

**PRESERVATIONISM, OR THE ELEPHANT IN THE ROOM.
HOW OPPONENTS OF SAME-SEX MARRIAGE DECEIVE US
INTO ESTABLISHING RELIGION**

JUSTIN T. WILSON*

*“People place their hand on the Bible and swear to uphold the Constitution.
They don’t put their hand on the Constitution and swear to uphold the Bible.”*

–Jamin Raskin, Professor of Law, American University,

in testimony before the Maryland Senate Judicial Proceedings Committee¹

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1. *Capital Notebook*, BALT. SUN, Mar. 2, 2006, at 5B (reporting on Prof. Raskin’s March 1, 2006 testimony).

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INTRODUCTION

America is suffering from a definitional crisis regarding the term “marriage.” This crisis has crystallized in the context of the debate over same-sex marriage.² Because Americans cannot agree on what marriage is or should be, we cannot agree on whether same-sex couples should be allowed to marry. Moreover, Americans have historically—and in recent years, sometimes deliberately—conflated notions of civil marriage and religious marriage.³ This has resulted in the imposition of a religious definition of marriage on the larger society. As a consequence, the definitional crisis is not mere disagreement about the humanity of same-sex couples—rather, the crisis also carries constitutional implications because of the tangled histories of religious and civil marriage. Nevertheless, the status quo (opposite-sex marriage only) remains largely

2. Throughout this Article, I use the terms “same-sex marriage” and “same-sex civil marriage” interchangeably to connote all two-party civil relationships in which one or both of the parties, for whatever reason, do not conform to a “one biological man, one biological woman” paradigm. The terms do not include incestuous, bestial, plural, polygamous, polygynous, polyandrous, polyamorous, monoamorous, child-adult, child-child, or group marriage models.

3. See *infra* Part I.B (discussing the ecclesiastical roots of modern-day civil marriage in America).

undisturbed: In all but one of the fifty states,⁴ marriage is presently defined—either explicitly or implicitly—as the legal union of one man and one woman.⁵

Most of the present-day definitional tension arises because American governments have historically intertwined the civil and religious roots of marriage. According to the Pew Research Center, the two most common demographic indicators for opposition to same-sex civil marriage are age⁶ and religiosity.⁷ Indeed, young adults and “seculars” actually *favor* same-sex civil marriage by substantial margins.⁸ The most commonly-cited reason for opposing same-sex civil marriage is that it goes against one’s own religious

4. The Commonwealth of Massachusetts is only state to bestow full marriage rights on same-sex couples. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Legislature’s failure to extend civil marriage to same-sex couples violated the Massachusetts Constitution’s equal protection guarantees; giving the Massachusetts Legislature 180 days to enact same-sex civil marriage); see also *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (responding to question from Massachusetts Senate regarding the permissibility of same-sex civil unions in lieu of same-sex civil marriage; holding that the same state constitutional infirmities lay with permitting only same-sex civil unions as with failing to permit same-sex civil marriage).

As this Article is going to press, the Massachusetts Legislature has just voted to authorize a citizen petition proposing a state constitutional amendment banning same-sex civil marriage. Cf. *Doyle v. Sec. of the Commonwealth*, SIC-09887, slip op. at *1 (Mass. Dec. 27, 2006) (in response to suit seeking order forcing the legislature to vote on the petition, holding that, while no judicial remedy existed to force a vote on the petition, “[t]hose members who now seek to avoid their lawful obligations . . . , ultimately will have to answer to the people who elected them”). The Legislature must authorize the petition in its 2007 legislative session before the measure can be placed on the statewide ballot in 2008. Authorization requires a “yes” vote from twenty-five percent of the legislators in two consecutive legislative sessions; the 2006 session was the first. It is unclear whether the petition will pass in 2007, and if it appears before the voters in 2008, it is unclear whether the measure will be adopted. See Pam Belluck, *Same-Sex Marriage Vote Advances in Massachusetts*, N.Y. TIMES, Jan. 3, 2007, at A12.

In 2006, a Boston Globe survey showed that approximately fifty-six percent of Massachusetts residents support same-sex civil marriage. See Michael Powell & Robin Shulman, *Mass. Gay Marriage Law Contested*, WASH. POST, Jan. 3, 2007, at A3.

5. See *Lewis v. Harris*, 908 A.2d 196, 208 & n.11 (N.J. 2006) (cataloguing marriage laws in all fifty states).

6. PEW RESEARCH CENTER, PRAGMATIC AMERICANS LIBERAL AND CONSERVATIVE ON SOCIAL ISSUES 8 (2006), <http://pewforum.org/publications/surveys/social-issues-06.pdf>. [hereinafter PEW RESEARCH CENTER, PRAGMATIC AMERICANS] (reporting that, as of August 2006, persons age sixty-five or older were thirty-five percent more likely to oppose same-sex civil marriage—termed “gay marriage” in the study—than were persons age eighteen to twenty-nine (seventy-three percent to thirty-eight percent)).

7. *Id.* (reporting that persons who attended religious activities “weekly or more” were forty percent more likely to oppose same-sex civil marriage than were persons who attended “seldom or never” (seventy-five percent to thirty-five percent)).

8. *Id.* (reporting that same-sex civil marriage enjoyed “relatively high levels of support” from persons under thirty and persons characterized as “secular” (fifty-three and sixty-three percent, respectively)). In the study, “seculars” includes those whose self-described religious preference was “[n]o religion, not a believer, atheist, agnostic.” *Id.* at 26. However, across the entire population, the more frequently one attends religious functions, the likelier one is to oppose same-sex marriage: Seventy-five percent of persons attending “[w]eekly or more” opposed “gay marriage,” while fifty-five percent of persons attending “[s]eldom or never” supported it. *Id.* at 8.

beliefs.⁹ These statistics are consistent with the Pew Research Center's conclusion that opposition to homosexuality and gay rights is derived primarily from religious beliefs.¹⁰

This is not to say that one could not both hold religious beliefs opposed to homosexuality *and* support same-sex marriage as a civil right. Indeed, the very fact that a small percentage of Evangelical Christians favor same-sex civil marriage shows this to be possible.¹¹ One likely reason for this welcome statistical variance is that many religious believers do not consider it appropriate for their beliefs to drive generally-applicable public policy—said differently, these believers prefer that spiritual and worldly authority remain separate.¹² It seems that, despite their philosophical differences,¹³ religious believers and “Secularists” (atheists, humanists, etc.)¹⁴ have nevertheless found common ground.¹⁵

These highly-textured statistics motivated me to investigate the extent to which religious beliefs are the driving force behind statutory and constitutional initiatives to prohibit judicial or legislative recognition of same-sex civil marriage. My findings were unsurprising: The overwhelming majority of

9. PEW RESEARCH CENTER, RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY 14 (2003), <http://pewforum.org/publications/surveys/religion-homosexuality.pdf>. [hereinafter PEW RESEARCH CENTER, RELIGIOUS BELIEFS] (reporting that, as of November 2003, sixty-two percent of respondents claimed that same-sex civil marriage—termed “gay marriage” in the study—went against their religious beliefs, and that, of those respondents opposed to same-sex civil marriage, forty-five percent offered explicitly religious grounds as a justification for holding that position (this last question was asked in an open-ended format)).

10. *Id.* at 1–5 (reporting that no major religious group has a majority expressing favorable views of gays and lesbians, while sixty percent of seculars hold positive views of homosexuals). *See also* PEW RESEARCH CENTER, PRAGMATIC AMERICANS, *supra* note 6, at 8 (reporting that, along religious lines, same-sex civil marriage enjoys a majority of support only among seculars (sixty-three percent)).

11. *See* PEW FORUM, PRAGMATIC AMERICANS, *supra* note 6, at 8 (reporting that fourteen percent of White Evangelicals favored “gay marriage”).

12. As we have seen, however, the more religiously-committed one is, the less likely one is to believe that such separation is theologically acceptable. *See* PEW FORUM, PRAGMATIC AMERICANS, *supra* note 6, at 8; PEW FORUM, RELIGIOUS BELIEFS, *supra* note 9, at 1–6.

13. From simple definitions: “secularism” is defined as “[t]he doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all considerations drawn from belief in God or in a future state.” XIV OXFORD ENG. DICTIONARY 849 (2d ed. 1989) (alteration added). Conversely, “religion” is defined as a

[r]ecognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence, and worship; the general mental and moral attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of this feeling as a standard of spiritual and practical life.

XIII OXFORD ENG. DICTIONARY 569 (2d ed. 1989) (alteration added).

By definition, then, it seems that one cannot be both a “theist” and a “non-theist”: One belief system claims “there is not a god” while the other claims “there is a god.” Rationally speaking, God either exists or she doesn’t—she cannot both exist and not exist, for that would be the very definition of a logical contradiction.

14. *See infra* text accompanying note 144.

15. *See infra* notes 145–50 (describing the Secularist position on same-sex marriage; noting that most of these positions are derived both from personal morality and from an objection to using religious beliefs as a ground for social policy).

support for bans on same-sex civil marriage has come from religious believers, and the so-called “secular justifications” for these bans are mere pretexts for religious beliefs that homosexuality, homosexuals, and same-sex couples are evil or sinful. Opponents of same-sex civil marriage derive their preferred definition of marriage almost entirely from the Christian precept that one-man, one-woman marriage was “ordained by God”¹⁶ and is therefore inherently superior to same-sex unions. The ongoing effort of the radical Christian right to impose its religious beliefs on Americans of all faiths and traditions has begun in piecemeal fashion—at the state level through state statutes and constitutional amendments, and at the federal level through the federal Defense of Marriage Act¹⁷ and the various proposed amendments to the U.S. Constitution.¹⁸

This Article discusses how, because of America’s history of blending religious and civil marriage, as well as the preservationist’s ongoing campaign to codify religious marriage in the law, our current definition of “civil” marriage is impermissibly derived from religious precepts, without a sufficient—

16. *E.g.*, 150 CONG. REC. H6587 (2004) (statement of Rep. Pence) (“Marriage was ordained by God”); 152 CONG. REC. S5525 (daily ed. June 7, 2006) (statement of Sen. Byrd).

It is my belief that the State of ‘marriage’ can exist only between a man and a woman. The Bible tells us that marriage must be defined this way, and that the marriage vow between a husband and wife, meaning between a man and a woman, is sacred.

. . . .

. . . [T]hroughout the annals of human experience, the relationship of a man and woman joined in holy matrimony has been a keystone to the stability, strength, and health of human society. I believe in that sacred union to the core of my being.

Id. (alteration added); 152 CONG. REC. H5295 (daily ed. July 18, 2006) (statement of Rep. Carter) (“I believe [marriage] is part of God’s plan for the future of mankind. The sacredness of a marriage is based, to this Nation, and, quite frankly, every Nation on Earth, it is how the based governing we have in our lives starts.” (alteration added)); *id.* at H5297 (statement of Rep. Gingrey) (“[T]hose of us who support this constitutional amendment feel that this is all about marriage that result, or potentially can result, in the procreation of children. This is what our Constitution has implied for 223 years and, indeed, what the word of God has implied for 2,000 years.” (alteration added)); *id.* at H5301 (statement of Rep. Pence) (“I believe that marriage matters, that it was ordained by God, instituted among men, that it is the glue of the American family and the safest harbor to raise children.”); *id.* at H5306 (statement of Rep. Beauprez).

I think very often about the fact that we proudly profess that we are founded on Judeo-Christian principles.

. . . .

. . . [M]arriage, since the beginning of time, as close as I can tell, ha been between a man and a woman. If it was, indeed, good enough for our Creator, and it was indeed our Creator’s plan, that we were created different for an absolute divine purpose, I think we best not be messing with His plan today.

Id.; 150 CONG. REC. H7894 (2004) (statement of Rep. Bartlett).

In the Christian community, and we are a Christian Nation . . . marriage is generally recognized as having started in the Garden of Eden. You may go back to Genesis to find that and you will note there that God created Adam and Eve. He did not create Adam and Steve. A union between other than a man and a woman may be something legally, but it cannot be a marriage, because marriage through 5,000 years of recorded history has always been a relationship between a man and a woman.

Id.

17. See discussion *infra* Parts II.A, V.A.1.

18. See discussion *infra* Part II.

rational—secular justification. What is the remedy? Courts should take a hard look at the substantive justifications offered in support of same-sex marriage bans, bearing in mind that (1) these justifications are universally offered by religious believers but are infrequently offered by credentialed Secularists, and (2) they are the result of a studied use of pretextual, secular-sounding language to cloak a religiously-motivated bias against homosexuals and same-sex couples. In Part I, I describe the definitional problem, briefly explore the roots of civil and religious marriage in America, and survey the variety of religious and irreligious beliefs about the morality of homosexuality and same-sex unions. In Part II, I describe what same-sex marriage bans are, introduce the proposed Federal Marriage Amendment (FMA) as exemplary of all such bans, and determine that fundamentalist religious beliefs are the common trait held by the vast majority of witnesses who testified before Congress in favor of the FMA. In Part III, I introduce the concept of “preservationism”—a unifying theory to explain the invidious religious purpose underlying the “secular” justifications for same-sex civil marriage bans. In Part IV, I discern the background neutrality principles underlying modern-day Establishment Clause jurisprudence, briefly delineate the two primary interpretive methods that the Supreme Court currently applies to Establishment Clause claims, and determine that the *Lemon*-endorsement test is the appropriate vehicle for analyzing the First Amendment implications of same-sex marriage bans. In Part V, I raise—and dismiss—the primary substantive objections to same-sex marriage that are continually raised by opponents of same-sex marriage (and key sponsors of the Federal Marriage Amendment), demonstrating that all of them fail to have a rationally secular relationship to banning same-sex civil marriage. I then apply the *Lemon*-endorsement test to the sectarian definition of marriage that same-sex marriage bans enshrine into the law, showing that a reasonable observer would conclude that such bans endorse one form of religious marriage over another, which creates a sizeable class of political outsiders and violates neutrality principles. In Part VI, I conclude that, if the Establishment Clause really means what it says, same-sex marriage bans impose and endorse one set of religious precepts regarding marriage, resulting in an unconstitutional establishment of religion.¹⁹

19. Dissenting voices in two recent same-sex marriage cases raised this same Establishment Clause objection *sua sponte*. See *Andersen v. King County*, 138 P.3d 963, 1032–35, 1037 (Wash. 2006) (Bridge, J., concurring in dissent) (cataloguing the self-evident religious bias and motivations underlying Washington’s 1998 Defense of Marriage Act, WASH. REV. CODE ANN. §§ 26.04.010(1), 26.04.020(1)(c), (3) (West Supp. 2006); concluding that “[a] religious or moral objection to same-sex marriage is not . . . a legitimate *state* interest” (emphasis in original)); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 747–48 & n.7 (Cal. Ct. App. 2006) (Kline, J., concurring and dissenting opinion) (noting that the religious rationales employed in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971), and *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), rested upon a “religious doctrine that cannot influence the civil law and, in any case, is not universally shared”; cataloguing the objections of several amici that “the ban on same-sex marriage has no secular legislative purpose, and the state’s reliance on the common understanding of marriage is a pretext for naked religious preference which impermissibly prefers certain religious beliefs over others” (internal quotations omitted)), *review granted and opinion superseded*, S147999 (Cal. Dec. 20, 2006).

Prof. Lynn Wardle recently catalogued the most commonly-used arguments in favor of same-sex civil marriage, noting that the Establishment Clause argument has come up several times in the literature, but not in the courts. Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why*

I. DEFINING “MARRIAGE”

A. A Brief History and Overview

The idea that the state should—or even could—legally recognize same-sex relationships is relatively new. *Baker v. Nelson*, the first lawsuit seeking a marriage license for same-sex plaintiffs, was brought in Minnesota in 1971.²⁰ Although the *Baker* plaintiffs were unsuccessful, the case signaled to the nation that the modern gay-rights movement had marriage equality on its agenda.

Many states began to assess the potential constitutional infirmities of their common-law definitions of marriage or antiquated marriage statutes. Consequently, some states affirmatively outlawed the legal recognition of same-sex unions through judicial fiat,²¹ statute, or state constitutional amendment.²² The number of states outlawing these unions has grown substantially since 2003 when Massachusetts recognized same-sex marriage in *Goodridge v. Department of*

and How, 20 BYU J. PUB. L. 439, 465 n.129 (2006) (alterations added) [hereinafter Wardle, *Federal Constitutional Protection*].

As these cases and articles show, I am not the first person to write in this area, but I am among the first to examine the question in detail in the literature since *Lawrence v. Texas*, 539 U.S. 558 (2003), *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), and *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), were decided. Without doubt, these cases significantly changed the constitutional landscape—particularly in terms of (1) the heightened requirement of government neutrality toward religion after *McCreary County* and (2) what constitutes a permissible morals-based rationale for same-sex marriage bans after *Lawrence*. If the Washington and California marriage cases are any indication, the courts and amici are picking up on this change.

20. 191 N.W.2d at 186.

21. *E.g.*, *id.* at 186 (holding that the Minnesota marriage statute “does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited”); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (holding that, although the then-applicable Kentucky marriage statutes did not specify the gender of the parties to a marriage, “the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage”).

22. A typical ban might read: “Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.” N.C. GEN. STAT. ANN. § 51-1.2 (West Supp. 2006). Other bans, instead of explicitly calling out same-sex couples for exclusion from marriage, might state the ban in more positive-sounding terms: “To be valid or recognized in this State, a marriage may exist only between one man and one woman.” ALASKA CONST. art. I, § 25 (adopted 1998). A number of bans also prevent the state from enacting laws that emulate marriage or provide its legal benefits to non-opposite-sex couples: “Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” OHIO CONST. art. XV, § 11 (adopted 2004). *See also* VA. CONST. art. I, § 15-A (adopted 2006).

[O]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Id. (alteration added). *See also* discussion *infra* Part II.

