied constitutional analyses, this article will focus solely on the issue of religious liberty and same-sex marriage.[13] It will outline the legal

4. *See Goodridge*, 798 N.E.2d at 953 (citing plaintiffs' argument that same-sex marriage ban violated plaintiffs' equal protection rights); *see also* In re Marriage Cases, 183 P.3d 384, 400 (2008) (commenting that the issues plaintiffs raised harkens to equal protection principles).

5. Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate From a Religious Perspective*, 96 Geo. L.J. 2103, 2113 (2008). Early court decisions addressed the interaction of religion and same-sex marriage, but as opponents of same-sex marriage realized the dangers inherent in religious arguments, they abandoned those claims for secular arguments in support of same-sex marriage bans. Id.

6. 763 N.W.2d 862 (Iowa 2009).

7. *Id.* at 904.

8. *Id.*

9. *See* Dean v. District of Columbia, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., 1992), *aff'd* 653 A.2d 307 (D.C. 1995).

10. *See infra* Part II.

11. Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

12. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

13. *See infra* Part IV.

history of the First Amendment establishment clause[14] and its relevance to today's marriage equality argument.[15] This article will then analyze the constitutionality of same-sex marriage bans under the First Amendment of the U.S. Constitution.[16]

This article seeks change. The time has come for courts to consider religion, to stop ignoring relevant constitutional principles simply because it is the popular religion that is supported through legislation, to recognize the impact of particular religious thought on the rights of all Americans, and to remedy the latent religious undertones of the same-sex marriage debate. The time has come for America's courts to walk us down the aisle towards equality for all people.

II. THE COURTSHIP PERIOD: THE HISTORY OF GAY RIGHTS AND THE FIGHT FOR MARRIAGE EQUALITY

"Everyone's restless, angry and high-spirited. No one has a slogan, no one even has an attitude, but something's brewing."[17] In the streets of Greenwich Village, in the early morning hours of June 28, 1969, the restlessness, anger, and high-spiritedness that once smoldered among the crowd outside the Stonewall Inn began to burn hotter, and in the blink of an eye, ignited the gay rights movement.[18] Prior to the Stonewall riots, America, as a whole, was generally anti-gay: in 1961, all but one state[19] criminalized consensual homosexual sexual conduct,[20] late-night raids on gay bars and arrests of their patrons were common[21] and homosexuality was considered a mental illness.[22] Gays and lesbians were unwilling to fight for rights in court, anticipating the almost assured legal loss and the scrutiny they would

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part IV.

17. DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 148 (2004).

18. *See* Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement*, 1969-1991, 72 NEB. L. REV. 723, 725 (1993).

19. CARTER, *supra* note 17, at 15. The only state not to criminalize homosexual sex was Illinois. *Id.* at 1.

20. *Id.* at 15.

21. *Id.* at 79-83.

22. The American Psychiatric Association categorized homosexuality as a mental illness until 1973. *See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the Diagnostic and Statistical Manual III).

face from a judgmental public.[23] The Stonewall riots changed all that.[24] In the wake of Stonewall, numerous national and local gay rights organizations formed.[25] The gay community "showed an increasing willingness...to assert legal claims challenging discrimination based on sexual orientation" and the American public began to show signs of acceptance.[26] Shortly after Stonewall, a Minnesota gay couple even filed a mandamus proceeding to obtain a marriage license, an act that constitutes the first attempt to legalize same-sex marriage through the court system.[27] Still, the gay rights movement was fighting an uphill battle. The law in almost every state remained anti-gay, and it would be years of continued discrimination, even from the nation's highest court, before any of that would change.[28]

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23. Rhonda R. Rivera, *Where are we? Anti-Gay-Lesbian-Bisexual Ballot Attacks Today*, 55 OHIO ST. L. J. 555, 557 (1994).

24. "Something unremarkable happened on June 27, 1969 in New York's Greenwich Village. . . . The police raided a gay bar." Lionel Wright, *The Stonewall Riots–19 –A Turning Point in the Struggle for Gay and Lesbian Liberation*, SOCIALISM TODAY, (July 1, 1999), *available at* http://socialistalternative.org/literature/stonewall.html (last visited August 31, 2010); *see also* MARTIN DUBERMAN, STONEWALL (Penguin, 1993). Although the raid began as nothing more than what had become commonplace at gay establishments in and around New York City in the 1960s, what happened as a result of that raid was anything but typical. *See* Wright, *supra* note 24. "Was it a 'butch' lesbian dressed in man's clothes who resisted arrest, or a male drag queen who stopped in the doorway between the officers and posed defiantly, rallying the crowd? . . . [T]here was no one thing that happened or one person, there was just . . . a flash of group, of mass anger." *Id.*

Some in the crowd threw coins; others threw rocks and bottles; they chanted "Gay Power!" at the tops of their lungs. *Id.* "As word spread through Greenwich Village and across the city, hundreds of gay men and lesbians, black, white, Hispanic, and predominantly working class, converged on the Christopher Street area around the Stonewall Inn to join the fray." *Id.* Although the police responded with force to break up the crowd, the protestors fought on. *Id.* "The [police] would disperse the jeering mob only to have it re-form behind them, yelling taunts, tossing bottles and bricks, setting fires in trash cans. . . . [The police soon] found themselves face-to-face with their worst nightmare: a chorus line of mocking queens, their arms clasped around each other, kicking their heels in the air Rockettes-style and singing at the tops of their sardonic voices . . . ." *Id.* For the next four nights, thousands of protestors filled the streets, unified against the city's ill-treatment of gays and lesbians. *Id.* At the beckoned call of drag queens and so-called social deviants, the gay rights movement had begun. *Id.*

25. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1581 (1993).

26. Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2751 (2008).

27. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). In *Baker*, the Supreme Court of Minnesota ruled that same-sex couples were not entitled to marriage, and that such a restriction was not unconstitutional under the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. *Id.* at 187.