Public Health.²³ The November 2006 election cycle alone saw voters weighing in on seven state-level constitutional amendments to prohibit same-sex marriage; six were ratified.²⁴ To date, Arizona is the only state in which voters have repudiated an attempt to amend a state constitution to ban same-sex civil marriage.²⁵ As of this writing, forty-five states have some form of a same-sex marriage ban on the books.²⁶ Five of these states nevertheless provide some legal rights to same-sex couples.²⁷ The remaining five states and the District of Columbia have not passed a statutory ban or a constitutional amendment.²⁸ Of these, Massachusetts is the only state to affirmatively recognize same-sex marriage,²⁹ courts in the other five jurisdictions have so far refused to force their respective legislatures to recognize civil marriage rights for same-sex couples.³⁰ No state allows marriages between more than two individuals.³¹

23. 798 N.E.2d 941 (Mass. 2003).

24. See CNN.com, America Votes 2006, Key Ballot Measures, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (reporting on the balloting results from the November 2006 election cycle for same-sex civil marriage bans proposed in Arizona, Colorado, Idaho, South Carolina, South Dakota, Virginia, and Wisconsin) (last visited Jan. 3, 2007).

25. See *id.* (reporting on the failure of Arizona Proposition 107 on November 7, 2006).

26. See Human Rights Campaign, Statewide Marriage Laws (Nov. 2006), <http://hrc.org/Template.cfm?Section=Arizona&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (cataloguing state laws regarding same-sex marriage) (last visited Jan. 3, 2007); see also National Conference of State Legislatures, Same Sex Marriage (Oct. 2006), <http://www.ncsl.org/programs/cyf/samesex.htm>. (last visited Jan. 6, 2007).

27. See Human Rights Campaign, *Relationship Recognition in the U.S.* (Apr. 2005), <http://hrc.org/Template.cfm?Section=Center&CONTENTID=26860&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (listing California, Connecticut, Hawai'i, Maine, and Vermont as states that provide some form of legal rights to same-sex couples) (last visited Jan. 3, 2007); cf. Human Rights Campaign, Statewide Marriage Laws, *supra* note 26 (listing California, Connecticut, Hawai'i, Maine, and Vermont as having statutory bans on same-sex marriage).

28. See Human Rights Campaign, Statewide Marriage Laws, *supra* note 26 (listing Massachusetts, New Jersey, New Mexico, New York, Rhode Island, and the District of Columbia as the only jurisdictions without an affirmative ban on same-sex civil marriage).

29. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

30. *E.g.*, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (refusing to find a due process or equal protection violation under the New York Constitution for the legislature's failure to permit same-sex civil marriages; holding that permitting such marriages was within the power of the legislature and would not be unconstitutional under the state constitution); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (refusing to find a due process violation under the New Jersey Constitution for the legislature's failure to permit same-sex civil marriages; holding that failure to provide same-sex couples with the legal rights, benefits, and obligations of civil marriage violated the state constitution; holding further that, in fashioning a remedy for the equal-protection violation, the legislature was not compelled to call the resulting legal arrangement "marriage," although it was within the legislature's power to do so); *Dean v. District of Columbia*, Civ. A. No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991) (challenging the 1981 version of the District of Columbia's Marriage Act, which has been subsequently amended to provide limited domestic partnership benefits to same-sex couples, while still reserving "marriage" for opposite-sex couples), available at 1992 WL 685364, *aff'd on other grounds*, 653 A.2d 307 (D.C. 1995); see also Tom Hester, Jr., *N.J. Gov. to Make Gay Unions Official*, ASSOCIATED PRESS, Dec. 21, 2006 (announcing decision of New Jersey legislature to remedy the equal-protection violation in *Lewis* through same-sex civil unions), available at <http://pewforum.org/news/display.php?NewsID=12246> (last visited Dec. 21, 2006).

31. See *infra* notes 40-41 (discussing polygamy); see also *infra* Part V.A.3.c; notes 397-400 (discussing the teleological argument against same-sex marriage).

Thirty-five years after *Baker v. Nelson*,³² a majority of Americans still oppose allowing same-sex couples the right to marry.³³ However, a majority also believe that it is important to give same-sex couples *some* legal protections.³⁴ Moreover, the size of that majority is growing and has been for at least a decade.³⁵ Presumably, this is because more and more Americans are beginning to understand the hardship wrought upon gay and lesbian families who are denied the panoply of state and federal rights, benefits, protections, and responsibilities afforded by civil marriage.³⁶ If this liberalizing trend continues, a majority of Americans may soon come to believe that civil marriage should be made available to same-sex couples. At that time, we could expect that several jurisdictions might amend their definitions of marriage to permit same-sex civil marriage.

But what is the definition of marriage? Why should we amend it? Why should we *not* amend it? In undertaking this inquiry, we immediately encounter difficulty. Currently, marriage is defined on both semantic and substantive levels. First, the semantic: Those opposed to giving same-sex couples access to marriage claim that, because marriage has only ever been between “one man and one woman,” that this is all that marriage could ever be.³⁷ Tactically, this

32. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971).

33. See PEW RESEARCH CENTER, PRAGMATIC AMERICANS, *supra* note 6, at 1 (reporting that fifty-six percent of respondents opposed same-sex civil marriage).

34. See *id.* at 1 (reporting that, as of August 2006, fifty-four percent of Americans support giving same-sex couples access to civil unions).

35. Cf. PEW RESEARCH CENTER, RELIGION AND POLITICS: CONTENTION AND CONSENSUS 1–2 (2003), <http://pewforum.org/publications/surveys/religion-politics.pdf>. (reporting that, between June 1996 and July 2003, the percentage of overall opposition to same-sex civil marriage dropped thirteen points, from sixty-five percent to fifty-three percent, while, over the same period, support for same-sex civil marriage rose eleven points, from twenty-seven percent to thirty-eight-percent).

36. A recent report released by the presently-named Government Accountability Office identified 1,138 discrete federal-level benefits that attach to legal marriage. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>. See also *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006) (Madsen, J., plurality opinion) (cataloguing several ways in which same-sex couples and families headed by same-sex couples are disadvantaged because they cannot access the state-level rights and obligations available to married couples; describing this disparity as a “clear hardship”). The state-level benefits that attach to marriage are so numerous and vary so widely that cataloguing them here would be impractical.

37. See, e.g., 152 CONG. REC. S5408 (daily ed. June 5, 2006) (statement of Sen. Allard) (“Marriage is embraced and intuitively understood to be what it is. Marriage is a union between a man and a woman.”); 152 CONG. REC. S5440 (daily ed. June 6, 2006) (statement of Sen. Allard) (“When it comes to same-gender couples there is a problem of definition. Two women or two men simply do not meet the criteria for marriage as it has been defined for thousands of years. Marriage is, as it always has been, a union between a man and a woman.”); *id.* at S5441 (statement of Sen. Brownback) (“[T]he basics of it say marriage is the union of a man and a woman, as it has been as an institution for thousands of years.” (alteration added)); *id.* at S5450 (statement of Sen. Inhofe) (“[T]he one-man, one-woman family structure is a crucial foundational element of the American democratic society . . .” (alteration added)); *id.* at S5456 (statement of Sen. Vitter) (“marriage is truly the most fundamental institution in human history”); *id.* at S5459 (statement of Sen. Thune) (same-sex couples are “trying to define marriage in a way that is contrary to what I believe is the tradition of this country, not only the tradition of this country, but since the beginning of time”); *id.* at S5474 (statement of Sen. Martinez) (“Our traditional and religious understanding of marriage is under attack by those who wish to redefine the meaning of marriage and family.”); 152 CONG. REC. S5533 (daily ed. June 7,

tautology is useful in deflecting criticism of an anti-same-sex marriage position, because it inevitably leads to a “yes it is, no it isn’t” banter that distracts from the substantive issue at hand.

Logically, however, this self-defining model of marriage is visibly undermined by its question-begging and circular reasoning.³⁸ By assuming the conclusion they wish to reach—that “marriage is marriage”—opponents of same-sex marriage have provided themselves with a pithy sound-bite—albeit one that fails to offer a substantive justification for itself.³⁹ As a lexicographical matter, the proposition “marriage is marriage” is inherently circular; it is impossible to divine the meaning of “marriage” without looking to sources of information beyond the word itself. Typically, however, opponents offer no additional normative reasons to explain why this definition of marriage is the only possible one, or for that matter, why *any* particular definition of marriage should remain static.

Moreover, the factual claim itself—that marriage has always been between only one man and one woman—is only half true: Polygamous marriage models have existed in many non-Western civilizations throughout history, and several currently exist today.⁴⁰ Narrowing the “marriage is marriage” definition to encompass only Western civilizations—or only the United States—also fails: Before Utah joined the Union, the early Mormon Church openly practiced polygamy, which establishes that the proffered definition is premised on historical inaccuracies.⁴¹ Moreover, polygamous sects in Utah and the surrounding areas persist today.⁴²

2006) (statement of Sen. Frist) (“Throughout human history and culture, the union between a man and a woman has been recognized as the cornerstone of our society.”); 152 CONG. REC. H5293 (daily ed. July 18, 2006) (statement of Rep. Neugebauer) (“Thousands of years and many civilizations have defined a marriage as the union between one man and one woman.”); *id.* at H5295 (statement of Rep. Carter) (“The reality is marriage has always been a union between a man and a woman.”).

38. See Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 190 (2005–2006) (describing the definitional argument as “circular and conclusory”); see also Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993) (dismissing the definitional argument as “tautological and circular”), *superseded by constitutional amendment and subsequent statute*, HAW. CONST. art I, § 23 (adopted 1998) (reserving power to define marriage to the legislature); HAW. REV. STAT. § 572-1 (West Supp. 2006) (defining marriage as between one man and one woman), *cited in* Carpenter, *supra*, at 190 n.31.

39. See Carpenter, *supra* note 38, at 191–92 (“Perhaps the man-woman definition is the best one; but to reach that conclusion we need substantive arguments supporting the definition . . . , not simply the definition itself.”).

40. See, e.g., PRISCILLA OFFENHAUER, FED. RESEARCH DIV., LIBRARY OF CONG., WOMEN IN ISLAMIC SOCIETIES: A SELECTED REVIEW OF SOCIAL SCIENTIFIC LITERATURE 40–41 (2005) (cataloguing the history and prevalence of state-sanctioned polygamy throughout the Islamic world, including practices that persisted into the Twentieth Century in Afghanistan, Egypt, Iran, Iraq, Malaysia, Morocco, Pakistan, Syria, Tunisia, Turkey, and Yemen). According to Offenbauer, legal polygamy persists into the Twenty-First Century in several of these nations, including Egypt, Iran, and Yemen. *Id.*

41. See generally, e.g., Reynolds v. United States, 98 U.S. 145 (1878) (acknowledging the history and then-current practice of polygamy in the Church of Jesus Christ of the Latter-Day Saints (Mormons) in the Utah Territory and surrounding areas).

42. See Bill Hanna, *Sect’s Texas Outpost Looking Permanent*, FT. WORTH STAR-TELEGRAM, Jan. 1, 2007, at B1 (cataloguing history of the Fundamentalist Church of Latter-Day Saints from 1890–2006, ending with the June 2006 arrest of Warren Jeffs, the sect’s leader). The Fundamentalist LDS Church,

These brief analyses show why limiting our inquiry to only the semantic level proves unhelpful in discerning a normative definition of “marriage.” Nevertheless, because the definitional argument is commonly encountered, it is addressed below in greater detail.⁴³

Same-sex marriage advocates⁴⁴ must sidestep this semantic quagmire and instead examine the substantive issues that give rise to our definitional crisis. For our purposes, a primary method of defining substantive marriage will be to identify and distinguish marriage’s civil and religious aspects. This cannot be achieved without identifying exactly what marriage is designed to *do*—i.e., identifying the purposes it is intended to serve. We must keep in mind, however, that any purpose we identify must clear the constitutional hurdles designed to check unbridled majoritarian will.⁴⁵ We may not develop or implement a model of marriage that inherently violates the Constitution.⁴⁶

Opponents of same-sex marriage claim that marriage is instrumental in achieving ends that only opposite-sex couples can meet.⁴⁷ As such, we can characterize their preferred conceptions of marriage as very narrow. For example marriage is, according to opponents, designed to provide an “ideal environment” for raising children; by definition, this model must include only one father and one mother, whose “gender complementarity” will teach children proper sex roles within adult relationships.⁴⁸ This “ideal environment” is often said to be the best method by which social values and knowledge can pass between generations; ergo, the government should encourage “responsible procreation,” or procreation within the confines of a pre-existing marriage.⁴⁹

Whether by chance or by design, same-sex couples fall outside this articulation of marriage—because same-sex couples are inherently mono-gendered, they cannot procreate without assistance, and they cannot provide children with both a “mother” and “father” in the classic sense. As a result, opponents conclude that marriage should not be made available to same-sex couples.

Each of the opponents’ arguments proceeds in a fashion similar to this one. By intentionally characterizing the purpose, nature, and function of marriage very narrowly, they are conveniently able to prevent same-sex couples from falling within the definition. Under this narrow sense of marriage, opponents

an offshoot of the larger Mormon church, has practiced polygamy and child marriage throughout its entire history, up to and including the present day. *See id.*

43. *See infra* Part V.A.2.b.

44. In the interests of full disclosure, I admit that I fall into this category.

45. “If a majority be united by a common interest, the rights of the minority will be insecure.” THE FEDERALIST No. 51 (James Madison).

46. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia’s ban on interracial marriage for violating both due process (by impermissibly burdening the fundamental right to marry) and equal protection (by drawing an impermissible racial classification) under the federal Constitution).

47. *See infra* Part V.A (raising and dismissing the key arguments used to justify bans on same-sex civil marriage).

48. *See infra* Part V.A.2.e.

49. *See infra* Parts V.A.2.c, f.

thus conclude that marriage-*qua*-marriage cannot, by definition, be made available to same-sex couples, because “what they want does not exist.”⁵⁰

Conversely same-sex marriage advocates take a broader view, frequently conceiving of marriage as a choice-based institution that is designed to allow individuals to make autonomous decisions as to partner, family structure, and effective methods of values-transfer to children.⁵¹ Indeed, one of the primary rebuttals to the “ideal” environment characterization of marriage is the very existence of divorce—if marriage is truly only about providing a mother and father for as many children as possible, then governments should necessarily make it much harder for married couples (and particularly those with children) to obtain a divorce.⁵² Moreover, if marriage were only about encouraging “responsible procreation,” couples that are infertile, elderly, or who do not want children should not be permitted to marry at all.⁵³ Yet, such prohibitions do not exist and seem intuitively absurd—but why? If Supreme Court precedent is any guide, marriage has been substantively reconceived as a private-ordering system that is not expressly tied to procreation and child-rearing;⁵⁴ thus, it would appear that marriage-*qua*-marriage—at least as opponents have conceived of it—does not exist.⁵⁵ If this is indeed the case, then, as a friend of

50. See Carpenter, *supra* note 38, at 186 (explaining the definitional argument).

51. Cf. generally, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27 (2003) (evaluating the fit of *Lawrence v. Texas*, 539 U.S. 558 (2003), within the larger body of autonomous choices that are currently protected by the Court’s fundamental privacy-rights jurisprudence).

52. For a more detailed discussion of this argument, see *infra* Part V.A.2.e.

53. For a more detailed discussion of this argument, see *infra* Part V.A.

54. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (holding that a prisoner’s right to marry could not be burdened by a requirement that the prisoner first receive permission from the prison warden before being permitted to marry another inmate or a citizen). *Turner* did not assume that prisoners have any right to conjugal visits or other sexual relations with their spouses. See *id.* at 95–96; accord Arthur S. Leonard, *Going for the Brass Ring: The Case for Same-Sex Marriage*, 82 CORNELL L. REV. 572, 587 (1997) (“By acknowledging that the state could refuse to allow prisoners to have sex with their spouses while incarcerated, the [*Turner*] Court implicitly rejected any contention that procreation is an indispensable attribute of marriage.” (alteration added)) (reviewing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 n.36 (2004) (noting that *Turner* held “without assuming that prisoners have any right to conjugal visits, that prisoners have a right to marry”); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2691 (2004) (“Of particular importance [to the evolution of marriage] was the extension, in *Turner v. Safley*, of the right to marry to [sic] circumstances under which procreation and child rearing were literal impossibilities.” (alterations added and footnote omitted)); cf. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (holding a statutory ban on contraception to be an unconstitutional violation of a married couple’s due process right to privacy in procreative decisionmaking).

55. See, e.g., James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 32 (2003) (in supporting broader marriage equality, suggesting that “family law is moving from a conception of marriage as an institution with a uniform meaning to a more variegated view that assesses marriage in terms of discrete groupings, or ‘bundles,’ of rights and responsibilities”).

An argument also exists that marriage as opponents would have it has *never* existed: In many societies, marriage began as a means to transfer wealth and property within bloodlines and class structures. While this history does not challenge the teleology of marriage, it does challenge the opponents’ claimed reasons for having marriage at all.

mine once said, “What’s the big deal with letting two people own property together?”

This definitional question has traditionally sounded in two constitutional doctrines: due process and equal protection.⁵⁶ It is important to briefly examine these doctrines before addressing the substantive Establishment Clause question, because the level of scrutiny and analytical methods employed in these areas will prove to be highly relevant.⁵⁷

First, the definitional question we face implicates “fundamental rights” under substantive due process. Opponents of same-sex marriage seek to define the right to marry very narrowly, while supporters seek a broader definition. (In other due-process cases, the outcome turned on whether the narrow or broad definition of the right prevailed,⁵⁸ just as it does here.) If a court construes the claimed right to marry narrowly, then same-sex marriage advocates have a difficult road to hoe: “[T]he right to marry someone of the same sex”⁵⁹ is not fundamental, because same-sex civil marriage is not “deeply rooted in this Nation’s history and tradition;”⁶⁰ as a result, the government’s interest in

56. *E.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 960 (Mass. 2003) (“The plaintiffs challenge the marriage statute on both equal protection and due process grounds.”); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (noting that plaintiffs presented both due process and equal protection claims); *Andersen v. King County*, 138 P.3d 963, 968 (Wash. 2006) (same); *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) (same).

57. *See infra* Part V.

58. *E.g.*, *compare Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding Georgia’s sodomy statute to be constitutional, because the fundamental due process “right to privacy” did not include a “fundamental right to engage in homosexual sodomy”), *with id.* at 199 (Blackmun, J., dissenting) (“This case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone.” (quotations and citation omitted)), *and Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”). *Compare also Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (Scalia, J., plurality opinion) (holding that the fundamental “right to parent” does not include awarding procedural due process rights to a natural father seeking paternity rights, when (1) the natural father is not the mother’s husband, (2) the presumption of marital paternity has gone un rebutted, and (3) the mother’s husband wishes to “embrace the child” within a “unitary family”), *with id.* at 141 (Brennan, J., dissenting) (noting the fundamental due process conception of “‘liberty’ must include the freedom not to conform” to pre-existing conceptions of “family” and “parenthood”).

In his *Michael H.* plurality opinion, Justice Scalia attempted to fix the method of inquiry for fundamental due process claims as “refer[ring] to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Id.* at 128 n.6. While four Justices signed on to the plurality opinion, Scalia’s conception of fundamental due process claims received only two votes: his and Justice Rehnquist’s. *See id.* at 132 (O’Connor, Kennedy, JJ., concurring in part).

I concur in all but footnote 6 of Justice Scalia’s opinion. . . . On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be the most specific level available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

Id. (internal quotations and citations omitted).

59. *Hernandez*, 855 N.E.2d at 9.

60. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (holding that there is no fundamental liberty interest in committing suicide or in assisting someone to commit suicide, because committing suicide is not “deeply rooted in this Nation’s history and tradition”) (citation omitted).

providing only opposite-sex couples with civil marriage receives rational-basis review. Analytically, same-sex marriage advocates are thus required to establish two propositions: (1) preventing same-sex couples from marrying is not rationally related to the state's interests in sustaining opposite-sex marriage and (2) allowing opposite-sex couples to marry is also not rationally related to the state's interests. Stated differently, same-sex marriage advocates are essentially required to establish that the state's purported interests in maintaining opposite-sex marriage are not legitimate.⁶¹ This is very difficult for two reasons: (1) there are many reasons that governments have opposite-sex marriage, and courts will probably find at least *some* of them to be legitimate; and (2) it is more likely than not that courts will determine opposite-sex marriage rationally advances these interests. Of all courts-of-last-resort to review due-process claims for same-sex marriage, only *Goodridge* has held that the state's asserted interests did not survive rational-basis review under a due process claim;⁶² this is partly because the Massachusetts Supreme Judicial Court construed the right in question to be "the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare."⁶³ No court yet has found a fundamental right to same-sex marriage *per se*.

Second, our definitional question also raises equal-protection concerns. Laws that limit marriage to heterosexuals single out sexual minorities⁶⁴ for disparate treatment based on a single trait. If courts begin to find that sexual minorities—particularly homosexuals—comprise a suspect class, they would begin to undertake a heightened scrutiny of the classifications drawn by heterosexuals-only marriage laws. Technically speaking, having a heterosexual sexual orientation is not a prerequisite to marriage: As many opponents delight in noting, homosexuals remain free to get married—they just have to marry someone of the opposite sex.⁶⁵ Nevertheless, under heightened-scrutiny review, a court would examine the classification to determine what group is most likely to be disparately impacted by the law. Clearly, same-sex civil marriage bans have no legal effect on heterosexuals, who continue to enjoy the right to engage in a course of action consistent with the nature of heterosexuality: entering into a relationship with someone of the opposite sex and subsequently marrying that individual. But these bans have a substantial legal effect on homosexuals, who are prevented from engaging in a course of action consistent with the nature of

61. *Cf. generally* *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional amendment prohibiting the state or local governments from passing anti-discrimination laws to protect homosexuals as illegitimate and based purely in animus against homosexuals as a group); *Lawrence*, 539 U.S. at 558 (invalidating a state statute criminalizing homosexual—but not heterosexual—sodomy as illegitimate and based purely in animus against homosexuals as a group).

62. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

63. *Id.* at 958.

64. This term is used to represent all manner of non-heterosexual individuals.

65. *See, e.g.*, Orson Scott Card, *Civilization Watch: Homosexual "Marriage" and Civilization*, THE RHINOCEROS TIMES (Greensboro, N.C.) (online ed.), Feb. 15, 2004 ("[I]t is a flat lie to say that homosexuals are deprived of any civil right pertaining to marriage. To get those civil rights, all homosexuals have to do is find someone of the opposite sex willing to join them in marriage. (alteration added)), available at <http://www.ornery.org/essays/warwatch/2004-02-15-1.html> (last visited Jan. 3, 2007). *But see Goodridge*, 798 N.E.2d at 958 (holding that "the right to marry means little if it does not include the right to marry the person of one's choice").

homosexuality: entering into a relationship with someone of the same sex and then marrying that person. As a result, homosexuals as a class are prevented from engaging in a desired course of action based on a single trait, and the marriage bans that draw these classifications would face an uphill battle within a heightened-scrutiny regime.

Unfortunately, the equal-protection heightened-scrutiny claim has not caught on in either federal or state courts.⁶⁶ As such, rational-basis review is currently all that is available for same-sex marriage advocates. Therefore, advocates must undertake an analysis similar to the one outlined above for due process. Essentially, they must establish that a heterosexuals-only definition of marriage irrationally discriminates against homosexuals as homosexuals. Said differently, advocates must establish that the state has no legitimate interest in excluding homosexuals from marriage when it makes marriage available to heterosexuals.

Because marriage is, in due-process terms, an individually-based right and not a couple-based right, it makes sense to characterize the equal-protection claim here along the lines of sexual orientation—a classification based on sexual orientation impacts individuals and not couples. However, the equal-protection violation could also be characterized as challenging the disparate treatment of opposite-sex and same-sex couples. Regardless of how the argument is cast, the methodology of the rational-basis analysis remains the same.⁶⁷

All told, advocates have had more success making equal-protection claims than due-process claims: All courts that have ruled in favor of same-sex couples have invoked equal protection; these cases have universally resulted in civil unions. Only *Goodridge* resulted in “marriage,” most likely because the Massachusetts Court *also* invoked due process; to date, it is the only court to have done so. Had *Goodridge* found *only* an equal-protection violation, the case might well have resulted in civil unions, just like the others.⁶⁸

66. *But see* Lewis v. Harris, 908 A.2d 196, 211–21 (N.J. 2006) (noting that, in light of the general equal-protection guarantees of the New Jersey Constitution and the state’s history of positive treatment of homosexuals, the interest of same-sex couples in receiving the benefits of marriage outweighed the state’s interest in denying same-sex couples these benefits). The Lewis Court did not make an express finding that homosexuals are constitutionally entitled to heightened scrutiny for equal-protection claims. *See id.* at 211–24.

67. *But see generally* Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002) (arguing that same-sex marriage bans constitute straightforward sex-discrimination violations and are therefore entitled to intermediate scrutiny under the federal Constitution); *but see also infra* note 404 and accompanying text.

68. *Compare Goodridge*, 798 N.E.2d at 969 (in response to both due-process and equal-protection violations, construing “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others”), *with Lewis*, 908 A.2d at 221–24 (ordering on equal-protection grounds that same-sex couples be given the rights and benefits of civil marriage, but not requiring that the resulting legal arrangement be termed “marriage”) *and Baker v. State*, 744 A.2d 864 (Vt. 1999) (same). *See also Baehr v. Lewin*, 852 P.2d 44, 60–67 (Haw. 1993) (characterizing the equal-protection violation as based in sex discrimination, which triggered heightened scrutiny under the Hawai’i Constitution; remanding claim for further review under the heightened-scrutiny standard), *superseded by constitutional amendment and subsequent statute*, HAW. CONST. art I, § 23 (adopted 1998) (reserving power to define marriage to the legislature); HAW. REV. STAT. § 572-1 (West Supp. 2006) (defining marriage as between one man and one woman). The *Baehr* Court is the only court-of-last-resort to date that has found a ban on same-sex marriage to expressly trigger any constitutionally-mandated

As these brief discussions show, the definitional question can be resolved in favor of same-sex civil marriage within the scope of either doctrine: Under substantive due process, we must adopt a broad definition of the “right to marry,” regardless of whether a fundamental right is implicated; under equal protection, we must identify homosexuals as a suspect class deserving of heightened scrutiny. In rarer instances—i.e., *Goodridge*⁶⁹ or *Lewis*⁷⁰—we might determine that the state’s interest is so lacking that neither of these actions is prerequisite to holding in favor of same-sex marriage or civil unions.

The arguments for same-sex civil marriage are numerous, nuanced, and complex. Because I am not advancing a due-process or equal-protection argument in favor of same-sex marriage, rehearsing them here is not necessary.⁷¹ For our purposes, it is important to keep in mind the courts’ consistent application of rational-basis review and the accompanying analytical method.

B. The Establishment Clause and Our Religious Heritage

In our pluralistic society, religious beliefs and sectarian texts like the Bible are considered by many to be unacceptable grounds for developing generally-applicable social and political policy.⁷² The Religion Clauses of the First Amendment reflect the Framers’ understanding that, when society conflates worldly and spiritual authorities, it undermines both. Religions cannot flourish when subjected to governmental meddling, and republican governments cannot survive when they are hijacked by religious dogma. The English settlement of New England began as a direct result of religious persecution against the Puritan belief system; the Settlers’ own experiments with religious governance showed that striving toward an ideologically-homogenous state led to dangerously unstable and tyrannical results—i.e., the Salem witch trials. Against this instructive history, the Framers drew the Religion Clauses to establish two primary goals: (1) keeping the government out of the pulpit (the Free Exercise Clause), and (2) keeping the pulpit out of the government (the Establishment Clause).

The American legal system has historically assumed that there is no inherent Establishment Clause problem with the form of marriage it inherited

heightened scrutiny, and *Baehr* is the only case so far to hold for same-sex marriage on a sex-discrimination theory.

69. 798 N.E.2d at 969.

70. 908 A.2d at 221–24.

71. As we will see, the argument is not “give us same-sex marriage.” Instead, it is “you haven’t given a good enough reason *not* to give us same-sex marriage.” These statements are cognitively different: one demands a positive assignment of rights, which would shift the scales from being weighted against same-sex marriage to being weighted for it; the other merely rids the scales of religious arguments—this may or may not weight the scales in favor of same-sex marriage, but it certainly makes room for more discussion based on genuinely secular arguments.

72. See Americans United for Separation of Church and State, <http://www.au.org>; People for the American Way, <http://www.pfaw.org>; American Civil Liberties Union, <http://www.aclu.org>; see also *infra* Table 2 and accompanying text. But see “*Our Fight Is Your Fight*,” EQUALITY, Fall 2006, at 9, 11 (interview with Dolores Huerta, co-founder of the United Farmworkers of America) (reporting that a California legislator explained his vote against California’s 2006 marriage-equality bill with the statement, “I vote my religion.”).

from the English common law.⁷³ Indeed, advocates of same-sex marriage have brought an Establishment Clause claim in only one case, *Dean v. District of Columbia* [*Dean I*].⁷⁴ It is ironic, then, that in dismissing the *Dean I* plaintiffs' challenge as "patently frivolous," the trial judge cited to the Bible and to specific Judeo-Christian beliefs regarding the immorality of sodomy and the sinfulness of possessing a homosexual status.⁷⁵ Unsurprisingly, the plaintiffs abandoned their Establishment Clause claim on appeal.⁷⁶

The *Dean I* trial court relied heavily upon the Supreme Court's cases *Lemon v. Kurtzman*,⁷⁷ *McGowan v. Maryland*,⁷⁸ and *Bowers v. Hardwick*.⁷⁹ The Court has subsequently altered both *Lemon* and *McGowan* since *Dean I*, and their applicability to First Amendment challenges has been largely supplanted by newer articulations of the constitutional values underpinning the Establishment Clause.⁸⁰ Moreover, *Bowers* was overruled explicitly in *Lawrence v. Texas*,⁸¹ as a result, it is an outstanding question whether bare religious disapproval of homosexual conduct still constitutes a legitimate justification for reserving civil

73. For a brief overview of the development of English ecclesiastical laws and their subsequent adoption into American legal canons, see Rev. Ellen M. Barrett, *Legal Homophobia and the Christian Church*, 30 HASTINGS L.J. 1019 (1978). See also Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427 (2004) (tracing the tangled history of religious and civil marriage in early America; delineating extant sources of pre-American religious marriage laws, including the Code of Hammurabi, the Torah, the New Testament, Roman consent laws, Anglican and Catholic traditions in Europe, and the English common law).

74. Civ. A. No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991) (challenging the 1981 version of the District of Columbia's Marriage Act, which has been subsequently amended to provide limited domestic partnership benefits to same-sex couples, while still reserving "marriage" for opposite-sex couples), available at 1992 WL 685364, *aff'd on other grounds*, 653 A.2d 307 [*Dean II*] (D.C. 1995).

75. *Dean I*, slip op. at *4 n.18.

76. See generally *Dean II*, 653 A.2d at 307.

77. 403 U.S. 602 (1971) (announcing the three-part "*Lemon* test"; holding that two programs providing state aid to non-public sectarian schools constituted excessive government entanglement with religion). See also *infra* Part IV (discussing the *Lemon* test and its evolution).

78. 366 U.S. 420, 442, 444-49 (1961) (holding that, despite their explicitly religious origin, state-wide Sunday Closing Laws did not violate the federal Constitution, because they had a reasonable secular purpose that existed independent of any incidental religious one; noting that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions"). It would seem, then, that *McGowan* presents a specific challenge to the thesis presented here—if there is a sufficiently secular reason for basing our modern-day definition of marriage upon a religious one, why then would opposite-sex marriage laws fail constitutional scrutiny? This characterization of *McGowan* slightly misconstrues the question before us. As I will discuss below, the question is not whether there is a "reasonable" secular purpose behind having opposite-sex marriage; this is undoubtedly true. Instead, the question is whether there is a "reasonable" secular purpose behind banning same-sex civil marriage. As I will establish, there are no such purposes. Therefore, even under *McGowan*'s rule, same-sex civil marriage bans cannot pass constitutional muster. See *infra* Part V.A (raising and dismissing the key arguments used to support same-sex marriage bans).

79. 478 U.S. 186 (1986), *overruled*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

80. See *infra* Part IV (discussing *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), and *Van Orden v. Perry*, 125 S. Ct. 2854 (2005)).

81. 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

marriage to opposite-sex couples only.⁸² No cases since *Dean I* have raised the Establishment Clause question addressed in this Article. Only recently have government officials⁸³ and commentators⁸⁴ begun to recognize the importance of

82. After *Lawrence*, many commentators have questioned what morals-based legislation—if any—could survive its reasoning. See generally, e.g., Tribe, *supra* note 54; Sunstein, *supra* note 51.

83. 152 CONG. REC. S5465 (daily ed. June 6, 2006) (statement of Sen. Dayton).

What we ought to do is leave marriage up to God. In the religious marriage services of my faith, the minister says that marriage is an institution created by God. Thus, we should leave the definition of marriage to those ordained by God, the leaders of the respective organized religions, and we should redefine the legal term for marriage to civil union or some other words and make that legal contract, with its rights, protections, and responsibilities, available equally to any two adult citizens as the equal protection clauses of our Constitution require.

That would be an American, a Christian, and a just resolution to this situation, one that elevates and enlightens us, one that continues the progress in our country toward acceptance and understanding, one that honors our common humanity.

Id.; *id.* at S5469 (statement of Sen. Harkin).

[I]t should be the right of every religion, under the freedom of religion, to decide the sacramental laws of marriage as defined by that religion. But when it comes to the contractual right, the civil right, that is determined by the State. That is why when you go to get married, you do two things—find a minister, a rabbi, a priest, whatever, but then you have to go to the courthouse of your State and get a license. Why? Because you are entering a contractual relationship. That is what this amendment would take away. Again, I would defend to the death the right of a religion to determine its own sacramental laws of what it determines a marriage to be, but also defend the right of a State to set up its own contractual laws within and under the umbrella of equal rights for all and nondiscrimination under the Constitution of the United States.

Id. (alteration added). See also 152 CONG. REC. H5294 (daily ed. July 18, 2006) (statement of Rep. Cleaver) (“[T]he domain of the church is the place where definitions should be made with regard to marriage. Every denomination has struggled with this issue.” (alteration added)); *id.* at H5309 (statement of Rep. Jackson-Lee) (“The vocal proponents of the MPA [FMA] show their strong and willful hatred of the gay and lesbian community. This egregious amendment would enshrine discrimination against a specific group of citizens and intolerance of specific religious beliefs into our Nation’s most sacred document.” (alteration added)); 150 CONG. REC. H7922 (2004) (written statement of Rep. Jones) (“[W]e . . . must resist the temptation to have the State engage in a religious battle. Separation of church and state is the basic principle of this Nation and it exempts us from this unnecessary action. Separation of church and state gives ministers, rabbis, imams, priests, [and] reverends . . . the freedom to practice their faith and choose to marry, or more importantly not to marry, any two people before them.” (alterations added)); *id.* at H7924 (statement of Rep. Wexler) (“Not only does this amendment completely disregard [our] basic liberties but it actually erodes the religious freedom upon which our great nation was founded.” (alteration added)); *id.* at H7931 (statement of Rep. Meehan) (“[I]f we leave the Constitution intact, every church, every community, and every State will be free to define marriage as they choose.” (alteration added)); *id.* at H7932 (statement of Rep. Honda) (“The legal right to marry—be it man-to-woman or same-sex—is and must remain separate from the religious one.”).