28. *Compare* Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) (holding that the United States Constitution does not provide homosexuals with a fundamental right to engage

A.Bowers v. Hardwick

Seventeen years after Stonewall, in 1986, the United States Supreme Court heard oral arguments in *Bowers v. Hardwick*,[29] a landmark case that many expected to be a major turning point in the gay rights movement.[30] In *Bowers*, Michael Hardwick, who was charged with the crime of committing a consensual homosexual sex act in his own home, challenged the constitutionality of Georgia's criminal sodomy statute.[31] Hardwick argued that, as "a practicing homosexual . . . the Georgia sodomy statute, as administered . . . placed him in imminent danger of arrest, and that the statute for several reasons violate[d] the Federal Constitution."[32] Hardwick argued that he had a constitutional right to privacy and that the Fourteenth Amendment protected his behavior.[33] In a 5–4 decision, the U.S. Supreme Court held, among other things, that "[t]he [U.S.] Constitution does not confer a fundamental right upon homosexuals to engage in sodomy."[34] It was a severe blow to the gay rights movement, the residual effects of which would linger for years to come, as some legislatures and courts used the *Bowers* decision to perpetuate discrimination against gays and lesbians.[35]

Despite the disappointing *Bowers* decision, and the resulting defense of sexual orientation discrimination in the years that followed, several states repealed their criminal sodomy statutes.[36] Although American society seemed to acknowledge the flaws of the *Bowers*

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in consensual sodomy) *with* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that homosexuals have a right to privacy such that their private consensual sexual conduct cannot be made a crime).

29. 478 U.S. 186 (1986).

30. Neil Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323, 329 (2005). The ACLU, which represented Mr. Hardwick, had long desired to challenge the constitutionality of sodomy statutes. After waiting five years, *Bowers* presented itself "as an all-but-perfect case." DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 656 (1994).

31. Bowers v. Hardwick, 478 U.S. 186 (1986). At the time, Georgia law stated that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . ." GA. CODE ANN. § 16-6-2 (1984). Violation of the statute was punishable by incarceration for a period of between one and twenty years. *Id.*

32. *Bowers*, 478 U.S. at 188.

33. *Id.* at 190.

34. *Id.* at 186.

35. Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 LAW & SEXUALITY 59, 59–60 (2006).

36. Lawrence v. Texas, 539 U.S. 558, 573 (2003).

decision, the gay and lesbian community remained saddled with an unfavorable legal landscape.[37]

B. Lawrence v. Texas

It took seventeen years for the U.S. Supreme Court to consider gay rights after the Stonewall riots, and the Court got it wrong.[38] It took seventeen more for the Court to get it right. In 2003, the U.S. Supreme Court revisited gay rights issues in *Lawrence v. Texas*.[39] At the time, Texas law provided that "[a] person commits [a criminal] offense if he engages in deviate sexual intercourse with another individual of the same sex."[40] "Deviate sexual intercourse" consisted of oral or anal sexual contact, even when it occurred between consenting adults.[41] The defendants, charged under the Texas statute after a police officer responding to a bogus "weapons disturbance" call caught them mid-coitus, challenged the constitutionality of the statute.[42] The Court determined that individuals "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[43] *Lawrence* overruled *Bowers*,[44] gave the gay rights movement a much-needed boost,[45] and blew the winds of change towards a new goal: marriage equality for same-sex couples.

C. The Modern Concept of Marriage

> [M]odern marriage is embedded in its historic tradition as a religious institution. Even today, marriage has not

37. Pfitsch, *supra* note 35, at 59–60.

38. *Compare* Bowers v. Hardwick, 478 U.S. 186, 189–90 (1986) (holding that the United States Constitution does not provide homosexuals with a fundamental right to engage in consensual sodomy) *with Lawrence*, 539 U.S. at 567 (2003) (holding that homosexuals have a right to privacy such that their private consensual sexual conduct cannot be made a crime).

39. 539 U.S. 558 (2003).

40. TEX. PENAL CODE ANN. § 21.06(a) (2003).

41. *Id.* at § 21.01(1).

42. Lawrence v. Texas, 539 U.S. 558, 562–63 (2003).

43. *Id.* at 578.

44. *Id.* Justice Anthony Kennedy, delivering the opinion of a 6-3 majority of the Court stated that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Id.*

45. "*Lawrence* was thought to be a sweeping victory; it opened up doors in the gay movement and granted a number of rights, all which seemed unattainable under the previous . . . regime." Shulamit H. Shvartsman, *"Romeo and Romeo": An Examination of* Limon v. Kansas *in Light of* Lawrence v. Texas, 35 SETON HALL L. REV. 359, 400 (2004).

> fully emerged as a secular legal status. Vestiges of the religious origins of marriage continue to shape attitudes and inform the views of many marriage defenders, and cause concern for those who are committed to secular legal institutions.[46]

While the forefathers of the American Constitution sought a strict separation between church and state,[47] marriage has always been, and will likely always be, an issue that cannot be so easily categorized. It logically follows that the religious rights embodied in the American Constitution must be a part of the conversation about same-sex marriage. However, parties and courts have been reluctant to approach the equal marriage issue from a religious perspective, deciding instead to resolve the issue on other constitutional grounds.[48]

D. Goodridge v. Department of Public Health

Following the filing of the first same-sex marriage case in 1971, several other same-sex couples in various states filed lawsuits in attempts to obtain marriage status, but on each occasion, they were denied relief.[49] It had taken seventeen years for gay rights advocates to turn a *Bowers*[50] defeat into a *Lawrence*[51] victory in the fight for the

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46. Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 538 (2007).

47. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1879–80 (2009).

48. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) (denying marriage equality as not required by equal protection principles); Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982) (holding that the denial of a same-sex marriage license to a gay couple met rational basis review under the due process and equal protection clauses); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (denying same-sex marriage despite right to privacy, due process and equal protection arguments); Dean v. District of Columbia, 653 A.2d 307, 318–20 (D.C. 1995) (denying same-sex couples the right to marry despite an additional Human Rights Act claim), *but see* Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (dismissing religious rights as a justification for denying same-sex marriage rights).

49. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. Ct. App. 1973) (determining that same-sex marriage, by definition, was impossible); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (denying marriage equality as not required by equal protection principles); Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982) (holding that the denial of a same-sex marriage license to a gay couple met rational basis review); Baehr v. Lewin, 852 P.2d 44, 68 (1993) (denying same-sex marriage despite right to privacy, due process and equal protection arguments); Dean v. Dist. of Columbia, 653 A.2d 307, 318–20 (D.C. 1995) (denying same-sex couples the right to marry despite an additional Human Rights Act claim).

50. 478 U.S. 186 (1986).

51. 539 U.S. 558 (2003).

right to privacy.[52] A mere five months later, gay rights advocates achieved their biggest victory yet.[53]

In *Goodridge v. Dep't of Public Health*,[54] the Supreme Judicial Court of Massachusetts addressed the right of same-sex couples to marry within the Commonwealth.[55] The Court utilized equal protection and due process analyses in rendering its decision.[56] Citing the many rights afforded only to married couples, the Court, in a controversial ruling that received national scrutiny, determined that Massachusetts could no longer "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. . . The Massachusetts Constitution . . . forbids the creation of second-class citizens."[57] In a few short months, the gay rights movement had advanced farther and faster than advocates could have anticipated, but the decision came at a heavy cost to the gay and lesbian community.