84. See, e.g., BARRY W. LYNN, PIETY & POLITICS: THE RIGHT-WING ASSAULT ON RELIGIOUS FREEDOM 203 (2006).

The Federal Marriage Amendment . . . would say to Unitarian ministers, ministers like myself in the United Church of Christ, and Reform rabbis, ‘Even though you have ecclesiastical authority to perform same-gender marriage rituals, we the state will not recognize those.’ That preference for state ‘blessing’ of only certain marriage rituals seems clearly to violate the idea of equal treatment of all faith traditions in America.

Id. See also Editorial, *Massachusetts diocese might no longer marry: Episcopal priests would stop acting as agents of the state*, STAR TRIB. (Minneapolis-St. Paul), October 11, 2006, at 16A (describing the Episcopal Diocese of Massachusetts’s proposal to stop performing legal marriages as “a healthy separation” between “ministers and priests” and “agents of the state”).

separating church from state in the course of resolving the definitional crisis regarding marriage.

American society and governments have historically—and in the past few years, deliberately—conflated civil marriage with religious marriage. In colonial times, English ecclesiastical marriage served as the model for what is frequently termed “traditional marriage.”⁸⁵ Despite its religious moniker, ecclesiastical marriage was derived in part from the feudal system of property, by which parents arranged marriages between the children of similarly-stationed families in order to protect family interests in land. The church’s role in marriage was twofold: (1) to provide a divine blessing for the marriage, and (2) to stand *in loco gubernationis* for the Crown, similar to how a modern-day state or federal agency governs under the auspices of its respective executive branch. As a result, the church served both religious and legal needs because the English monarchy had no administrative system akin to the modern American system.⁸⁶

With the rise of the American administrative state, the church found its role in the legal—or “civil”—part of marriage increasingly limited: Parties seeking only a “civil” marriage can circumvent the religious aspects of marriage entirely, as each state vests certain government officials with the power to solemnize a marriage. Religious leaders have retained the power to solemnize a marriage on behalf of the government—and legal presumptions favoring validity may arise as a result of a religious marriage ceremony—but the parties generally must file for a marriage license from the state before a marriage becomes fully valid.⁸⁷

Modern conceptions of what constitutes a “civil marriage” are relatively universal: “Civil marriage” occurs when the government recognizes the legal existence of a relationship between certain kinds and numbers of individuals, and as a result of that relationship, vests in those individuals a bundle of legally-enforceable rights, benefits, and responsibilities. Both opponents and advocates of same-sex marriage proffer definitions of marriage that fall within this generic teleological conception of marriage: What opponents of same-sex marriage call “traditional marriage” is the “one-man, one-woman” model of civil marriage that prevails in all jurisdictions save Massachusetts; as mentioned above, same-sex marriage advocates characterize civil marriage as a two-party, choice-based institution, regardless of the gender of the parties. Both of these definitions classify relationships along lines of quality (i.e., gender of the parties) and

85. Opponents of same-sex marriage have adopted the phrase “traditional marriage” as a clarion call to their fundamentalist constituencies. Lawmakers and fundamentalist political activists alike frequently use code words—e.g., “traditional marriage,” “ideal environment,” “gender-complementarity,” “values-transmission”—to signal their support for insinuating one set of fundamentalist Christian values into the law. See discussion *infra* Part III.A (identifying code words as a key part of the modernization of anti-gay discourse).

86. See also generally Barrett, *supra* note 73.

87. *But see* State v. Denton, 983 P.2d 693 (Wash. App. 1999) (validating a marriage when, despite their failure to formally file for a marriage license, the couple had gone through a religious ceremony and had held one another out as husband and wife for a period of several years). See also IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 73–79 (4th ed. 2004) (describing the formal requirements for licensing and solemnizing a marriage; identifying potential procedural defects in meeting these formal requirements; discussing various judicial methods of addressing procedural defects).

quantity (i.e., number of parties),⁸⁸ but they give a different weight to each of the factors. Advocates place almost no weight on the quality of the parties, while opponents give each factor equal importance.

Religious notions of “marriage” vary widely and depend both upon the creed of the religious institution and upon the particular adherents. Teleologically, modern permutations of “religious marriage” range from two-party marriage (including same-sex marriage) to man-woman marriage (so-called “traditional marriage”) to polygamy. Table 1 summarizes the positions of major American and world religions regarding the nature of marriage.

This list of religious beliefs is far from exhaustive, and it is not intended to characterize non-Judeo-Christian faith communities one-dimensionally. It is indeed likely that theological and philosophical divisions exist within Buddhist, Islamic, and Hindu traditions that parallel the theological divisions among Jews and Christians over the issues of homosexuality and same-sex marriage. For our purposes, however, this table is sufficient to show that, both in America and worldwide, there is no religious consensus on the meaning of “marriage.”

Opponents of same-sex marriage have pointed out that, regardless of this diversity of belief, the vast majority of religious observers in America belong to groups that either oppose or are theologically suspicious of homosexuality and same-sex marriage.⁸⁹ Undoubtedly, the opponents’ suggestion is that such an incredible majority of believers cannot be wrong about the meaning of marriage. While it is true that a huge majority of believers belong to faith traditions that profess belief in exclusively opposite-sex marriage, it is an oversimplification to assume that every believer within each one of those faith traditions also believes that same-sex religious marriage is theologically unsound. Such a suggestion belies the complexity of most faith systems and willfully mischaracterizes the ongoing theological shift occurring within several large, mainstream churches.

Consider: the list of religious groups in the “Traditional Marriage” column is the largest of any column. However, a nearly-equal number of religious groups are listed in the “Traditional Marriage”-Plus column, and if we add in the number of religious groups in the Two-Party Marriage column, the total exceeds the number of groups listed in the first. Of the groups listed under “Traditional Marriage”-Plus, a significant number have simultaneously affirmed opposite-sex marriage and begun to grapple with the theological implications of same-sex marriage. This reveals that religious beliefs regarding same-sex mar-

88. There may be a third dimension to the teleological matrix: character (i.e., intimate relationship between the parties). However, an intimate relationship is no longer required for a marriage to legally exist, and parties to a marriage are not required to love one another before they get married. See *supra* notes 54–55 (discussing the general consensus that the legal aspects of marriage no longer turn on the parties’ ability to procreate or their willingness to be intimate). As a result, the character of marriage seems significantly less relevant to the teleological debate than the quality and quantity of marriage. But see *infra* Part V.A.2.d (discussing the civilizing qualities inherent in marital relationships).

89. See, e.g., MARRIAGE LAW PROJECT, WORLD RELIGIONS AND SAME-SEX MARRIAGE 1 (2002) (“In the United States, of 163,916,650 adherents of the five major religions [Christianity, Judaism, Islam, Hinduism, and Buddhism], 160,049,690 are in religious bodies that affirm the classical definition of marriage (97.6 percent), while 3,030,930 are in religious bodies which support same-sex ‘marriage’ (2.4 percent).” (alteration added)), available at <http://marriagelaw.cua.edu/publications/wrr.pdf>.

TABLE 1. RELIGIOUS VIEWS ON MARRIAGE.

<p>“Traditional Marriage”: Opposite-Sex Marriage</p>	<p>“Traditional Marriage”- Plus: Opposite-Sex Marriage; Some Congregations Bless Same-Sex Unions; No Unified Theological Viewpoint</p>	<p>Two-Party Marriage: Opposite-Sex and Same-Sex Marriage</p>	<p>Polygamy/Polyamory</p>
<p><u>Christian Traditions</u> American Baptist Association⁹⁰ Anabaptists (Amish, Mennonites)⁹¹ Assemblies of God (Pentecostal)⁹² Children of God (The Family)⁹³ Christian Reformed (Calvinist)⁹⁴ Church of Christ⁹⁵ Latter-Day Saints (Mormons)⁹⁶ Coptic Orthodox⁹⁷ Evangelical Christian Church (Christian Disciples)⁹⁸ Jehovah’s Witnesses (The Watchtower)⁹⁹ Presbyterian Church in America (PCA)¹⁰⁰ Reformed Church in America¹⁰¹ Roman Catholic Church¹⁰² Russian Orthodox Church¹⁰³ Seventh-Day Adventist¹⁰⁴ Southern Baptist Convention¹⁰⁵ Unification Church (“Moonies”)¹⁰⁶ United Pentecostal Church International¹⁰⁷ The Way, International¹⁰⁸ Worldwide Church of God¹⁰⁹ <u>Judaic Traditions</u> Orthodox (and Ultra-Orthodox)¹¹⁰ <u>Other Traditions</u> Baha’i¹¹¹ Hinduism¹¹² Zoroastrianism¹¹³</p>	<p><u>Christian Traditions</u> American Baptist Churches in the USA (Northern Baptist Convention, American Baptist Convention)¹¹⁴ Christian Church (Disciples of Christ)¹¹⁵ Church of Christ, Scientist (Christian Science)¹¹⁶ Community of Christ (Reorganized Latter-Day Saints)¹¹⁷ Cooperative Baptist Fellowship¹¹⁸ Episcopal Church, USA¹¹⁹ Evangelical Lutheran Church of America¹²⁰ Presbyterian Church (USA)¹²¹ Quakers (Society of Friends)¹²² United Methodist Church¹²³ Unity Church¹²⁴ <u>Judaic Traditions</u> Conservative¹²⁵ <u>Other Traditions</u> Buddhism¹²⁶ Native American Traditions¹²⁷ Neopaganism (Asatru, Druid, Wicca, Witchcraft)¹²⁸ Scientology¹²⁹ Theosophy¹³⁰</p>	<p><u>Christian Traditions</u> Alliance of Baptists (Southern Baptist Alliance)¹³¹ Evangelicals Concerned¹³² Metropolitan Community Church¹³³ National Gay Pentecostal Alliance¹³⁴ United Church of Canada¹³⁵ United Church of Christ¹³⁶ <u>Judaic Traditions</u> Reconstructionist¹³⁷ Reform¹³⁸ <u>Other Traditions</u> Unitarian-Universalist Association¹³⁹</p>	<p><u>Christian Traditions</u> Fundamentalist Latter-Day Saints: opposite-sex marriage and polygamy—man may have two or more wives¹⁴⁰ <u>Other Traditions</u> Islam: opposite-sex marriage and polygamy—man may have two or more wives¹⁴¹</p>

90. Religious Tolerance.org, American Baptist Association and Homosexuality, http://www.religioustolerance.org/hom_aba.htm (last visited Jan. 4, 2007).

91. Religious Tolerance.org, The Mennonite Churches and Homosexuality, http://www.religioustolerance.org/hom_men.htm (last visited Jan. 4, 2007); Religious Tolerance.org, The Amish: Practices of Various Groups, <http://www.religioustolerance.org/amish4.htm> (describing marriage practices of several Amish communities in America) (last visited Jan. 4, 2007).

92. Religious Tolerance.org, The Assemblies of God and Homosexuality, http://www.religioustolerance.org/hom_ag.htm (last visited Jan. 4, 2007).

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93. Religious Tolerance.org, The Family a.k.a. The Children of God: Its beliefs about homosexuality, <http://www.religioustolerance.org/homthefam.htm> (last visited Jan. 4, 2007).
94. Religious Tolerance.org, Christian Reformed Church and Homosexuality, http://www.religioustolerance.org/hom_crc.htm (last visited Jan. 4, 2007).
95. Religious Tolerance.org, The Church of Christ, and Homosexuality, http://www.religioustolerance.org/hom_coc.htm (last visited Jan. 4, 2007).
96. Religious Tolerance.org, The LDS Church & Homosexuality, http://www.religioustolerance.org/hom_lds.htm (last visited Jan. 4, 2007).
97. Religious Tolerance.org, The Coptic Orthodox Church and homosexuality, http://www.religioustolerance.org/hom_copt.htm (last visited Jan. 4, 2007).
98. Religious Tolerance.org, The Evangelical Christian Church and Homosexuality, http://www.religioustolerance.org/hom_eccdc.htm (last visited Jan. 4, 2007).
99. Religious Tolerance.org, Jehovah's Witnesses and Homosexuality, http://www.religioustolerance.org/hom_jeh.htm (last visited Jan. 4, 2007).
100. Religious Tolerance.org, The Presbyterian Church in American (PCA) and Homosexuality: *Statements on homosexuality: 2000 to now*, http://www.religioustolerance.org/hom_pcia3.htm (last visited Jan. 4, 2007).
101. Religious Tolerance.org, Reformed Church in America and Homosexuality, http://www.religioustolerance.org/hom_rca.htm (last visited Jan. 4, 2007).
102. Religious Tolerance.org, Roman Catholic Church and Homosexuality, http://www.religioustolerance.org/hom_rom4.htm#ssm (last visited Jan. 4, 2007).
103. Religious Tolerance.org, Russian Orthodox Church and Homosexuality, http://www.religioustolerance.org/hom_russi.htm (last visited Jan. 4, 2007).
104. Religious Tolerance.org, The Seventh-Day Adventist Church and Homosexuality, http://www.religioustolerance.org/hom_sda.htm (last visited Jan. 4, 2007).
105. Religious Tolerance.org, Southern Baptist Convention and Homosexuality, http://www.religioustolerance.org/hom_sbc.htm (last visited Jan. 4, 2007).
106. Religious Tolerance.org, The Unification Church and Homosexuality, http://www.religioustolerance.org/hom_uni.htm (last visited Jan. 4, 2007).
107. Religious Tolerance.org, Homosexuality and the Pentecostal movement, http://www.religioustolerance.org/hom_upci.htm (last visited Jan. 4, 2007). Several offshoots of the Pentecostal movement—e.g., the National Gay Pentecostal Alliance—would fall in the “Two-Party Marriage” category as fully affirming the right of same-sex couples to be religiously married. *Id.*
108. Religious Tolerance.org, The Way, International and Homosexuality, http://www.religioustolerance.org/hom_way.htm (last visited Jan. 4, 2007).
109. Religious Tolerance.org, The Worldwide Church of God and Homosexuality, http://www.religioustolerance.org/hom_wcg.htm (last visited Jan. 4, 2007).
110. Religious Tolerance.org, Judaism and Homosexuality: Orthodox Judaism, http://www.religioustolerance.org/hom_jortho.htm (last visited Jan. 4, 2007).
111. Religious Tolerance.org, The Baha'i Faith and Homosexuality, http://www.religioustolerance.org/hom_bah.htm (last visited Jan. 4, 2007).
112. MARRIAGE LAW PROJECT, *supra* note 89, at 3 (“Within the history of Hinduism, one finds a variety of views on homosexual feelings and behaviors, ranging from indifference to disapproval to strong opposition.” (citing Arvind Sharma, *Homosexuality and Hinduism*, in *HOMOSEXUALITY AND WORLD RELIGIONS* 68 (Arlene Swidler ed., 1993) (observing that as “a religion Hinduism is perhaps more tolerant of homosexuality than it is as a culture”))).
113. Religious Tolerance.org, The Zoroastrian Faith and Homosexuality, http://www.religioustolerance.org/hom_zor.htm (last visited Jan. 4, 2007). Zoroastrians have taken no public stance on same-sex marriage, and they are divided regarding the morality of homosexuality. *Id.*
114. Religious Tolerance.org, American Baptist Churches in the USA, and Homosexuality, http://www.religioustolerance.org/hom_abc.htm (last visited Jan. 4, 2007).
115. Religious Tolerance.org, The Christian Church (Disciples of Christ) and Homosexuality, http://www.religioustolerance.org/hom_disc.htm (last visited Jan. 4, 2007).