The backlash from *Goodridge* resonated throughout the country, as eleven states enacted legislation banning same-sex marriage within the next twelve months.[58] In the five years following the *Goodridge* decision, the number of states officially rejecting same-sex marriage grew; by the close of the 2008 election, forty-four states specifically banned same-sex marriage.[59] Perhaps the most painful of those state bans was enacted in California in 2008. Proposition 8, a voter initiative that banned same-sex marriages in the state, passed a short five months after the California Supreme Court ruled that same-sex couples could marry there.[60] The passage of Proposition 8 initially proved to be a major setback in the gay community.[61]

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52. *Compare Bowers*, 478 U.S. at 195 (1986) (holding that the United States Constitution does not provide homosexuals with a fundamental right to engage in consensual sodomy) *with Lawrence*, 539 U.S. at 578 (2003) (holding that homosexuals have a right to privacy such that their private consensual sexual conduct cannot be made a crime).

53. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).

54. 798 N.E.2d 941 (Mass. 2003).

55. *Id.* at 948–50.

56. *Id.* at 953.

57. *Id.* at 948.

58. Joel Roberts, *11 States Ban Same-Sex Marriage*, CBS NEWS (Nov. 2, 2004), http://www.cbsnews.com/stories/2004/09/30/politics/main646662.shtml.

59. *See* HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (Nov. 17, 2008), http://www.hrc.org/documents/marriage_prohibitions.pdf.

60. *Id*; *see also* In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

61. Following the passage of Proposition 8, a lawsuit was filed in federal court in California to overturn the voter initiative. *See Perry v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 78817, *11 (N.D. Cal., Aug. 4, 2010). The case proceeded to a highly-publicized bench trial, and on August 4, 2010, Chief Judge Vaughn Walker of the United States District Court for the Northern District of California issued an opinion ruling that Proposition 8 was

Despite the disappointing Proposition 8 vote, in late 2008 and early 2009, the tide swung again, this time in favor of marriage equality. Between October 2008 and March 2010, five states and the District of Columbia joined Massachusetts and added their names to the same-sex marriage registry: Connecticut[62] and Iowa[63] by judicial decree; Maine,[64] Vermont,[65] the District of Columbia[66] and New Hampshire[67] through legislative action. While the decision of the Supreme Court of Connecticut generally mirrored the *Goodridge*[68] decision, the Supreme Court of Iowa went one step further and entered unchartered territory.[69]

E. Varnum v. Brien

In *Varnum v. Brien*,[70] for the first time ever, a state high court considered religion as it affects same-sex marriage.[71] Although the issue was not brought before the court at oral argument,[72] the Iowa court, *sua sponte*, addressed the issue directly.[73] After considering that various religions and religious sects treat the concept of same-sex marriage differently, the court stated that "in pursuing our task . . . we

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unconstitutional under the due process and equal protection clauses of the United States Constitution. *Id.* at *191–93, 216–17 (ruling that Proposition 8 violated the due process clause because it impacted the fundamental right of marriage and proponents of the law failed to present evidence that the amendment was narrowly tailored to a compelling government interest and that it violated the equal protection clause because Proposition 8 "disadvantages gays and lesbians without any rational justification").

62. *See* Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 482 (Conn. 2008).

63. *See* Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

64. *See* Jenna Russell & Eric Moskowitz, *Maine governor OK's gay marriage*, BOSTON GLOBE, (May 7, 2009). In November 2009, a Maine voter initiative overturned the State's same-sex marriage law. Devin Dwyer, *Maine Gay Marriage Law Repealed*, ABC NEWS (Nov. 4, 2009), available at http://abcnews.go.com/Politics/maine-gay-marriage-law-repealed/story?id=8992720.

65. *See* Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, April 8, 2009, at A1.

66. *See Same-sex couples in D.C. Say 'I do'*, CNN, (Mar. 9, 2010), http://articles.cnn.com/2010-03-09/politics/same.sex.marriages_1_same-sex-couples-marriage-equality-supreme-court?_s=PM:POLITICS (last visited August 31, 2010).

67. *See* Eric Moskowitz, *N.H. ties gay-marriage knot*, BOSTON GLOBE, June 4, 2009, at 1.

68. 798 N.E.2d 941 (Mass. 2003).

69. *See* Varnum v. Brien, 763 N.W.2d 862, 905–06 (Iowa 2009) (discussing religious views on same-sex marriage and ruling that such views cannot impact the constitutional consideration of same-sex marriage).

70. 763 N.W.2d 862 (Iowa 2009).

71. *Id.* at 904–06.

72. *Id.* at 904.

73. *Id.* at 905.

proceed as civil judges, far removed from the theological debate . . . and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage."[74] The Court dismissed religious rights as a justification for upholding a gay marriage ban, acknowledging that as religious opinions of same-sex marriage differ, religious opposition to same-sex marriage cannot be used to justify a same-sex marriage ban,[75] as acceptance of such a justification would endorse some religious beliefs over others. With its decision, the Supreme Court of Iowa changed the landscape of the same-sex marriage debate and opened the door for "reverse" religious rights attacks on same-sex marriage bans through the court system.

III. THE RULES OF ENGAGEMENT: ESTABLISHMENT CLAUSE JURISPRUDENCE, THE LAW OF RELIGION, AND GAY MARRIAGE

While *Varnum* reinforced the idea that equal protection challenges to same-sex marriage bans can be successful, the opinion was novel because it was the first one to address religion's role in the debate.[76] The constitutional protections of religion are found in the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[77] In considering religion's interaction with same-sex marriage, the Supreme Court of Iowa may have laid a path for plaintiffs to follow in future challenges to same-sex marriage bans. As the Iowa decision suggests, religious arguments may be a basis for relief in same-sex marriage cases, which raises the question of whether the same success could be achieved under the Establishment Clause.[78]

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74. *Id.* The decision of the Iowa Supreme Court, although a monumental victory for the gay rights movement, was not without consequence. In November 2010, three judges who joined the unanimous decision to overturn the Iowa same-sex marriage were not approved for retention by Iowa voters, an unprecedented turn of events. Hayley Bruce, *Supreme Court justices involved in gay marriage ruling not retained*, THE DAILY IOWAN, Nov. 3, 2010, at 1A, *available at* http://www.dailyiowan.com/2010/11/03/Metro/19821.html (last visited Nov. 8, 2010).

75. *Id.* at 906.

76. *Id.* at 904.