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116. Religious Tolerance.org, The Church of Christ, Scientist (Christian Scientist) & Homosexuality, http://www.religioustolerance.org/hom_chsc.htm (last visited Jan. 4, 2007).
117. Religious Tolerance.org, The Community of Christ and Homosexuality, http://www.religioustolerance.org/hom_reo.htm (last visited Jan. 4, 2007).
118. Religious Tolerance.org, The Cooperative Baptist Fellowship, and Homosexuality, http://www.religioustolerance.org/hom_cbf.htm (last visited Jan. 4, 2007).
119. Religious Tolerance.org, The Episcopal Church, USA and Homosexuality, http://www.religioustolerance.org/hom_epis.htm (last visited Jan. 4, 2007).
120. Religious Tolerance.org, Evangelical Lutheran Church in America and Homosexuality, http://www.religioustolerance.org/hom_ecla4.htm (last visited Jan. 4, 2007).
121. Religious Tolerance.org, The Presbyterian Church (USA) and Same-Sex Unions, http://www.religioustolerance.org/hom_pru5.htm (last visited Jan. 4, 2007); Religious Tolerance.org, The Presbyterian Church (USA) and Homosexuality, http://www.religioustolerance.org/hom_pru.htm (last visited Jan. 4, 2007).
122. Religious Tolerance.org, The Society of Friends (Quakers) and Homosexuality, http://www.religioustolerance.org/hom_quak.htm (last visited Jan. 4, 2007).
123. Religious Tolerance.org, The United Methodist Church and Homosexuality: An Overview, http://www.religioustolerance.org/hom_umc4.htm (last visited Jan. 4, 2007).
124. Religious Tolerance.org, Unity Church and Homosexuality, http://www.religioustolerance.org/hom_unit.htm (last visited Jan. 4, 2007).
125. Religious Tolerance.org, Judaism and Homosexuality: Conservative Judaism, http://www.religioustolerance.org/hom_jcons.htm (last visited Jan. 4, 2007). *See also* Laurie Goodstein, *Conservative Jews Allow Gay Rabbis and Unions*, N.Y. TIMES, Dec. 7, 2006, at A26 (reporting on the December 6, 2006 vote that permitted “individual synagogues to decide whether to accept or reject gay rabbis and commitment ceremonies”).
126. Religious Tolerance.org, The Buddhist Religion and Homosexuality, http://www.religioustolerance.org/hom_budd.htm (last visited Jan. 4, 2007). Buddhists have taken no public stance regarding same-sex marriage, but they are generally against anti-gay discrimination. *Id.* However, the Dalai Lama has described homosexual sex as against Buddhist teachings because it is a misuse of the sex organs. *Id.*
127. Religious Tolerance.org, Homosexuality and Religion: Policies of Non-Judeo-Christian Religions, http://www.religioustolerance.org/hom_chur3.htm#nativ (last visited Jan. 4, 2007). Many Native American traditions have celebrated homosexuals as healers and shamans, referring to them as berdache or “two-spirited.” *Id.* To date, no Native American tribes permit same-sex marriage, but several tribes—including the Cherokee and Navajo—have taken up the issue in recent years. *See* Lois Romano, *Battle Over Gay Marriage Plays Out in Indian Country*, WASH. POST, Aug. 1, 2005, at A2 (noting that one Cherokee lesbian couple was permitted to marry before the Cherokee Nation banned same-sex civil marriage).
128. Religious Tolerance.org, Homosexuality and Religion: Policies of Non-Judeo-Christian Religions, http://www.religioustolerance.org/hom_chur3.htm#neopa (last visited Jan. 4, 2007). It is likelier than not that, given the general openness of Neopaganism to homosexuality, most Neopaganists would publicly support same-sex marriage within their faith traditions. However, given the decentralized nature of the coven system, there is no one public stance on same-sex marriage that is attributable to Neopaganism. *See id.*
129. Religious Tolerance.org, The Church of Scientology® & homosexuality, http://www.religioustolerance.org/hom_scie.htm (last visited Jan. 4, 2007). Scientologists have taken no public stance regarding same-sex marriage, but they are generally against anti-gay discrimination. *Id.*
130. Religious Tolerance.org, Homosexuality and Theosophy, http://www.religioustolerance.org/hom_theo.htm (last visited Jan. 4, 2007). Theosophists have taken no public stance regarding same-sex marriage, but they are generally against anti-gay discrimination. *Id.*
131. Religious Tolerance.org, The Alliance of Baptists and homosexuality, <http://www.religioustolerance.org/homalbapt.htm> (last visited Jan. 4, 2007).
132. Evangelicals Concerned, About Evangelicals Concerned, <http://www.ecwr.org/aboutus/aboutus.html> (last visited Jan. 4, 2007). Evangelicals Concerned is “a nationwide ministry which encourages and affirms lesbian, gay, bisexual and transgendered Christians in their faith.” *Id. See also*

-riage are neither static nor universally-held within a single faith system—in fact, a heated debate is currently taking place within major religious groups around the nation.¹⁴²

Finally, it is critical to understand that, just because a particular religious group rejects same-sex *religious* marriage, it does not necessarily follow that the

Neela Banerjee, *Gay and Evangelical, Seeking Paths of Acceptance*, N.Y. TIMES, Dec. 12, 2006, at A1 (reporting on Evangelicals Concerned and other gay-affirming Evangelical Christian groups).

133. Religious Tolerance.org, The Metropolitan Community Church and Homosexuality, http://www.religioustolerance.org/hom_met.htm (last visited Jan. 4, 2007).

134. Religious Tolerance.org, Homosexuality and the Pentecostal movement, http://www.religioustolerance.org/hom_upci.htm (last visited Jan. 4, 2007).

135. Religious Tolerance.org, United Church of Canada and Homosexuality, http://www.religioustolerance.org/hom_ucc.htm (last visited Jan. 4, 2007).

136. Religious Tolerance.org, United Church of Christ and Homosexuality: General Synod 25 in 2005: Endorsement of same-sex marriage, http://www.religioustolerance.org/hom_ucca4.htm (last visited Jan. 4, 2007).

137. Religious Tolerance.org, Judaism and Homosexuality: Other Groups, http://www.religioustolerance.org/hom_jother.htm (last visited Jan. 4, 2007).

138. Religious Tolerance.org, Judaism and Homosexuality: Reform Judaism, http://www.religioustolerance.org/hom_jref.htm (last visited Jan. 4, 2007).

139. Religious Tolerance.org, The Unitarian-Universalist Association and Homosexuality, http://www.religioustolerance.org/hom_uua.htm (last visited Jan. 4, 2007).

140. See Bill Hanna, *Sect's Texas Outpost Looking Permanent*, FT. WORTH STAR-TELEGRAM, Jan. 1, 2007, at B1 (cataloguing polygamous history of the Fundamentalist Church of Latter-Day Saints from 1890–2006).

141. See OFFENHAUER, *supra* note 40, at 40–41 (cataloguing Islamic nations in which polygamy is legal). See also Religious Tolerance.org, Islam and Homosexuality: All Viewpoints, http://www.religioustolerance.org/hom_isla.htm (noting that Islamic traditions oppose homosexuality and same-sex relationships and that homosexual behavior is punishable by death in several Islamic nations) (last visited Jan. 4, 2007).

142. The seriousness of this theological dispute is not debatable. For example, the seventy-seven million-member world-wide Anglican Communion, known in the United States as the Episcopal Church, has begun to schism over the ordination of openly homosexual bishops. See, e.g., *Episcopalians approve gay bishop: Opposition vows to seek intervention from Anglican leaders*, CNN.COM, Aug. 6, 2003, <http://www.cnn.com/2003/US/08/05/bishop/> (last visited Jan. 8, 2007); Alex Kirby, *Analysis: Anglican schism nears reality*, BBC NEWS UK, Feb. 25, 2005, <http://news.bbc.co.uk/1/hi/uk/4296373.stm>.

In an attempt to stave off schism, key Anglican leaders have begun a dialogue about how to keep the church from fracturing over the issues of homosexuality, gay-ordination, and same-sex marriage. E.g., Peter Lee & Jack Spong, *A Catechesis on Homosexuality* (2006), <http://www.dioceseofnewark.org/jspong/catech.html> (identifying the roots of the theological debate over homosexuality and encouraging Anglicans to remain committed to continued unification) (last visited Aug. 9, 2006). Bishops Lee and Spong are from the Dioceses of Christ the King (Southern Africa) and Newark (USA), respectively. *Id.*

Despite these best efforts, American Episcopalians are finding that the issue of schism is far from resolved. On December 17, 2006, eight Episcopal parishes in Virginia voted to break with the American Episcopal Church over the ordination of gays and women. *Wars of Religion*, ECONOMIST, Dec. 23, 2006, at 65.

Finally, intra-sect divisions over social issues are not limited to same-sex marriage. For example, in the abortion context, most of the religious groups in the “Traditional Marriage” column oppose abortion, but polls show that the majority of Americans support preserving a woman’s right to choose as a fundamental constitutional right. See PEW RESEARCH CENTER, ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES 1 (2005), available at <http://people-press.org/reports/pdf/253.pdf>.

group also rejects same-sex *civil* marriage. As mentioned above, some religious groups regard the *legal* right to marry as a civil or human right, regardless of their own beliefs about the morality or immorality of homosexuality.¹⁴³ Likewise, *individuals* within faith traditions are not of one mind—and as voters, they may vote against same-sex marriage bans as a matter of civic conscience, while simultaneously believing that homosexuality is sinful or theologically problematic.

And what of non-theists? Secularists are found throughout America. By its nature, secularism rejects religion and mysticism, instead drawing upon philosophy and science as sources of personal morality. As a whole, Secularists favor same-sex civil marriage.¹⁴⁴ For comparison purposes, the beliefs of Secularists are laid out in Table 2.

TABLE 2. SECULAR VIEWS ON MARRIAGE.

"Traditional Marriage": Opposite-Sex Marriage	"Traditional Marriage"- Plus: Opposite-Sex Marriage; Some Members Support Same-Sex Unions; No Unified Viewpoint	Two-Party Marriage: Opposite-Sex and Same-Sex Marriage	Polygamy/Polyamory
		<p><u>Atheist Traditions</u> American Atheists¹⁴⁵</p> <p><u>Humanist Traditions</u> American Humanist Association (Humanist Society)¹⁴⁶ Council for Secular Humanism¹⁴⁷ Institute for Humanist Studies¹⁴⁸</p> <p><u>Secular Traditions</u> Secular Coalition for America¹⁴⁹ Secular Judaism¹⁵⁰</p>	

143. *E.g.*, Religious Tolerance.org, Reformed Church in America and Homosexuality, http://www.religioustolerance.org/hom_rca.htm (noting that, while “[h]omosexuality is not God’s intended expression of sexuality,” the church also believes that “[h]omosexual persons should be accorded their full measure of human and civil rights” (alterations added)) (last visited Jan. 4, 2007); *see also* Religious Tolerance.org, The United Methodist Church and Homosexuality: An Overview, http://www.religioustolerance.org/hom_umc4.htm (reporting that liberals within the UMC “generally look upon gay/lesbian ordination and same-sex marriage as civil rights issues—fundamental human rights . . . that should be available to persons of all sexual orientations”) (last visited Jan. 4, 2007).

144. *See supra* note 10 and accompanying text.

145. American Atheists, Inc., Vote on Federal Marriage Amendment Slated for Tuesday, June 6, <http://www.atheists.org/action/alert-03-jun-2006.html> (urging atheists to “oppose religion-based discrimination” in the form of a federal constitutional amendment banning same-sex civil marriage) (last visited Dec. 19, 2006); *see also* American Atheists, Inc., Bush Push for Federal Marriage “Protection” Amendment—Senate May Vote Tues [sic] on S.J.1, “The Battle of Our Times,” <http://www.atheists.org/flash.line/gaym1.htm> (last visited Dec. 19, 2007).

146. Press Release, American Humanist Association, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons, <http://www.americanhumanist.org/press/VaticanMarriage.html> (noting that the AHA has advocated for legal recognition of same-sex marriage for decades; stating that “[t]he AHA will continue to advocate for equal justice under

These tables are not an exercise in mere exhaustiveness—establishing the diversity of religious and Secularist opinion in America is central to the point. America’s ongoing failure to distinguish religious from civil marriage has led to two constitutionally-impermissible results: (1) the government is allowing a majority of religious believers to impose a theological definition of “marriage” upon a significantly-sized minority of non-believers and different-believers, without offering a rationally secular justification for the mandated definition; and (2) by allowing this to occur, the government is endorsing the majority’s definition of religious marriage, and as a result, has created a sizeable class of political outsiders who are being told that their religious beliefs are, at best, less-worthy than the majority’s or, at worst, simply *wrong*. The Establishment Clause expressly forbids such explicit sectarianism.¹⁵¹

II. A PRIMER ON THE FEDERAL MARRIAGE AMENDMENT AND ITS KIN

A. What Are Same-Sex Marriage Bans and What Do They Do?

Before we undertake our constitutional analysis, it is important to understand what same-sex marriage bans are and what they are intended to accomplish. Typically, same-sex marriage bans arise as either constitutional amendments or statutory revisions to pre-existing Marriage Acts, and they come in two general flavors: those that ban legal recognition of same-sex marriages performed in other jurisdictions—also known as Defense of Marriage Acts¹⁵²—

the law, and won’t rest until there are equal marriage laws in all fifty states and the District of Columbia” (alteration added) (last visited Dec. 19, 2006). See also Charlene Gomes, *The Need for Full Recognition of Same-Sex Marriage*, 63 HUMANIST 15 (Sept.–Oct. 2003), available at <http://www.thehumanist.org/humanist/articles/GomesSO03.pdf>.

147. Massimo Pigliucci, *Rationally Speaking: Bush, the Pope, and Gay Rights* (2003), <http://www.secularhumanism.org/index.php?section=columns&page=03-10-pope-vs-gays> (last visited Jan. 4, 2007).

148. Institute for Humanist Studies, *Testimony in Support of Legally Recognizing Same-Sex Marriage in New York State*, http://humaniststudies.org/media/same_sex_marriage.html (transcript of testimony of Matt Cherry, Executive Director of the IHS) (last visited Dec. 19, 2006).

149. Secular Coalition for America, *Constitutional amendments on marriage*, <http://secular.org/issues/marriage/?view=summary> (opposing bans on same-sex civil marriage because they enact “theological definitions for civil contracts”) (last visited Jan. 4, 2007).

150. Religious Tolerance.org, *Judaism and Homosexuality: Other Groups*, http://www.religioustolerance.org/hom_jother.htm (last visited Jan. 4, 2007).

151. *But see* George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 593 (1999) (“Basing the legal definition of marriage on religion would not breach the Constitution’s Establishment Clause because it does not endorse or compel obedience to any faith.”). Dent elides the fact that basing the civil definition of “marriage” upon a religious one requires the government to choose among several available definitions of marriage. While such a definition would certainly not *compel* religious observance, the very act of choosing one religious definition over another clearly *endorses* the religion that supplied the preferred definition. Moreover, the government must have a rational secular basis for adopting the chosen definition—as discussed below, none of the proffered justifications for same-sex marriage bans is rationally secular. See discussion *infra* Part V (raising and dismissing the “secular” arguments against same-sex marriage; applying the *Lemon*-endorsement test to same-sex marriage bans).

152. *E.g.*, WASH. REV. CODE ANN. § 26.04.020(1)(c), (3) (West Supp. 2006).

and those that permit only opposite-sex marriage to the exclusion of all others.¹⁵³ Many states that have adopted same-sex marriage bans have adopted both types.¹⁵⁴

Whether stated positively (e.g., “To be valid or recognized in this State [Alaska], a marriage may exist only between one man and one woman.”¹⁵⁵) or negatively (e.g., “Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”¹⁵⁶), the legal effect is the same: Same-sex civil marriage bans prohibit the legal recognition of any civil or religious marriage between persons of the same sex.

Some bans go even further, prohibiting the creation of marriage-like legal arrangements or the conferral of marriage-like benefits (commonly referred to as “the legal incidents” of marriage).¹⁵⁷ These broad-based “legal-incidents” bans are even more sweeping than simple same-sex marriage bans: Whether by accident or by design, they bar same-sex couples from obtaining even marginal legal protections for their relationships.

Proponents of “legal-incidents” bans claim that they are only intended to prevent legislatures and municipal governments from allowing same-sex couples to enter civil unions and domestic partnerships.¹⁵⁸ Despite this assertion,

(1) Marriages in the following cases are prohibited: . . . (c) When the parties are persons other than a male and a female.

. . . .

(3) A marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection . . . (1)(c) . . . of this section.

Id.

153. *E.g., id.* § 26.04.010(1) (West Supp. 2006) (“Marriage is a civil contract between a male and a female . . .”).

154. *See supra* notes 26–28 (cataloguing state-level bans on same-sex marriage).

155. ALASKA CONST. art. I, § 25 (adopted 1998) (alteration added).

156. N.C. GEN. STAT. ANN. § 51-1.2 (West Supp. 2006).

157. *E.g.,* LA. CONST. art. XII, § 15.

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the *legal incidents thereof* be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

Id. (emphasis added).

158. *See, e.g.,* Chris L. Jenkins, *Voters to Decide on Gay Unions*, WASH. POST, Nov. 2, 2006, at VA23 (reporting that the purported goal of the Virginia constitutional amendment banning same-sex marriage and civil unions was to “protect against judges who might rule that the current statut[ory ban] is unconstitutional” (alteration added)). Virginia’s constitutional amendment reads:

[O]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design,

it is an outstanding question whether these bans potentially reach private relationship contracts, wills, and powers of attorney.¹⁵⁹ For example, Michigan's state attorney general recently determined that Michigan's constitutional amendment bars state and local governments from offering employment benefits to same-sex couples as domestic partners.¹⁶⁰ Similarly, Ohio's amendment has been read to bar unmarried *heterosexual* domestic-violence victims from bringing certain suits against their batterers in Domestic Violence Court, because standing to bring these claims is limited to persons in a legal familial relationship, which is only created through blood or marriage.¹⁶¹

At the federal level, there is already a statutory ban on same-sex marriages: the federal Defense of Marriage Act (DOMA). Enacted in 1996, DOMA was codified in two separate titles of the United States Code. First, DOMA enacted a garden-variety ban on same-sex marriage by establishing a "one-man, one-woman" definition of marriage for the purposes of federal law.¹⁶² Until DOMA, there had never been a federal definition of marriage; moreover, the Supreme Court has long recognized that the regulation of family law—including determining what constitutes "marriage"—lies beyond the reach of federal

qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

VA. CONST. art. I, § 15-A (adopted 2006) (alteration added).

159. See, e.g., Jenkins, *supra* note 158, at VA23 (reporting that opponents of the Virginia constitutional amendment thought it could potentially hamper "the ability of unwed heterosexual couples to engage in contracts covering such things as property ownership and allowing partners to determine health care"; noting that opponents thought it might also "threaten protective orders and additional safeguards for unmarried victims of domestic violence by barring legal recognition of unmarried family or household members").

160. See 7171 Op. Att'y Gen. 1, 9 (Mich. 2005) (determining that the City of Kalamazoo's "policy of offering benefits to same-sex domestic partners violates the [Michigan constitutional] amendment's prohibition against recognizing any 'similar union' other than the union of one man and woman in marriage" (alteration added)), available at 2005 WL 639112; see also MICH. CONST. art. I, § 25 (adopted 2004) ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.").

Such determinations are devastating for the same-sex couples and their families. For example, as of January 2007, 13 state governments, 139 city and county governments, 299 colleges and universities, 264 Fortune-500 companies, and 9,378 other private-sector companies offered domestic-partner health benefits. For a continually-updated count provided by the Human Rights Campaign, see <http://www.hrc.org/worknet> (last visited Jan. 8, 2007).