77. U.S. CONST. amend I.

78. *Id.*

A. Modern Establishment Clause Jurisprudence

This country's modern-day Establishment Clause concepts began with *Everson v. Board of Education of Ewing*,[79] where the United States Supreme Court iterated the "wall of separation between church and state" principle.[80] In *Everson*,[81] the Court was tasked with determining whether it is "an impermissible establishment of religion for a state to subsidize transportation for students attending certain private religious schools, but not all private schools, whether secular or religious[.]"[82] The Court determined that, under the Establishment Clause, the government must remain neutral.[83]

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State. . . . [The purpose of the Amendment is] to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public . . . support for religion.[84]

For the next twenty-five years, Establishment Clause decisions were fairly consistent[85] as the Court tailored its rulings to fit within the wall of separation created in *Everson*.[86]

In 1968, the U.S. Supreme Court took the Establishment Clause a bit further in *Board of Education v. Allen*.[87] In *Allen*, the Court reviewed a New York statute that required "local public school authorities to lend textbooks free of charge to all students in grades seven through [twelve]" including private school students.[88] The Court

79. 330 U.S. 1 (1947).

80. Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 604 (2007) (citing Everson v. Board of Education of Ewing, 330 U.S. 1, 16 (1947)).

81. 330 U.S. 1 (1947).

82. Wilson, *supra* note 80, at 604.

83. 330 U.S. at 15–16.

84. Wilson, *supra* note 80, at 604–05.

85. Note, *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1758 (2009) [hereinafter "Church, Choice, and Charters"].

86. 330 U.S. 1, 16 (1947).

87. 392 U.S. 236, 243 (1968).

88. *Id.* at 238.

was called on to consider, in part, whether the statute was "a law respecting the establishment of religion."[89] In ruling that the statute was constitutional under the First Amendment, the Court reiterated a test developed through prior case law called the "purpose and primary effect" test.[90] Under that test, "if either [the purpose or primary effect of the statute] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[91] The purpose and primary effect test made the Establishment Clause analysis a bit clearer, offering a guide for constitutional analysis. However, in 1971, the Court issued an opinion[92] that made the Establishment Clause analysis a bit murky.[93]

B. Lemon v. Kurtzman

In *Lemon v. Kurtzman*,[94] the United States Supreme Court considered Pennsylvania and Rhode Island statutes that provided government funding to church-related private schools.[95] Under its statute, the Pennsylvania government created subsidies for religious schools to reimburse them for teachers' salaries, textbooks and educational materials.[96] Rhode Island's statute provided for payments to be made directly to private school teachers to supplement their salaries.[97] The taxpayers of the two states filed suit seeking to declare the statutes unconstitutional under the Establishment and Free Exercise clauses of the First Amendment.[98] In finding both statutes unconstitutional, the U.S. Supreme Court combined its prior decisions to create what became known as the *Lemon* test,[99] a three-pronged test

89. *Id.*

90. *Id.* at 243. The Court looked to its previous decisions in *Everson*, 330 U.S. at 16 (1947), *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), *McGowan v. Maryland*, 366 U.S. 420, 461 (1961), and *Abington Twp. School District v. Schempp*, 374 U.S. 203, 222 (1963) which originally fashioned the purpose and primary effect test.

91. *Schempp*, 374 U.S. at 222.

92. 403 U.S. 602 (1971).

93. David Felsen, Comment, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 413 (1989) (arguing that the multiple tests that have developed, beginning with the *Lemon* decision create a difficult analysis for courts today).

94. 403 U.S. 602 (1971).

95. *Id.* at 606–07.

96. *Id.*

97. *Id.* at 607.

98. *Id.* at 608.

99. The Court pulled three concepts from two prior Establishment Clause cases to create the *Lemon* test. *See* Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (requiring statutes that impact religion to have a secular purpose and to not have the effect of advancing or inhibiting

for Establishment Clause analysis.[100] The *Lemon* test, which essentially added a third prong to the purpose and primary effect test developed through history and reiterated in *Allen*,[101] dictates that a statute will be ruled unconstitutional under the Establishment Clause unless: (a) the statute has a secular legislative purpose; (b) the statute does not have the primary effect of either advancing or inhibiting religion; and (c) the statute does not result in an "excessive government entanglement" with religion.[102]

In the years following the announcement of the *Lemon* test, the Justices of the U.S. Supreme Court followed the test closely, but as Establishment Clause cases became more complicated, so too did the test used to evaluate them.[103] At various times throughout recent history, the Justices of the Supreme Court have shown a general dissatisfaction with the *Lemon* test as a whole, at least "as a comprehensive test for all [E]stablishment [Clause] cases."[104] The *Lemon* test, however, has never been expressly discarded, and "a majority of [J]ustices [continue] to suppose that either a purpose to promote religion or a direct effect of advancing religion may render a program unconstitutional."[105] The Court now uses the Lemon test sporadically as it developed and used other tests in more recent Establishment Clause cases.[106]

C. Other Establishment Clause Tests

In Establishment Clause analyses, the Court occasionally employs the "historical acknowledgment test" which is rarely, but effectively used to quash controversial issues that seek to invalidate

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religion); Walz v. Tax Commission of City of New York, 397 U.S. 664, 674 (1970) (ruling unconstitutional those statutes that foster an "excessive government entanglement with religion").

100. *Lemon*, 403 U.S. at 612–13.

101. 392 U.S. 236 (1968).

102. *Id.*

103. In *Roemer v. Md. Pub. Works*, 426 U.S. 736, 751(1976), for example, Justice Blackmun discussed a potential fourth prong to the *Lemon* test: divisiveness. The Court also mentioned a three-part expansion to the entanglement prong. *Id.* at 755–56. The interweaving of the various tests apparently began to confuse Supreme Court Justices from time to time. For instance, Justice White, acknowledged his confusion in his dissent in *Roemer*, and he called on the Court to return the test to the simple two-factor test discussed in *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) which originally fashioned the purpose and primary effect test. *Id.* at 767–69.

104. *Church, Choice, and Charters*, *supra* note 85, at 1759.

105. KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 13–22 (Princeton, 2005).

106. *Church, Choice, and Charters*, *supra* note 85, at 1759 n.67.

long-standing religious practices. [107] Justice Warren Burger announced the test in *Marsh v. Chambers*,[108] stating "if the practice is one that has been common throughout United States history, it is not a violation of the [E]stablishment [C]lause."[109] The historical test offers greater protections to the religious majority–those individuals who have conducted themselves in a certain way for so long that the Court occasionally offers their conduct protection under the law.[110]

As the Supreme Court continued to wrestle with its Establishment Clause decisions, Justice Sandra Day O'Connor suggested what has become known as the "endorsement test" in a concurring opinion in *Lynch v. Donnelly*.[111] The endorsement test states that "if a reasonable observer would find a particular practice to be an endorsement of religion, that practice violates the Establishment Clause."[112] The test generally offers greater protections to religious minorities and non-believers than the other tests, as it removes the concept of practical history from the equation.[113] The endorsement test is rarely used today. It was criticized shortly after it was announced and described as "unworkable,"[114] and it is unlikely that the endorsement test will see increased use in the future now that its author has retired from the U.S. Supreme Court.[115]

The coercion test is the most recent of the four Establishment Clause tests developed by the U.S. Supreme Court.[116] The coercion test, announced by Justice Anthony Kennedy in *County of Alleghany v. ACLU*,[117] states that the "government may not coerce anyone to

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107. Wilson, *supra* note 80, at 611–12.