161. See *Phelps v. Johnson*, No. DV05 305642, 2005 WL 4651081, at *1 (Ohio Ct. Com. Pl. Nov. 28, 2005) (holding that Ohio's constitutional amendment banning same-sex civil marriage had the unintended effect of invalidating Ohio's Domestic Violence Act, insofar as it conferred standing to bring claims in Domestic Relations Court upon unmarried heterosexual individuals). Ohio's constitutional amendment reads:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OHIO CONST. art. XV, § 11 (adopted 2004).

162. Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000)).

authority, instead falling squarely within the states' regulatory powers.¹⁶³ DOMA's second part purported to fashion an exception to the Full Faith and Credit Clause¹⁶⁴ by allowing states to refuse to recognize any same-sex marriage performed in another jurisdiction.¹⁶⁵ The constitutionality of DOMA has been the subject of much speculation and analysis.¹⁶⁶

The proposed Federal Marriage Amendment (FMA) is designed to preempt any constitutional challenges to DOMA.¹⁶⁷ The FMA is a "legal-incidents" ban that first appeared in 2002, when Rep. Ronnie Shows, D-Miss., introduced it to the Second Session of the 107th Congress as H.J. Res. 93.¹⁶⁸ In 2003, the 108th Congress saw H.J. Res. 56¹⁶⁹ and S.J. Res. 26¹⁷⁰ introduced in the First Session, by

163. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (holding that "domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States" (citing *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . ."); *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.") (alteration added)).

Therefore, the only limitation on the states' right to regulate in this area is the federal Constitution itself. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967) (holding that Virginia's anti-miscegenation statute unconstitutionally violated equal protection and due process); *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (holding that Wisconsin's statute requiring child-support payors to seek judicial permission before remarrying unconstitutionally burdened the payors' fundamental right to marry); *Turner v. Safley*, 482 U.S. 78 (1987) (holding that a prisoner's right to marry could not be burdened by a requirement that the prisoner first receive permission from the prison warden before being permitted to marry another inmate or a citizen).

164. U.S. CONST. art. IV, § 1.

165. Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2000)).

166. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the full faith and credit aspects of DOMA do not pass constitutional muster); Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507 (2005) (exploring the constitutionality of DOMA as a federal definition of marriage and as a full faith and credit question). The constitutionality of DOMA has been addressed at length in the literature, so it will not be addressed here.

167. 151 CONG. REC. S364 (daily ed. Jan. 24, 2005) (statement of Sen. Allard) ("[T]he Marriage Protection Amendment . . . define[s] marriage as a union between a man and a woman. . . . What we are trying to do is protect the voice of the American people. The right place for this to be determined is in the legislative bodies of this country, in the Congress of the United States and each and every legislature in every state, and *not in the Federal courts.*" (emphasis and alterations added)); see also *infra* Part V.A.6.

168. 107th Cong. 2d Sess. (May 15, 2002).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

Id. H.J. Res. 93 was referred to the House Committee on the Judiciary on May 15, 2002, which in turn referred it to the House Subcommittee on the Constitution on July 18, 2002. No subsequent action was taken on it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HJ00093>.

169. 108th Cong. 1st Sess. (May 21, 2003).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

Rep. Marilyn Musgrave, R-Colo. and Sen. Wayne Allard, R-Colo., respectively. Neither of these amendments got off the ground in a meaningful way.

Since 2003, Rep. Musgrave and Sen. Allard have introduced five versions of the FMA, four of which have come up for a vote in their respective chambers. First among the subsequent versions was S.J. Res. 30,¹⁷¹ introduced in the 108th Congress's Second Session. S.J. Res. 30 was replaced later on in the Session with S.J. Res. 40 ("Allard Amendment I")¹⁷² and its companion bill in the House, H.J. Res. 106 ("Musgrave Amendment I"),¹⁷³ which were the first two versions of the FMA to come to the floor of either chamber. Neither S.J. Res. 40 nor H.J. Res. 106 passed its respective chamber with the requisite two-thirds majority. In the Second Session of the 109th Congress, renewed efforts to revive the FMA

Id. H.J. Res. 56 was referred to the House Committee on the Judiciary on May 21, 2003, which in turn referred it to the House Subcommittee on the Constitution on June 25, 2003. The Subcommittee held hearings on May 13, 2004. No subsequent action was taken on it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HJ00056>.

170. 108th Cong. 1st Sess. (Nov. 25, 2003).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

Id. S.J. Res. 26 was referred to the Senate Committee on the Judiciary on November 25, 2003. No subsequent action was taken on it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJ00026>.

171. 108th Cong. 2d Sess. (Mar. 22, 2004).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id. S.J. Res. 30 was referred to the Senate Committee on the Judiciary on March 22, 2004. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJ00030>.

172. 108th Cong. 2d Sess. (July 7, 2004).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id. The Allard Amendment I was brought to the Senate floor on July 8, 2004, and after a motion to proceed to consideration of measure was made on July 9, 2004, it was the subject of intense debate for several days—several motions to invoke cloture and end debate were made during this time. Under Senate rules, a motion to invoke cloture must pass by a three-fifths majority. On July 14, 2004, the Senate voted 48 to 50 *not* to invoke cloture and thus did not consider the measure. While the cloture vote did not technically address the substance of the Allard Amendment I, it was largely understood to represent the Senate's receptiveness to the measure. On July 15, 2004, the motion to proceed to consideration of measure was withdrawn, and no subsequent action was taken on the Allard Amendment I. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJ00040>.

173. 108th Cong. 2d Sess. (Sept. 23, 2004).

Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id. The Musgrave Amendment I was referred to the House Committee on the Judiciary on September 23, 2004. On September 30, 2004, after some debate, the measure failed 227 to 186. No subsequent action was taken on the Musgrave Amendment I. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HJ00106>.

spawned S.J. Res. 1 (“Allard Amendment II”)¹⁷⁴ and H.J. Res. 88 (“Musgrave Amendment II”).¹⁷⁵ Both S.J. Res. 1 and H.J. Res. 88 came up for a vote in their respective chambers and failed for a second time.¹⁷⁶

174. 109th Cong. 1st Sess. (Jan. 24, 2005), *renewed without amendment*, 109th Cong. 2d Sess. (May 18, 2006).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id. The Allard Amendment II was referred to the Senate Committee on the Judiciary on January 24, 2005, which in turn referred it to the Senate Subcommittee on the Constitution, Civil Rights and Property Rights, where hearings were held on November 9, 2005. On May 26, 2006, the Allard Amendment II was brought to the Senate floor with a motion to proceed to consideration of measure. Like the Allard Amendment I, the Allard Amendment II sparked intense debate for several days, and several motions to invoke cloture were made. On June 7, 2006, the Senate voted 49 to 48 *not* to invoke cloture and thus did not consider the measure. As with the Allard Amendment I, no vote was taken on the Allard Amendment II itself; however, it was generally understood that the cloture vote was at root a vote on the substantive merits of the measure. No subsequent action was taken on the Allard Amendment II. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SJ00001>.

175. 109th Cong. 2d Sess. (June 6, 2006).

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id. The Musgrave Amendment II was referred to the House Committee on June 6, 2006. It was brought to the House floor on July 18, 2006, where it failed 236 to 187. No subsequent action was taken on the Musgrave Amendment II. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HJ00088>.

176. Several other versions of the FMA were proposed in the 109th Congress, none of which gained any meaningful momentum. Rep. Daniel Lungren, R-Cal., introduced H.J. Res. 39, 109th Cong. 1st Sess. (Mar. 17, 2005).

§ 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

§ 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

§ 3. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.

Id. H.J. Res. 39 was referred to the House Committee on the Judiciary on March 17, 2005, which in turn referred it to the House Subcommittee on the Constitution on April 4, 2005. No subsequent action was taken on it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HJ00039>.

Sen. Sam Brownback, R-Kan., introduced S.J. Res. 13, 109th Cong. 1st Sess. (Apr. 14, 2005).

§ 1. Marriage in the United States shall consist only of the union of a man and a woman.

§ 2. Congress shall have the power to enforce this article by appropriate legislation.

Id. S.J. Res. 13 was referred to the Senate Committee on the Judiciary on April 14, 2005. No subsequent action was taken on it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SJ00013>. On May 18, 2005, Sen. Brownback withdrew S.J. Res. 13. See 151 CONG. REC. S5434 (daily ed. May 18, 2005) (statement of Sen. Brownback).

Rep. Louie Gohmert, R-Tex., introduced H.J. Res. 91, 109th Cong. 2d Sess. (July 11, 2006).

The versions of the FMA that concern us here are the four that came up for a vote on the floor of Congress. The Musgrave and Allard Amendments were virtually identical each time they were considered; Rep. Musgrave and Sen. Allard were joint co-sponsors of one another's proposed amendments. As a matter of interpretation, then, the legislative histories of these four versions of the FMA should and will be considered as a whole. To that end, when I refer to the FMA, I am referring collectively to these four proposals.

B. Who Supports the FMA?

Many individuals have testified in hearings before Congress in favor of the FMA. With only two possible exceptions¹⁷⁷ and one notable one,¹⁷⁸ every single one of these witnesses was a fundamentalist Christian, Mormon, or Catholic, each vested with strong religious credentials earned from years of working on behalf of fundamentalist religious causes. As discussed above in Table 1, all of the religious traditions to which these witnesses belong vehemently oppose homosexuality and same-sex marriage—and for explicitly religious reasons. Table 3 lists all of the witnesses who testified in favor of the FMA in congressional hearings.

Interestingly, despite these witnesses' obviously religious viewpoints, each one employed a carefully-crafted non-religious vocabulary to advance the secular-sounding arguments dismissed below.¹⁷⁹ Couched in safe, secular-ish terms, each witness's arguments were cleverly—albeit transparently, to the keen observer—designed to mask the FMA's invidious purpose of imposing religious marriage onto an unsuspecting nation.

It is impossible to rationally conclude that these witnesses had a genuinely secular purpose in mind or actually believed the *secular* implications of their

Marriage in the United States shall consist only of a legal union of one man and one woman.

Id. H.J. Res. 91 was referred to the House Committee on the Judiciary on July 11, 2006. No subsequent action was taken on it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HJ00091>.

177. Gregory Coleman, Former Texas Solicitor General, and Jon Bruning, Nebraska Attorney General, both gave statements in their representative official capacities. See *What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before the Senate Comm. on the Judiciary Subcommittee on the Constitution, Civ. Rights and Property Rights*, 108th Cong. 1st Sess. (Aug. 28, 2003) [hereinafter Senate, *What Is Needed*] (statement of Gregory Coleman); *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Senate Comm. on the Judiciary Subcommittee on the Constitution, Civ. Rights and Property Rights*, 108th Cong. 2d Sess. (Mar. 3, 2004) [hereinafter Senate, *Judicial Activism*] (statement of Jon Bruning). While no information is available on Coleman's religious affiliation, Bruning calls himself a Christian and attends a Christian-Congregationalist church, see *Biography*, http://www.jonbruning.com/index.php?PAGE_ID=3 (last visited Jan. 8, 2007).

178. Stanley Kurtz is a conservative commentator and legal theorist who does not ground his arguments in religion. Stanley Kurtz, *Point of No Return*, NAT'L REV. ONLINE, Aug. 3, 2001 ("I personally do not see homosexuality as sinful . . ."), available at http://www.hudson.org/index.cfm?fuseaction=publication_details&id=935. He instead argues in favor of the FMA on consequentialist grounds, claiming that same-sex marriage would result in ancillary harms to other legitimate governmental interests. See *infra* Part V.A.3.a.

179. See *infra* Part V.A.

testimony. How do we know this? Because of the strong religious pedigree of each of the witnesses. The idea that these individual witnesses—decidedly-religious, almost to a person—somehow prefer secular-ish conceptions of “traditional marriage”—a minority position among Secularists¹⁸⁰—to their deeply-held religious beliefs again defies common sense.¹⁸¹

TABLE 3. CONGRESSIONAL TESTIMONY IN FAVOR OF THE FMA.

Name/Affiliation	Religious Tradition	Hearing(s) Attended
Judge Robert Bork, <i>U.S. Cir. Ct. App. for the 4th Cir.</i> ¹⁸²	Catholic (Natural Law)	<i>Federal Marriage Amendment (The Musgrave Amendment)</i> ¹⁸³
Gerard V. Bradley, <i>Prof. of Law, Univ. of Notre Dame Law Sch.</i>	Catholic (Natural Law)	<i>Less Faith in Judicial Credit: Are Federal and State Defense of Marriage Initiatives Vulnerable to Judicial Activism?</i> ¹⁸⁴
Jon Bruning, <i>Neb. Att’y Gen.</i>	Christian-Congregational	<i>Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?</i> ¹⁸⁵
Gregory Coleman, <i>Former Tex. Solicitor Gen.</i>	Unknown	<i>What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?</i> ¹⁸⁶
Teresa S. Collett, <i>Prof. of Law, St. Thomas Univ. Sch. of Law</i>	Catholic (Natural Law)	<i>A Proposed Constitutional Amendment to Preserve Traditional Marriage</i> ¹⁸⁷

180. See *supra* notes 6–10 (discussing the significant majority of secularists who support same-sex civil marriage).

181. See H.R. REP. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916 (House Committee on the Judiciary report on the 1996 “Defense of Marriage Act”) (describing same-sex civil marriage bans as the result of a “moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”). *But see supra* notes 11, 143 (noting that many religious believers choose to privatize their religious views, instead relying on secularism to supply justifications for social policy).

182. Some may challenge my characterization of Judge Bork as a religious believer. It is true that, for the better part of his career, Bork was not a highly-religious person, despite authoring such religiously-overtone works as *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996) (cataloguing perceived excesses in American society, including loosening strictures on sexual mores). Bork converted to Catholicism in 2003. Tim Drake, *Judge Bork Converts to the Catholic Faith*, NAT’L CATH. REG. (online ed.), July 20–26, 2003. He subsequently authored *A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES* (2005), in which he heavily criticizes the Supreme Court’s recent religion cases, claiming that they have inappropriately accelerated the secularization of America. From his writings, it seems reasonable to characterize Bork as a religion-driven preservationist.

183. *Hearing on H.J. Res. 56 Before the House Comm. on the Judiciary Subcomm. on the Const.*, 108th Cong. 2d Sess., at 16–18 (May 13, 2004) [hereinafter House, *Musgrave Amendment I*] (statement of Judge Bork).

184. *Hearing Before the Senate Comm. on the Judiciary Subcommittee on the Const., Civ. R. and Property R.*, 109th Cong. 1st Sess. (Apr. 13, 2005) [hereinafter Senate, *Less Faith*] (statement of Prof. Bradley).

185. Senate, *Judicial Activism*, *supra* note 177 (statement of Att’y Gen. Bruning).

186. Senate, *What Is Needed*, *supra* note 177 (statement of Gregory Coleman).

187. *Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 2d Sess. (Mar. 23, 2004) [hereinafter Senate, *Proposed Amendment*] (statement of Prof. Collett).

TABLE 3. CONGRESSIONAL TESTIMONY IN FAVOR OF THE FMA.

Name/Affiliation	Religious Tradition	Hearing(s) Attended
John Cornyn, <i>U.S. Sen., R-Tex.</i>	Church of Christ (Pentecostal)	<i>A Proposed Constitutional Amendment to Preserve Traditional Marriage</i> ¹⁸⁸ <i>Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?</i> ¹⁸⁹ <i>What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?</i> ¹⁹⁰
Pastor Daniel de Leon, Sr., <i>Gen. Presbyter, Alianza de Ministerios Evangélicos Nacionales (AMEN)</i>	Assemblies of God (Pentecostal)	<i>Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?</i> ¹⁹¹
Dwight Duncan, <i>Assoc. Prof. of Const. Law, S. New Eng. Sch. of Law</i>	Catholic (Natural Law)	<i>Legal Threats to Traditional Marriage: Implications for Public Policy</i> ¹⁹²
John C. Eastman, <i>Prof. of Law, Chapman Univ. Sch. of Law</i>	Christian (Natural Law, affiliation unknown)	<i>The National Consensus to Protect Marriage: Why a Constitutional Amendment Is Needed</i> ¹⁹³
Michael Farris, <i>President, Patrick Henry Coll.</i>	Fundamentalist Non-Denominational Evangelical	<i>What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?</i> ¹⁹⁴
Scott Fitzgibbon, <i>Prof. of Law, Boston Coll.</i>	Catholic (Natural Law)	<i>An Examination of the Constitutional Amendment on Marriage</i> ¹⁹⁵
Maggie Gallagher, <i>President, Inst. for Marriage & Pub. Pol'y</i>	Catholic (Natural Law)	<i>Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?</i> ¹⁹⁶ <i>What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?</i> ¹⁹⁷
Rev. Dr. Ray Hammond II, <i>Pastor, Bethel African Methodist Episcopal (AME) Church</i>	Methodist-Holiness (Pentecostal)	<i>What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?</i> ¹⁹⁸

188. Senate, *Proposed Amendment*, *supra* note 187 (statement of Sen. Cornyn).

189. Senate, *Judicial Activism*, *supra* note 177 (statement of Sen. Cornyn).

190. Senate, *What Is Needed*, *supra* note 177 (statement of Sen. Cornyn).

191. Senate, *Judicial Activism*, *supra* note 177 (statement of Pastor de Leon).

192. *Hearing Before the House Comm. on the Judiciary Subcomm. on the Const.*, 108th Cong. 2d Sess., at 5–14 (Apr. 22, 2004) [hereinafter House, *Legal Threats*] (statement of Prof. Duncan).

193. *Hearing Before the Senate Comm. on the Judiciary Subcommittee on the Const., Civ. R. and Property R.*, 109th Cong. 1st Sess. (May 18, 2005) (statement of Prof. Eastman). This hearing was cancelled, and Prof. Eastman's testimony was never made publicly available.