108. 463 U.S. 783, 795 (1983). In *Marsh*, the Court determined that the principles discussed in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), should not be applied to the Nebraska Legislature's practice of beginning each session with a prayer led by a chaplain paid from the State coffers with the legislature's approval. *Marsh*, 463 U.S. at 784, 795. The Court reasoned that "[t]he unbroken practice [of beginning legislative sessions with a prayer] for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat" of an Establishment Clause violation. *Id.* at 795 (quoting Panhandle Oil Co. v. Miss. ex rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

109. Schuman, *supra* note 5, at 2131.

110. *Id.* at 2131–32.

111. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

112. Schuman, *supra* note 5, at 2132 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

113. *Id.* at 2132–33.

114. *Id.* at 2133.

115. *Id.*

116. *Id.*

117. 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part).

support or participate in any religion or its exercise."[118] The coercion test offers what Justice Kennedy believes to be a basic rule that helps clarify Establishment Clause jurisprudence.[119] Rather than make Establishment Clause analyses easier, the existence of four tests muddies the already cloudy waters even more.[120]

D. The Law of the Land

Today, the *Lemon* test remains the most consistently applied test for Establishment Clause cases.[121] The Supreme Court applied it recently in *McCreary County v. ACLU*,[122] a 2005 case holding that religiously-themed displays on government-owned land violate the Establishment Clause. The Court, however, has abandoned one or more prongs of the *Lemon* test when it deems appropriate, as it did in *Van Orden v. Perry*[123] and *Zelman v. Simmons-Harris*.[124] Despite the Court's wavering use of the *Lemon* test, foundationally, all Establishment Clause cases will receive *Lemon* review; it remains the law of the land.[125]

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118. Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 427 (2009).

119. Schuman, *supra* note 5, at 2133–34.

120. *Id.* at 2134.

121. Barry P. McDonald, *Getting Beyond Religion as Science: Unstifling Worldview Formation in American Public Education*, 66 WASH. & LEE L. REV. 587, 655 n.323 (2009).

122. 545 U.S. 844 (2005).

123. 545 U.S. 677, 686 (2005). In *Van Orden*, the Court weighed whether a monument of the Ten Commandments outside the Texas State Capitol violates the Establishment Clause. *Id.* at 681. In an opinion drafted by Chief Justice William Rehnquist, the Court stated that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* at 686.

124. 536 U.S. 639, 662–63 (2002). In *Zelman*, the Court considered an Ohio educational pilot program that provided tuition aid to students at both public and private schools. *Id.* at 644–49. In a concurring opinion, Justice Sandra Day O'Connor explained that while the *Lemon* test is a "central tool" in the Court's Establishment Clause jurisprudence, *id.* at 668, in "indirect aid cases" such as *Zelman*, two factors are considered: "first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers . . .; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid." *Id.* at 669. Only where the answer to either question is "no" is there an Establishment Clause violation. *Id.*

125. *See generally* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).

E.The Establishment Clause in Past Same-Sex Marriage Cases

The Superior Court of the District of Columbia applied the *Lemon* test in deciding its first same-sex marriage case, *Dean v. District of Columbia*,[126] in 1992. The D.C. court dismissed an Establishment Clause argument quickly by stating that "[w]hatever may be the exact contours of the separation [of Church and State], it is inconceivable that the 'wall' is so impregnable as to preclude judicial or legislative resort to the Bible merely as a historical reference. None of the *Lemon* proscriptions is implicated in the least by so doing."[127] By additionally citing religious dogma and tradition as a basis for its decision,[128] the court ruled that the Establishment Clause did not render the statute unconstitutional.[129] It is, to date, the only time an Establishment Clause claim has been argued in a same-sex marriage case.[130] The new emerging landscape of the same-sex marriage debate beckons for that issue to be raised once more. It is time for the courts to revisit religion.

IV. THE MAIN EVENT: WHY SAME-SEX MARRIAGE BANS ARE UNCONSTITUTIONAL ESTABLISHMENTS OF RELIGION

While the Supreme Court has recently shown a willingness to depart from the traditions of the *Lemon* test for Establishment Clause decisions,[131] the three-pronged test remains the jumping-off-point for all Establishment Clause analyses.[132] With that in mind, this article will analyze the same-sex marriage question by following this path. In order to determine whether same-sex marriage bans meet constitutional muster, a reviewing court would first consider whether: (a) the ban on same-sex marriages has a secular legislative purpose; (b) these bans have the primary effect of enhancing or inhibiting religion; and (c) the bans result in an excessive government

126. No. 90-13892, 1992 WL 685364 (Sup. Ct. D.C. 1992).

127. *Id.* at *5.

128. *Id.* at *7.

129. *Id.* at *5.

130. Wilson, *supra* note 80, at 577.

131. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 686 (2005) (holding that the *Lemon* test "is not useful in dealing with the sort of passive monument that Texas has erected on its capitol grounds. Instead, our analysis is driven by both the nature of the monument and by our Nation's history"); Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (utilizing the purpose and primary effect test without a total abandonment of the test iterated in *Lemon*).

132. 403 U.S. 602, 612 13 (1971).

entanglement with religion.[133] While the Supreme Court of Iowa considered religion in its landmark same-sex marriage decision,[134] the analysis was confined to whether religious opposition to same-sex marriage justified a ban on same-sex marriages.[135] This article considers the reverse: Do same-sex marriage bans have the effect of establishing religion in violation of the First Amendment of the United States Constitution?

A. There is No Secular Purpose for Banning Same-Sex Marriage

If a statute has a secular legislative purpose, the Establishment Clause will "not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions . . . ."[136] Such a bright line rule presents a major hurdle for gay rights claimants.[137] Although marriage equality advocates can argue that a law restricting marriage to same-sex couples has an inherent decidedly religious basis, the Court is unlikely to be receptive to such an argument unless the claimants can distinguish themselves from the rule.[138] In essence, claimants must prove affirmatively that no secular purpose exists for the statute. That process can be a complicated one, wrought with historical and sympathetic arguments from the opposition.[139] Nevertheless, the overwhelming evidence applicable to the same-sex marriage debate shows that a valid secular purpose does not exist for banning same-sex marriages.[140] Accordingly, same-sex marriage bans must be struck down as a violation of the Establishment Clause.