194. Senate, *What Is Needed*, *supra* note 177 (statement of Michael Farris).

195. *Hearing Before the Senate Comm. on the Judiciary Subcommittee on the Const., Civ. R. and Property R.*, 109th Cong. 1st Sess. (Oct. 20, 2005) [hereinafter Senate, *Examination*] (statement of Prof. Fitzgibbon).

196. Senate, *Judicial Activism*, *supra* note 177 (statement of Maggie Gallagher).

197. Senate, *What Is Needed*, *supra* note 177 (statement of Maggie Gallagher).

198. Senate, *What Is Needed*, *supra* note 177 (statement of Rev. Dr. Hammond).

TABLE 3. CONGRESSIONAL TESTIMONY IN FAVOR OF THE FMA.

Name/Affiliation	Religious Tradition	Hearing(s) Attended
Orrin Hatch, <i>U.S. Sen., R-Utah</i>	Mormon (LDS)	<i>Preserving Traditional Marriage: A View from the States</i> ¹⁹⁹ <i>A Proposed Constitutional Amendment to Preserve Traditional Marriage</i> ²⁰⁰ <i>Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?</i> ²⁰¹ <i>What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?</i> ²⁰²
Stanley Kurtz, <i>Hoover Inst.</i>	Natural Law/Consequentialism (no affiliation)	<i>Legal Threats to Traditional Marriage: Implications for Public Policy</i> ²⁰³
Marilyn Musgrave, <i>U.S. Rep., R-Colo.</i>	Assemblies of God (Pentecostal)	<i>Federal Marriage Amendment (The Musgrave Amendment)</i> ²⁰⁴ <i>Preserving Traditional Marriage: A View from the States</i> ²⁰⁵ <i>A Proposed Constitutional Amendment to Preserve Traditional Marriage</i> ²⁰⁶
Lincoln C. Oliphant, <i>Res. Fellow, Marriage Law Project</i>	Catholic (Natural Law)	<i>Legal Threats to Traditional Marriage: Implications for Public Policy</i> ²⁰⁷
Rev. Richard Richardson, <i>Asst. Pastor, St. Paul African Methodist Episcopal (AME) Church</i>	Methodist-Holiness (Pentecostal)	<i>A Proposed Constitutional Amendment to Preserve Traditional Marriage</i> ²⁰⁸ <i>Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?</i> ²⁰⁹
Mitt Romney, <i>Gov. of Mass.</i>	Mormon (LDS)	<i>Preserving Traditional Marriage: A View from the States</i> ²¹⁰
Jay Sekulow, <i>Am. Ctr. for Law. & Justice</i>	Fundamentalist Non-Denominational Evangelical	<i>Federal Marriage Amendment (The Musgrave Amendment)</i> ²¹¹
Katherine S. Spaht, <i>Prof. of Law, La. State Univ.</i>	Christian (affiliation unknown); primary drafter of covenant marriage legislation in Louisiana ²¹²	<i>A Proposed Constitutional Amendment to Preserve Traditional Marriage</i> ²¹³

199. *Hearing Before the Senate Comm. on the Judiciary Subcommittee on the Const., Civ. R. and Property R.*, 108th Cong. 2d Sess. (June 22, 2004) [hereinafter Senate, *View from the States*] (statement of Sen. Hatch).

200. Senate, *Proposed Amendment*, *supra* note 187 (statement of Sen. Hatch).

201. Senate, *Judicial Activism*, *supra* note 177 (statement of Sen. Hatch).

202. Senate, *What Is Needed*, *supra* note 177 (statement of Sen. Hatch).

203. House, *Legal Threats*, *supra* note 192, at 14–34 (statement of Stanley Kurtz).

204. House, *Musgrave Amendment I*, *supra* note 183, at 5–15 (statement of Rep. Musgrave).

205. Senate, *View from the States*, *supra* note 199 (statement of Rep. Musgrave).

206. Senate, *Proposed Amendment*, *supra* note 187 (statement of Rep. Musgrave).

207. House, *Legal Threats*, *supra* note 192, at 38–47 (statement of Lincoln Oliphant).

208. Senate, *Proposed Amendment*, *supra* note 187 (statement of Rev. Richardson).

209. Senate, *Judicial Activism*, *supra* note 177 (statement of Rev. Richardson).

210. Senate, *View from the States*, *supra* note 199 (statement of Gov. Romney).

211. House, *Musgrave Amendment I*, *supra* note 183, at 22–34 (statement of Jay Sekulow).

212. See Katherine S. Spaht, *Covenant Marriage*, <http://faculty.law.lsu.edu/katherinespaht/convenantinfo.htm> (last visited Jan. 8, 2007).

213. Senate, *Proposed Amendment*, *supra* note 187 (statement of Prof. Spaht).

TABLE 3. CONGRESSIONAL TESTIMONY IN FAVOR OF THE FMA.

Name/Affiliation	Religious Tradition	Hearing(s) Attended
Lynn Wardle, <i>Prof. of Law, Brigham Young Univ.</i>	Mormon (LDS)	<i>Less Faith in Judicial Credit: Are Federal and State Defense of Marriage Initiatives Vulnerable to Judicial Activism?</i> ²¹⁴
Richard Wilkins, <i>Prof. of Law, Brigham Young Univ.</i>	Mormon (LDS)	<i>An Examination of the Constitutional Amendment on Marriage</i> ²¹⁵
Christopher Wolfe, <i>Prof. of Pol. Sci., Marquette Univ.</i>	Catholic (Natural Law)	<i>An Examination of the Constitutional Amendment on Marriage</i> ²¹⁶

Why then, if the supporters of the FMA are as staunchly religious as their credentials would lead us to believe, would they resort to arguing from a Secularist viewpoint? Only one Secularist, Stanley Kurtz, was put forward to lend credibility to the claim that the FMA is based on secular principles—and his consequentialist legal theories are so irrational and have been so heavily criticized (by writers on both ends of the political spectrum) that they are not creditable.²¹⁷ Instead, delineating the FMA's secular purposes was left largely to the say-so of numerous highly-religious witnesses.

This is not to say that the mere presence of a creditable Secularist would cure the underlying constitutional infirmities of the FMA. Even if one were put forward, if there is no rational secular relationship between the purposes given for the FMA and the action that the law takes (banning same-sex civil marriage),²¹⁸ then no amount of secularist pontification would be able to justify it: The purpose of the law would still be religious, even if not on its face. Thus, it would be void under an endorsement analysis.²¹⁹

Still, why does this matter? Taking a page from the Establishment Clause's sister doctrine is instructive. When courts hear Free Exercise claims, they frequently inquire as to the sincerity with which the claimed adherents hold their beliefs.²²⁰ And so it should be in the search for a secular purpose: Divining a secular purpose for a government action demands an inquiry into the sincerity with which its proponents believe the action to be genuinely secular. Merely claiming a secular purpose does not mean that one exists. If that were the rule, then the Establishment Clause would be undermined from within: Without a more searching inquiry, no court could ever discern an invidious religious purpose, as the central question is whether the claimed secular purpose is merely pretextual for a religious one.

This has nothing to do with evaluating the content of one's beliefs and everything to do with whether actually believes that the claimed secular purpose is actually secular. If courts are competent to undertake inquiries into purpose at all, then they must necessarily be competent to determine whether the proponents of a law are subtextually motivated by religious beliefs.

214. Senate, *Less Faith*, *supra* note 184 (statement of Prof. Wardle).

215. Senate, *Examination*, *supra* note 195 (statement of Prof. Wilkins).

216. Senate, *Examination*, *supra* note 195 (statement of Prof. Wolfe).

217. *See infra* Part V.A.3.a.

218. *See infra* Parts IV.A.2, V.A.

219. *See infra* Parts IV.A.2, V.B.

220. *E.g.*, *United States v. Ballard*, 322 U.S. 78 (1944).

Finally, one might question my use of the FMA as exemplary of all same-sex marriage bans or as even relevant at all. Indeed, it may seem silly to evaluate the constitutionality of a constitutional amendment. However, because similar constitutional concerns exist for DOMA and for individual state bans on same-sex civil marriage (whether statutory or constitutional), the Establishment Clause discussion remains highly relevant. At the time of this writing, no new versions of the FMA have been introduced into the First Session of the 110th Congress. Nevertheless, if the opponents of same-sex marriage are true to their word,²²¹ efforts to amend the federal Constitution are far from over. Future Congresses will almost certainly face incarnations of the FMA that are essentially replicas of those that—so far—have been voted down. These yet-unwritten versions of the FMA will undoubtedly implicate the same Establishment Clause concerns that are addressed here.

Barring a significant change in opponents' rhetoric, the so-called "secular" arguments used to justify prior bans will be recycled anew for the consideration of future legislators. Therefore, it is important to debunk these pretextual arguments *now*, to better equip same-sex marriage advocates for future debate and litigation.

III. WHERE ARE WE GOING, AND WHY ARE WE IN THIS HANDBASKET?: A SHIFT IN FUNDAMENTAL(IST) RHETORIC

"Overt bias, when prohibited, has oft-times been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before."

—Judge Simon E. Sobeloff, in *Griggs v. Duke Power Co.*²²²

Until recently, same-sex civil marriage advocates were entirely disempowered in their attempts to obtain any legal recognition of same-sex relationships.²²³ While successes have come in fits and starts, with several key state court decisions being handed down recently and others on the way,²²⁴ the

221. See, e.g., 152 CONG. REC. S5518 (daily ed. June 7, 2006) (statement of Sen. Brownback) ("We are making progress in America on defining marriage as the union of a man and a woman, and we will not stop until it is defined and protected at the union of a man and a woman.").

222. 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part), *rev'd*, 401 U.S. 424 (1971).

223. Compare generally *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971) (holding that a same-sex couple could not qualify for a marriage license, in part because, as two men, they fell outside of the historical definition of religious marriage), with *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that, under the Vermont Constitution, same-sex couples could not be denied the civil benefits and obligations of marriage, regardless of what the resulting legal arrangement was called), and *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that, under the Massachusetts Constitution, same-sex couples could not be denied access to civil marriage and its attendant legal benefits), and *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (holding that New Jersey's refusal to extend the rights and privileges of marriage to same-sex couples violated equal protection but not due process under the New Jersey Constitution).

224. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (holding that New York's refusal to extend the rights and privileges of marriage to same-sex couples violated neither due process nor equal protection under the New York Constitution); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (holding the Washington's state DOMA violated neither due process nor equal protection

legal recognition of same-sex relationships is in a state of constant flux and upheaval. Religion is playing a key role on both sides of the debate.²²⁵

Historically, the Supreme Court has described marriage using explicitly religious language, portraying it as a “holy estate”²²⁶ or “sacred precinct”²²⁷ that could only be entered into by one man and one woman. Indeed, in early same-sex civil marriage cases, courts invoked similar language in determining that legal recognition of same-sex relationships was improper.²²⁸ As discussed above, one trial court cited both the Bible and specific Judeo-Christian beliefs in disposing of a claim seeking same-sex civil marriage rights.²²⁹

Currently, the proponents of same-sex civil marriage are not raising claims of any religious liberty interests.²³⁰ Opponents of same-sex marriage are tiptoeing around the subject of religion, mostly claiming that allowing same-sex civil marriage would limit the availability of religious exemptions from anti-discrimination laws that protect homosexuals—said more plainly, opponents claim that allowing same-sex civil marriage will hamper Christians’ ability to (1) publicly speak out against homosexuality and (2) act on those beliefs in a functionally-discriminatory way; therefore, their right to free exercise of religion trumps the government’s interest in preventing invidious discrimination based on sexual orientation. While the religious-freedom claim is addressed more fully below,²³¹ it is important to note that, for the bulk of opponents, Free Exercise is

under the Washington Constitution). *See also* In re Marriage Cases, 49 Cal. Rptr. 675 (Cal. Ct. App. 2006), *review granted and opinion superseded*, S147999 (Cal. Dec. 20, 2006). The California Supreme Court has yet to hear the marriage cases.

225. *See* Matthew Hay Brown, *Senate to revisit same-sex marriage: Hope for a ban unites many faiths*, BALTIMORE SUN, June 5, 2006, at 1A (reporting on the high levels of religious fervor encountered on both sides of the same-sex civil marriage question). For a functionalist argument in favor of expanding religion’s role in supporting claims for same-sex civil marriage, *see generally* Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221 (2002).

226. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

227. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964).

228. *See, e.g., Baker v. Nelson*, 191 N.W.2d at 186 (“The institution of marriage as a union of man and woman . . . is as old as the book of Genesis.”); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (“Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church.”); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. 1974) (quoting the “book of Genesis” language from *Baker v. Nelson*), *review denied*, 84 Wash. 2d 1008 (Wash. 1974); *see also Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (regarding same-sex marriage within the context of federal immigration law, holding that “there has been for centuries a combination of scriptural and canonical teaching under which a ‘marriage’ between persons of the same sex was unthinkable and, by definition, impossible”; regarding both federal and Colorado law, holding that “[g]iven the scriptural, canonical, and civil law authorities[, and] the prevailing mores and moral concepts of this age, one could not entertain a good faith belief that [the plaintiff] could be married to a person of the same sex” (alterations added)), *aff’d on other grounds*, 673 F.2d 1036 (9th Cir. 1982).

229. *See Dean I*, Civ. A. No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991), *available at* 1992 WL 685364, *aff’d on other grounds*, 653 A.2d 307 [*Dean II*] (D.C. 1995).

230. For a strategy outlining how same-sex civil marriage advocates could be raising these claims to their advantage, *see generally* Catá Backer, *supra* note 225.

231. *See infra* Part V.A.4.

the only context in which they currently appear comfortable advancing affirmatively religious arguments.²³²

A. The Theoretical Underpinnings of Preservationism

Over time, as American society as a whole has grown more tolerant—albeit not totally accepting—of homosexuality,²³³ opponents of same-sex civil marriage have learned to couch their arguments in positive-sounding, seemingly unbigoted terms, and to decry any “hatred” or intent to “discriminate” against anyone’s “lifestyle choices.”²³⁴

As a result, once overtly-religious rhetoric has been largely supplanted with what Prof. Edward Rubin terms “post hoc, secular-sounding argument[s].”²³⁵ As Prof. William Eskridge has pointed out, this shift in language and tone does not show that the substance of the religious arguments has abated—instead, it indicates that anti-gay rhetoric and discourse has “sedimented,” a process by which the old religious arguments have evolved to become more sophisticated and secular-sounding.²³⁶

Describing the foundation of anti-gay rhetoric as “religious natural law theory,” Eskridge notes that religion forms the bedrock for these newer, secularized arguments used to “promote” opposite-sex civil marriage.²³⁷ This “sedimentation” has layered three distinct levels of anti-gay rhetoric upon one another, like a wedding cake: (1) the bedrock layer is “God’s law,” a religiously-derived form of natural-law theory that emphasizes the moral depravity of homosexuality, bolstering these claims with “objective” scientific data

232. *But see* 152 CONG. REC. S5450 (daily ed. June 6, 2006) (statement of Sen. Inhofe) (quoting the book of Genesis and the Gospel of Matthew as justifications for the Allard Amendment II; describing these biblical texts as “the Law”).

233. *See supra* notes 6–10 (tracing liberalization of opinions regarding same-sex marriage and civil unions).

234. *See, e.g.*, 150 CONG. REC. S8089 (2004) (statement of Sen. Hatch) (“I make it clear nobody wants to discriminate against gays. Simply put, we want to preserve traditional marriage. Gays have a right to live the way they want. But they should not have the right to change the definition of traditional marriage.”); *see also infra* Part V.A (raising and dismissing key justifications for same-sex civil marriage bans).

235. Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 43 (2005).

236. *See generally* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000) [hereinafter Eskridge, *No Promo Homo*].

237. *Id.* at 1338, 1347, 1364. To be sure, there are both religious and secular natural-law theories. Secular natural-law theory has been rent asunder in attempts to find within it theoretical and philosophical justifications for banning same-sex marriage. However, the theory can be convincingly read to both support and oppose same-sex marriage. *See generally* Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51 (1998) (establishing that the legal theories of secular natural law cannot be construed as either supporting or opposing same-sex marriage with any definiteness, and that any attempts to do so result in outcome-determinative analytical methods).

Every argument raised against same-sex marriage on secular natural-law grounds has an equally-compelling counterargument, which leaves the theory in equipoise. Because of this irreconcilable ambiguity within secular natural-law theory, it is not a useful method of analysis when attempting to justify bans on same-sex marriage.

Moreover, the natural-law theory in play with the FMA is entirely religious. *See infra* note 245. As such, it is the only form of natural-law analysis with which we must concern ourselves.

purporting to show that homosexuality and same-sex relationships are bad for society;²³⁸ (2) the constitutional tier protects “normal”²³⁹ (heterosexual) people’s right to be free from exposure to homosexuals, because such exposure could make heterosexuals uncomfortable or corrupt their children;²⁴⁰ and (3) the “no promo homo” frosting seeks to prevent any suggestion that the government “promotes” homosexuality as an “acceptable lifestyle choice”—particularly to children.²⁴¹

Eskridge concludes that the discourse has layered itself in this way in order to appeal to the broadest cross-section of anti-gay constituencies: (1) the religious fundamentalists who believe that *Leviticus* 18:22²⁴² and 20:13,²⁴³ and *Romans* 1:26–27²⁴⁴ should govern modern legal treatment of homosexual behavior and orientation; (2) the moral bigots who believe the various scientific claims—derived from religious natural-law theory²⁴⁵—that homosexuals and

238. Eskridge, *No Promo Homo*, *supra* note 236, at 1338, 1351–52, 1363.

239. The word “normal” is used with due care regarding its implications. There is a general scientific consensus that homosexuality is a benign variation of human sexuality and is therefore “normal.” See *infra* notes 359–62. As such, the idea that heterosexuality is “normal” and homosexuality is “abnormal” is not conceded here.