1. So-Called "Valid" Secular Arguments in Opposition of Same-Sex Marriages

Same-sex marriage scholars have divided the secular arguments against same-sex marriage into three categories: the definitional argument, the stamp-of-approval argument, and the

133. *Id.*

134. Varnum v. Brien, 763 N.W.2d 862, 905 (Iowa 2009).

135. *Id.* at 906.

136. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

137. Marc L. Rubinstein, Note, Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause, 46 HASTINGS L.J. 1585, 1595–96 (1995).

138. *Id.*

139. *See, e.g.*, *id.* at 1609–13 (presenting anti-gay rights arguments such as traditional morality and disfavor of "special rights").

140. *See infra* Parts IV.A.

defense-of-marriage argument.[141] Under the definitional argument, "marriage is a union between a man and a woman because that's the way it's always been."[142] The stamp-of-approval argument states that "any rights of marriage afforded to same-sex couples will be perceived as an endorsement of homosexuality."[143] Finally, the defense-of-marriage argument proposes that "if sanctioned, [same-sex marriage] will undermine the sanctity of 'traditional marriage' and lead to a moral collapse."[144]

a. The Definitional Argument

Perhaps the simplest of the secular purposes for banning same-sex marriages is the definitional argument.[145] Black's Law Dictionary still defines marriage as "[t]he legal union of a couple as husband and wife,"[146] necessarily excluding the possibility of two men or two women creating a marriage. In 1970, in *Jones v. Hallahan*,[147] Kentucky's highest court considered various reference texts to determine that "marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary."[148] Although "[s]ame-sex unions have been recognized throughout history . . . in ancient Greece and Rome, Egypt, parts of China, Japan, South East Asia, Australia, India, South America, Medieval Eastern Europe, and practically everywhere else in the world,"[149] such was not the case in the United States until *Goodridge v. Dep't of Public Health*[150] and the definitional argument provided a simple, easy way out for reviewing judges.

While, prior to 2003, the "it is what it is" argument would have made perfect sense to those unfamiliar with historical international treatment of same-sex marriage,[151] or those who based their support solely on the historical treatment of same-sex marriage in the United States up to that point, neither Black's definition, nor the definitional

141. Schuman, *supra* note 5, at 2113.

142. *Id.* (citing William N. Eskridge, Jr. & Darren R. Spedale, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 21–22 (Oxford, 2006)).

143. *Id.* (citing ESKRIDGE, *supra* note 142, at 25–26).

144. *Id.* (citing ESKRIDGE, *supra* note 142, at 28–29).

145. *Id.* at 2114.

146. BLACK'S LAW DICTIONARY (8th ed. 2004), marriage.

147. 501 S.W.2d 588 (Ky. 1973).

148. *Id.* at 589.

149. Schuman, *supra* note 5, at 2114.

150. 798 N.E.2d 941 (Mass. 2003).

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

argument are current or accurate. In the United States alone, five states plus the District of Columbia recognize same-sex couples' rights to marry.[152] Outside the United States, there is even greater support for same-sex marriage, as several Western European countries, Canada, and South Africa all permit same-sex marriages.[153] "[G]iven the fact that marriage is [now] defined more broadly across this nation and throughout this world, 'that's just the way it is' carries less weight than it used to,"[154] and can no longer be considered a valid secular purpose for banning same-sex marriage.

b. The Stamp-of-Approval Argument

The stamp-of-approval argument has become increasingly popular with opponents of same-sex marriage.[155] Such an argument allows opponents of same-sex marriage to accept homosexuality for the role it plays in society–in essence, abiding by an "I won't bother you if you don't bother me" theory of human interaction[156]–but prevents same-sex marriage from "transform[ing] the [historical] institution of marriage by questioning traditional roles, rights and duties based on gender."[157] A shining example of this phenomenon is that opponents of same-sex marriage "routinely contend that the legal recognition of gay and lesbian unions would be the first step down a slippery slope that would ultimately foreclose legal prohibitions on minors entering into marriage, polygamy, incest, and even bestiality."[158] For opponents of same-sex marriage, this argument is generally based on individual and collective senses of morality.[159] Historically, homosexuality has been seen as immoral in the eyes of a vocal majority;[160] therefore a large segment of the American population is unwilling to embrace a law that could promote its acceptance. At least one Justice on the U.S. Supreme Court supports

152. *See supra* notes 64–69 and accompanying text.

153. Schuman, *supra* note 5, at 2114.

154. *Id.*

155. *Id.* at 2115.

156. *Id.* at 2116.

157. Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 89–90 n.23 (1998).

158. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1316 (2009).

159. Adam J. MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions*, 23 B.Y.U. J. PUB. L. 1, 59 (2008).

160. M. Blake Huffman, *Out of Step: Why* Pulliam v. Smith *Should be Overruled to Hold All North Carolina Parents—Gay and Straight—to the Same Custody Standard*, 87 N.C. L. REV. 257, 284 n.190 (2008) (stating that over fifty-five percent of individuals interviewed in a Gallup Poll in 2002 thought homosexuality was immoral).

the stamp-of-approval argument. Justice Antonin Scalia, in a dissenting opinion in *Lawrence v. Texas*,[161] argued that the majority, which, in that case, acknowledged a right to privacy and fostered a certain tolerance for homosexuality that was absent from the Court's previous decisions, had "signed on" to a "homosexual agenda . . . directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[162] While the stamp-of-approval argument has become increasingly popular with opponents of same-sex marriage, it has also become perhaps the most vulnerable argument to attack.

At the outset, the so-called valid secular justification for banning same-sex marriage that is the stamp-of-approval argument is not-so-secular after all. One's concept of morality is often shaped by religious beliefs,[163] and it is often the case that an individual's condemnation for homosexuality stems directly from biblical text.[164] An overwhelming percentage of individuals who consider themselves religious oppose same-sex marriage, whereas there exists a split of opinion among those who do not consider themselves religious.[165] Such evidence suggests that the stamp-of-approval argument, with its feet firmly rooted in concepts of morality, is based more in religion than the constitution might allow.

The validity of the stamp-of-approval argument is also easily called into question. "[W]hen a state recognizes same-sex marriages, it purports to be[,] and actually is[,] supporting interpersonal commitment (marriage), not homosexuality."[166] Considering that the stereotype that members of the gay community are promiscuous and lack interpersonal commitment is one of the main reasons given when opponents of same-sex marriage question the morality of homosexuality,[167] the logical assumption is that same-sex marriage

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161. 539 U.S. 558 (2003).

162. *Id.* at 602 (Scalia, J., dissenting).

163. *See* Justin R. Pasfield, *Confronting America's Ambivalence Towards Same-Sex Marriage: A Legal and Policy Perspective*, 108 W.VA. L. REV. 267, 295 (2005).

164. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 225 (2001).

165. Jennifer Agiesta & Alec MacGillis, *Poll: Rising U.S. Support for Social Issues, Such as Gay Marriage*, WASH. POST (Apr. 30, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043001640.html; *see also* Schuman, *supra* note 5, at 2108.

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

167. Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 92 (1997).

would take a step towards promoting the morality of the gay community. By way of analogy, "the governmental action of granting a marriage license to a same-gender couple signals no more approval of the act of gay sex or the group of gay couples, than the governmental action of granting a marriage license to a convicted rapist signals approval of the act of rape or the group of rapists."[168] The palpable difference is that the rapist can obtain a marriage license in any state of this nation, so long as he or she is not attempting to marry a person of the same sex.[169]

c. The Defense of Marriage Argument

> The 'defense of marriage' argument is based on the underlying premise that 'the great virtue of marriage is the creation of an altruistic space, where adults sacrifice their own self-interest in the service of mutual commitment to one another and to children they raise together.' The proponents of this argument maintain that traditional marriage has declined because this ideal has been sacrificed by liberalizations that treat marriage as just another avenue for seeking self-fulfillment and pleasure. The legal recognition of same-sex marriage would allegedly render the liberal conception of marriage victorious and constitute the proverbial straw that broke traditional marriage's back.[170]

This argument presupposes that same-sex couples are unable or unwilling to create relationships based on mutual commitment. Rather, it is suggested, same-sex relationships are based on selfishness, self-centeredness, and solidarity.[171] This concept allegedly weakens or

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

169. Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155, 161 (1997) ("Convicted felons, divorced parents who refuse to pay child support, delinquent taxpayers, fascists, and communists–all receive marriage licenses from the state. The Supreme Court stands ready to discipline any state that denies their citizens their right to marry, yet no one believes that the license constitutes state approval of felony, default on support obligations, tax delinquency, communism, or fascism. . . . Gay people constitute virtually the only group in America whose members are not permitted to marry the partner they love").

170. Staszewski, *supra* note 158, at 1317–18.

171. Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 450 (2007).

cheapens the traditional marriage model such that opponents of same-sex marriage must prevent marriage equality.

The validity of the defense of marriage argument is questionable. "[S]ame-sex couples can, and do[,] enter into relationships that comport with the traditional ideal of marriage."[172] Since 2003, thousands of same-sex couples in the United States have been married,[173] and thousands more have entered civil unions.[174] Same-sex couples buy houses, pay taxes, raise children, attend church, volunteer in their communities, and do the various other "stuff" that heterosexual married couples do. Moreover, the establishment of same-sex unions in various states has led to an "increase [in] the number of 'married' couples, as well as the number of children who are raised by two parents who are married to one another[,]"[175] a fact that researchers say benefits the child, regardless of the gender of that child's parents.[176] "[W]hile [such] research is undoubtedly in a preliminary state, the defense of marriage argument . . . appears . . . to amount to nothing more than unwarranted speculation."[177] Based on this evidence, the question remains: "Defend marriage from what?"[178]

B. Same-Sex Marriage Bans Enhance Some Religions and Inhibit Others in Violation of the Establishment Clause.

It is an unconstitutional violation of the Establishment Clause if a statute's primary effect advances or inhibits religion.[179] The U.S. Supreme Court has decreed that "the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer

172. Staszewski, *supra* note 158, at 1318.

173. As of 2006, 11,000 same-sex couples had married in Massachusetts, David Filipov, *5 years later, views shift subtly on gay marriage*, BOSTON GLOBE, Nov. 17, 2008, http://www.boston.com/news/local/massachusetts/articles/2008/11/17/5_years_later_views_shift_subtly_on_gay_marriage/, and prior to the passage of Proposition 8, over 18,000 same-sex couples were married in California. Bob Egelko, *Anti-gay Marriage Group Steps Up for Prop. 8*, S.F. CHRON., Nov. 11, 2008, at B-2. Presumably, with the institution of same-sex marriages in Connecticut, Iowa, Washington D.C., Vermont and New Hampshire, those numbers will grow exponentially.

174. As of 2003, over 2,500 civil unions had been performed in Vermont alone. Roderick T. Chen & Alexandra K. Glazier, *Can Same-Sex Partners Consent to Organ Donation?*, 29 AM. J.L. & MED. 31, 33 n.13 (2003).

175. Staszewski, *supra* note 158, at 1318–19.

176. *Id.* at 1319.

177. *Id.* at 1319–20.

178. Schuman, *supra* note 5, at 2119.

179. Lemon v. Kurtzman, 303 U.S. 602, 612–13 (1971).

one religion over another.'"[180] Therefore, if a state enacts a same-sex marriage ban, it must do so without promoting the religious tenets of certain faiths or diminishing the tenets of certain others. In regard to same-sex marriage, the enhancement prong of the *Lemon* test has been considered before. In *Dean v. District of Columbia*,[181] the Superior Court of the District of Columbia found that "[n]o 'religion' is advanced by a refusal [to recognize same-sex marriages], since said refusal applies equally to same-sex applicants who are atheists, agnostics, or believers, and no one is thereby coerced in the slightest to alter his or her convictions."[182] The present day treatment of same-sex marriage within the eyes of various religious faiths makes the institution of a same-sex marriage ban an almost impossible task to complete without directly violating this concept.

Notwithstanding the analysis expressed in *Dean*,[183] under the second prong of the *Lemon* test–considering the state of same-sex marriage today and the landscape of religious sentiment towards same-sex marriage–a same-sex marriage ban, in effect, both enhances and inhibits various religions in violation of the Establishment Clause. "[A] law banning gay marriage achieves two ends. First, such a law favors, or 'advances,' those religions that do not condone same-sex unions by siding with that particular viewpoint. At the same time, religions that would gladly solemnize a same-sex marriage but for the law are 'inhibited.'"[184] While a large number of religious denominations, such as some American Baptists, Roman Catholics, and Evangelical Christian Churches, only recognize traditional marriages between a man and a woman, a larger number of denominations, such as some Episcopalians, Presbyterians, Quakers, and Unitarian Universalists, are supportive of same-sex unions.[185] Simply put, "religious beliefs regarding same-sex marriage are neither static nor universally-held within a single faith system."[186] The

180. Bd. of Educ. v. Allen, 392 U.S. 236, 242 (1968) (citing Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)).

181. No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., 1992), *aff'd* 653 A.2d 307 (D.C. 1995).

182. Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 51 n.217 (2002) (quoting *Dean*, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., 1992), *aff'd* 653 A.2d 307 (D.C. 1995)).

183. No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., 1992), *aff'd* 653 A.2d 307 (D.C. 1995).

184. Amelia A. Miller, Note, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2211 (2005).

185. Wilson, *supra* note 80, at 584 (compiling a thorough list of religious denominations with their corresponding views on same-sex marriage).

186. *Id.* at 583–84.

analysis expressed in *Dean*[187] fails to fully consider the issue; the question is not whether individuals are coerced to change their religious beliefs, but whether state action advances a certain set of religious beliefs.[188] By enacting a same-sex marriage ban to restrict the behavior of its citizens, a state essentially imposes the religious views of the majority "over what should be secular, contractual rights."[189] Such a practice is exactly the type of behavior the First Amendment aims to prevent.

C. Same-Sex Marriage Bans Appear to Promote Certain Anti-Gay Religious Beliefs and Therefore Run Afoul of Justice O'Connor's Endorsement Test.

Although Justice Sandra Day O'Connor no longer sits on the Court, and the endorsement test she created to evaluate Establishment Clause questions perhaps lies dormant in the annals of Supreme Court history, an endorsement test analysis is nevertheless telling. Under the test, if a reasonable observer would find a particular practice to be an endorsement of religion, that practice violates the Establishment Clause as "an impermissible enhancement of religion."[190]

From the eye of the unbiased observer, the issue of same-sex marriage is clearly affected by religious interference. On one hand, most Americans believe that the Bible condemns homosexuality,[191] whether they follow scripture or not. When the issue comes to debate, the most vocal opponents of same-sex marriages are religious leaders and churchgoers who consider homosexuality a sin.[192] Religious organizations and churches are strong financial supporters of traditional marriage initiatives.[193] Protestors of same-sex marriage

187. No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., 1992), *aff'd* 653 A.2d 307 (D.C. 1995).

188. Bd. of Educ. v. Allen, 392 U.S. 236, 242 (1968) (citing Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)).

189. Miller, *supra* note 184, at 2211.

190. Schuman, *supra* note 5, 2132 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

191. Rubinstein, *supra* note 137, at 1616.

192. Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 143 (2007).

193. Jesse McKinley & Kirk Johnson, *11th-Hour Effort Saved Same-Sex Marriage Ban On California Ballot*, N.Y. TIMES, Nov. 15, 2008, at A1 (discussing the $40 million contribution from congregants of the Mormon Church in support of Proposition 8, which banned same-sex marriages in California).

often hold signs citing Biblical passages.[194] On the other hand, less-religious individuals support marriage equality.[195] The young and liberal generally support marriage equality, populations that are less likely to embrace a specific religious tradition.[196] From the outside looking in, religion clearly controls the debate. Therefore, under O'Connor's endorsement test, a same-sex marriage ban should be invalid.

D. Religion's Impact on the Same-Sex Marriage Debate Fosters Excessive Government Entanglement with Religion in Violation of the First Amendment.

A statute is unconstitutional if it fosters an excessive government entanglement with religion.[197] For the purposes of a constitutional analysis, "excessive entanglement" means "that the institutions of church and state are more entangled than they need to be in order for government to accomplish its otherwise legitimate purposes in the program or policy at issue."[198] If the purposes of denying same-sex couples the right to marry are threefold–to preserve the history and custom of marriage in the United States, to maintain America's moral compass as it pertains to marriage, and to defend the sanctity of the traditional marriage model[199]–then each must be accomplished in a manner as least-restricted by religion as possible.

To determine whether same-sex marriage bans pass constitutional muster, one must first consider that "the current state of marriage is already an excessive entanglement with religion, given the connection between the state and clergy in sanctioning a legal marriage relationship."[200] When religion informs the moral scale against which same-sex marriages are compared,[201] when religion

194. Susan J. Becker, *Many are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & LAW 177, 219 (2006).

195. Schuman, *supra* note 5, at 2108.

196. Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution*, 20 BYU J. PUB. L. 195, 219 (2006).

197. Lemon v. Kurtzman, 303 U.S. 602, 612–13 (1971).

198. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 349–50 (1986).

199. *See supra* Part IV (A).

200. Schuman, *supra* note 5, at 2119.

201. *See supra* notes Part IV (A)(1)(b).

dictates the confines of the traditional marriage model,[202] when religion fills the bank accounts of anti-marriage equality organizations,[203] and when religion creeps into legislative debate over same-sex marriage,[204] one must believe that religion has impermissibly entangled itself farther than necessary into the law.

V. CONCLUSION

In 2006, the Maryland General Assembly debated the issue of marriage equality.[205] At the time, only Massachusetts law permitted same-sex marriage, and like a majority of states, Maryland law provided that the only valid marriage was one between a man and a woman.[206] American University law professor Jamie Raskin testified at a committee hearing in favor of marriage equality.[207] During Raskin's testimony, Senator Nancy Jacobs, a conservative Republican representing rural Cecil and Harford Counties, stated: "As I read Biblical principles, marriage was intended, ordained and started by God–that is my belief . . . For me, this is an issue solely based on religious principals."[208] Without pause, Raskin replied: "Senator, when you took your oath of office, you placed your hand on the Bible and swore to uphold the Constitution. You did not place your hand on the Constitution and swear to uphold the Bible."[209] The Raskin-Jacobs exchange is a microcosm of the same-sex marriage issue. Despite arguments to the contrary, religion has always been, and will always be, a factor when considering marriage equality. Yet, when same-sex marriage cases reach the appellate courts, religious arguments and analyses are mysteriously absent.

The United States Constitution was created with a mind towards separating Church and State, but on some social issues, such as same-sex marriage, courts have turned a blind eye to the ideals of our forefathers, allowing religious beliefs to color the law. The result, based on arguments of morality, defense of traditional marriage, and history–and all laden more with religious undertones than secular reasoning–is that opponents of same-sex marriage have succeeded in

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202. *See supra* notes Part IV (A)(1)(a).

203. *See supra* note 195 and accompanying text.

204. *See infra* Part V.

205. Kelly Brewington, *Emotions flare over same-sex marriage*, BALT. SUN, Mar. 2, 2006, at 5B.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

enacting laws that violate the Establishment Clause of the First Amendment and the rights of same-sex couples in this country. The time for change has come, but until courts are willing to analyze religion's impact on same-sex marriage, the ban plays on.