240. Eskridge, *No Promo Homo*, *supra* note 236, at 1362–63.

The rights of people frightened of homosexuality to speak out against it, of parents to control the education of their children, of children to be free from the trauma of a lesbian or gay household, of spouses to enjoy the sanctity of their institution, and of churches, landlords, employers, soldiers, and organizations like the Boy Scouts not to involve themselves with openly gay persons are just as often heard in antigay churches and political rallies as in the courtroom.

Id.

241. *Id.* at 1330–31, 1362–64.

242. “You shall not lie with a male as with a woman; it is an abomination.” *Leviticus* 18:22 (New Oxford ann., New Revised Standard Version).

243. “If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.” *Leviticus* 20:13 (New Oxford ann., New Rev. Standard Version).

244. “For this reason God gave them up to degrading passions. Their women exchanged natural intercourse for unnatural, and in the same way also the men, giving up natural intercourse with women, were consumed with passion for one another. Men committed shameless acts with men and received in their own persons the due penalty for their error.” *Romans* 1:26–27 (New Oxford ann., New Rev. Standard Version).

245. One doesn’t have to look very hard to discover that the majority of “religious natural law” scholarship against same-sex marriage is written by religious authors and published by religious institutions. For example, the University of Notre Dame Law School (a conservative Catholic university) sponsors a law journal that was founded in 1947 as the “Natural Law Institute” (the oldest legal journal devoted to the study of natural law) and is now known as the “American Journal of Jurisprudence.” <http://law.nd.edu/ajj/index.html> (last visited Jan. 4, 2007). One of the faculty editors of the journal, Prof. Gerard V. Bradley, was a primary drafter of the FMA. See 151 CONG. REC. S5454 (daily ed. June 6, 2006) (statement of Sen. Feingold) (identifying Prof. Bradley as a drafter of the FMA).

Moreover, several religious law schools appear to be fixated on same-sex marriage and homosexuality. In 1995, the Notre Dame Journal of Ethics and Public Policy hosted a symposium titled “Sexual Orientation,” and in 1996, a symposium titled “Law and the Family.” In 1997, the American Journal of Jurisprudence hosted a forum titled “Sexual Morality and the Possibility of ‘Same-Sex Marriage.’” In 1998, the Brigham Young University Journal of Public Law hosted a symposium titled “Law and the Politics of Marriage: *Loving v. Virginia* After Thirty Years.” In 2002,

same-sex relationships are bad for society; and (3) the “normal people” who assert their collective “constitutional right”—typically claiming free exercise of religion²⁴⁶—to avoid exposure to homosexuals.²⁴⁷ At the heart of this layered discourse lie two common elements: (1) religious belief and (2) the opinion that such beliefs should guide the government’s treatment of homosexuals in the public sector.

Prof. Reva Siegel takes a slightly different approach to conceiving the modernization of disempowering anti-minority rhetoric. Characterizing the phenomenon as “preservation through transformation,”²⁴⁸ she notes that “struggles over group inequality can transform the rules and reasons by which social stratification is enforced and justified.”²⁴⁹ Transformation occurs antiphonally: first, members of a disfavored minority—e.g., same-sex couples, or homosexuals generally—begin to successfully discredit the historical rhetoric used to justify their continued disempowerment. In response, the majority simply modernizes its justificatory rhetoric—often through the use of code

the Regent University Law Review hosted a symposium titled “Homosexuality: Truth Be Told.” In 2004, three symposia were sponsored by conservative religious schools: the Notre Dame Journal of Law, Ethics & Public Policy hosted a symposium titled “Marriage and the Law”; the University of St. Thomas (Minneapolis-St. Paul) Law Review hosted a symposium titled “Federal Marriage Amendment: Yes or No?”; and the Brigham Young University Journal of Public Law hosted a symposium titled “Same-Sex Marriage.” In 2005, Regent University Law Review hosted a symposium titled “Moral Realism and the Renaissance of Traditional Marriage.” Also in 2005, the St. Thomas University (Miami) Law Review hosted a symposium on “*Lofton* and the Future of Gay and Lesbian Adoption.” In 2006, Ave Maria University Law Review hosted a symposium titled “Perspectives on Natural Marriage.”

This is not an exhaustive list of the work that these religious schools have published; nor is it to say that secular schools are not also publishing in this area. The point is that there is a predilection on the part of conservative religious schools to solicit, develop, and publish anti-same-sex marriage scholarship that is based heavily on religious natural-law principles—a predilection that appears to be unique to these institutions.

246. See, e.g., Maggie Gallagher, *Banned in Boston*, WEEKLY STANDARD, May 15, 2006, at 20 (reporting that, when the Catholic Charities of Boston failed to receive a religious exemption from Massachusetts’s anti-discrimination laws protecting sexual orientation, it was faced with the choice of having to place children with homosexual and same-sex couple adoptive parents; instead of complying with the law, Catholic Charities chose to forfeit its license and stopped providing adoption placement services altogether) [hereinafter Gallagher, *Banned in Boston*]. Gallagher characterized this situation as a “tragedy.” *Id.* See discussion *infra* Part V.A.4 (addressing the religious-freedom argument against same-sex civil marriage).

247. Eskridge, *No Promo Homo*, *supra* note 236, at 1409.

Apparently, those advocating on behalf of the “normal people” have forgotten the lesson of *Cohen v. California*, 403 U.S. 15 (1971), which held that a citizen wearing a jacket emblazoned with the phrase “Fuck the Draft” could not be censored in public fora, because any observers who were offended by the phrase had the option to avert their gaze. *Id.* at 21 (noting that persons who find certain information or speech to be offensive “could effectively avoid further bombardment of their sensibilities simply by averting their eyes”). In a broader sense, *Cohen* recognized that pluralistic societies with open marketplaces of speech and expression cannot tolerate the censorship of some viewpoints for the sake of preserving the comfort of observers.

248. Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 111 (2000).

249. *Id.* at 111.

words,²⁵⁰ making only superficial adjustments to its excuses for discrimination. This serves to perpetuate the power imbalance without addressing head-on the substantive question of why the minority deserves to be disempowered—instead, it brilliantly smoothes over the conflict, leaving the majority comfortable with its newfangled explanation for why it should remain superior.

When the minority realizes that, despite the facial shift in rhetoric, nothing of substance has changed, the cycle begins anew. This call and response continues *ad infinitum* until one of the following occurs: (1) the majority's arguments to support continued disempowerment eventually become so attenuated that they are no longer creditable; (2) the majority tires of the masquerade and ceases to engage in modernization; or (3) the majority actually liberalizes and decides that there are no longer adequate substantive justifications for continued disempowerment. Only then does equalizing change become possible.

B. Preservationism: An Application

A prime example of “preservation through transformation” and “sedimentation” is the veritable evolution of “creation science” into “intelligent design.” In *Kitzmiller v. Dover Area School District*, a school board passed a resolution requiring teachers to read a statement offering “intelligent design” as an alternative “scientific” theory to evolutionary biology.²⁵¹ Several parents from the area challenged the resolution as an unconstitutional establishment of religion.²⁵² At the head of its analysis, the court traced the refinement of Fundamentalist rhetoric about evolutionary biology from the Scopes Monkey Trial²⁵³ to the present day: During the Twentieth Century, as more and more public-school teachers and public-school systems eschewed blatantly-religious instruction in favor of teaching evolutionary biology in public-school classrooms, it became harder for the Fundamentalists to justify their desire for the teaching of facially-religious beliefs in public schools. In response, the Fundamentalists changed their rhetoric, but only incrementally, and only as much as was necessary to pass muster under ever-more-stringent constitutional standards. Most importantly, the underlying religious purpose never changed.²⁵⁴

In *Scopes*, it was considered constitutionally permissible to bring a criminal prosecution for teaching evolutionary biology in lieu of biblical creationism.²⁵⁵ Forty years later, in *Epperson v. Arkansas*, the Supreme Court struck down statutory prohibitions against teaching evolutionary biology in public schools.²⁵⁶ In response, Fundamentalists began to advocate for laws requiring “balanced treatment” of biblical creationism and evolutionary biology—teachers wishing to teach evolutionary biology were forced to devote equal time to biblical

250. See generally *id.* (discussing the use of “semantic code” in “color-blindness” discourse to signal—and perpetuate—white privilege).

251. 400 F. Supp. 2d 707, 708–09 (M.D. Pa. 2005).

252. *Id.* at 709–11.

253. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

254. See *Kitzmiller*, 400 F. Supp. 2d at 711–12.

255. *Scopes*, 289 S.W. at 363.

256. 393 U.S. 97 (1968).

creationism. This too, was struck down by the Sixth Circuit Court of Appeals in *Daniel v. Waters*.²⁵⁷ In response, Fundamentalists began to reason that scientific-sounding language would help their religious purpose to survive constitutional scrutiny: hence “creation science.” When, in *Edwards v. Aguillard*, the Supreme Court struck down a requirement that “creation science” be taught alongside evolutionary biology,²⁵⁸ “intelligent design” was born.

In striking down the Dover School Board’s resolution as an unconstitutional establishment of religion, the *Kitzmiller* court recognized the evolution of the Fundamentalists’ discourse for what it was: preservation through transformation. The Fundamentalists had simply layered new, scientific-sounding language over their previously-religious rhetoric, but the underlying message and purpose remained unchanged.

* * * *

As the evolution case reveals, Siegel’s “preservation through transformation” formulation synthesizes with Eskridge’s “sedimentation” theory rather nicely: When the disfavored minority empowers itself, the language used to perpetuate the minority’s disempowerment transforms—or sediments—itsself into a more politically-palatable rhetoric, while maintaining a broad-based appeal to a majority whose bigotry remains palatable.

Both “preservation through transformation” and “sedimentation” have occurred throughout the debate over same-sex civil marriage. As it has become less fashionable to use expressly religious rhetoric to justify holding an anti-gay position, it has become more important for religiously-motivated opponents of same-sex marriage²⁵⁹ to couch their arguments in secular-sounding terms. Currently, opponents rely mostly on social-science evidence and broader appeals to “morality”; express citations of religious doctrines are rare. Still, it is necessary for these religious believers to communicate with one another, so they have developed code words that signal a belief in the unstated—but ever-present—religious objective, which is to impose a specific religious definition of marriage on the entire nation.

Catchphrases such as “traditional marriage,” “ideal environment,” “gender complementarity,” and “values-transmission” abound. They are derived from the larger “family-values”-talk that permeates many religious spheres. However, because phrases like these straddle the line between sounding comfortably secular and signaling a religious objective, it is not always obvious when modernized anti-gay discourse is afoot. With experience, however, same-sex civil marriage advocates will learn to decode this rhetoric and expose the underlying religious objectives to all who would see them. The same-sex marriage debate is drenched with this “family-values” newspeak. I will refer to the tactical use of such modernized discourse as “preservationism.”

257. 515 F.2d 485 (6th Cir. 1975).

258. 482 U.S. 578 (1987).

259. According to the Pew Research Center, there really isn’t another kind. See *supra* notes 6–10 (reporting that advanced age and religiosity—which frequently go hand-in-hand—are the two best predictors of opposition to same-sex civil marriage).

IV. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE: "HOPELESS DISARRAY"²⁶⁰

"[W]e do not count heads before enforcing the First Amendment."
—Justice Sandra Day O'Connor, in *McCreary County v. ACLU*²⁶¹

Before same-sex civil marriage bans can be properly analyzed under the Establishment Clause, it is important to ascertain the current constitutional landscape that applies to such bans. Identifying background principles that are universally agreed-upon has proven to be a Sisyphean task for the Supreme Court. For example, consider *Everson v. Board of Education of Ewing*,²⁶² the first modern-day case to discern a durable theory of the Establishment Clause. *Everson* presented a deceptively simple question: Is it 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? The Court voted 9–0 in favor of the now-famous “wall of separation between church and state” principle handed down by Justice Black.²⁶³ All Justices concurred in Black’s articulation of what might be described as basic neutrality rules:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.²⁶⁴

Even so, the Court divided 5–4 over whether the transportation program constituted an establishment of religion—the majority concluded that it did not, while the dissent concluded that it did. Why? Because the dissenting Justices had actually sought a *more* stringent set of neutrality rules than the ones adopted by the majority:

The Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of

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

261. 125 S. Ct. 2722, 2747 (2005) (O’Connor, J., concurring).

262. 330 U.S. 1 (1947).

263. *Id.* at 16. See also *id.* at 59 (Rutledge, J., dissenting) (opining that “complete separation between the state and religion is best for the state and best for religion”).

264. *Id.* at 15–16 (Black, J., majority opinion).

the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.²⁶⁵

Regardless of which of these conceptions one prefers, it seems that the Court took a unified, aggressive stance in favor of the government remaining neutral in its treatment of religious affairs, both among religions and between religion and irreligion.

Fast-forward to 2005. Heard, decided, and announced together, the twin cases of *McCreary County v. ACLU*²⁶⁶ and *Van Orden v. Perry*²⁶⁷ are the bellwether of present-day Establishment Clause jurisprudence. But simply put, the opinions are a mess. Like *Everson*, *McCreary County* and *Van Orden* also presented a deceptively simple question: In what context, if ever, is a government-sponsored display of the Ten Commandments on government-owned property constitutional? Said more broadly, where do we draw the line between displays that acknowledge America's religious heritage and those that actually "establish" religion?

The Court answered the question two ways: The *McCreary County* displays were struck down while the *Van Orden* display was allowed.²⁶⁸ The *McCreary County* displays were in two Kentucky county courthouses,²⁶⁹ and the *Van Orden* display was on the grounds of the Texas State Capitol.²⁷⁰ Although the specific context and background of each display varied, and the outcome of each case differed, the Justices generally wrote as if they were addressing a single case, rendering a total of *ten* opinions across the two cases: three in *McCreary County* and seven in *Van Orden*.²⁷¹

Of all that might be said about these cases, they begged for the Court to articulate a unifying principle and stick to it. In rendering their ten opinions, the Justices struggled to delineate an analytical method that was not susceptible of substantive criticism from the other side. Still, with Justice Breyer²⁷² and Justice

265. *Id.* at 31–32 (Rutledge, J., dissenting).

266. 125 S. Ct. 2722 (2005).

267. 125 S. Ct. 2854 (2005).

268. In each case, the Court split 5–4, with the "swing" vote being Justice Breyer, who joined the *McCreary County* majority opinion and concurred in judgment only in *Van Orden*.

269. 125 S. Ct. at 2727.

270. 125 S. Ct. at 2858.

271. When the Court announced its ten opinions, Chief Justice Rehnquist joked, "I didn't know we had that many people on our Court." Evan Thomas et al., *Transition: Hail to the Chief*, NEWSWEEK, Sept. 12, 2005, at 60, 60.

272. Justice Breyer employed a "divisiveness" test that asked whether striking down the challenged government action would "tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in judgment). Reasoning from the principle that government and religion are separate but not "mutually hostile," Breyer concluded that (1) the display conveyed a sufficiently secular message of morality as to not constitute an outright imposition of religion and (2) given the display's context among numerous other monuments and historical markers, the degree to which the display is divisive because it potentially offends passersby is outweighed by the degree to which the removal of the display would be divisive. The length of time for which the display had stood unchallenged was a relevant, but not dispositive, factor—this display had stood for forty years. All told, the point is to circumnavigate outcomes that could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." See *id.* at 2869–71 (alteration added).

Thomas²⁷³ providing two notable exceptions, the Justices fell neatly across two interpretive schools: the *Lemon*-endorsement test and the historical-acknowledgement test. (The liberal wing of the Court applied the former, and the conservative wing of the Court applied the latter.) The tests are comprised of starkly contrasting analytical methods, which the Justices have drawn from their various schools of constitutional interpretation.

Save for Justice Breyer's defection in *Van Orden*, a five-Justice majority emerged in *McCreary County* in favor of applying the *Lemon*-endorsement test. As discussed below, the *Lemon*-endorsement test was derived from the longstanding neutrality principles articulated in *Everson*. However, given the recent turnover of Justices, and most notably the replacement of Justice O'Connor with the decidedly more conservative Justice Alito, it is unclear whether the liberal wing of the Court will have the last word on resolving this doctrinal fracture. As such, it is important to at least identify the competing principles that caused the Court to fracture so badly in these cases. Thus, a portion of the following discussion will address the historical-acknowledgment test, despite the fact that for now, the *Lemon*-endorsement test is the controlling framework applicable to Establishment Clause claims.

A. The *Lemon*-Endorsement Test: Context-Specificity and the Requirement of Government Neutrality Toward and Among Religions

Over the last thirty years, various majorities of the Court have employed two tests in analyzing Establishment Clause questions: the "*Lemon* test" and the "endorsement test." Both of these tests are the direct offspring of the Court's longstanding recognition that the Establishment Clause calls for government neutrality both among religions and between religion and irreligion.²⁷⁴ Over time, the two tests have merged into a single endorsement analysis steeped in neutrality ideals.

1. *The Lemon Test*

The famous "*Lemon* test," announced in *Lemon v. Kurtzman*,²⁷⁵ held that government actions are unconstitutional under the Establishment Clause (1) if they have no valid secular purpose, (2) if they have the effect of establishing religion, or (3) if they result in unnecessary government "entanglement" with

For an explanation of how *all* applications of the Establishment Clause are inherently divisive, thus rendering any analysis that focuses primarily on divisiveness to be essentially meaningless, see generally Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1 (2005).

273. Justice Thomas employed an "actual coercion" test in determining that the display in *Van Orden* did not compel any religious observance or profession of belief through threat of coercion, punishment, or force of law. *Van Orden*, 125 S. Ct. at 2865.

Even if Thomas's "coercion" test was the controlling one, it is possible that the banning of same-sex marriage constitutes impermissible legal coercion, because it has the purpose of "prevent[ing] individuals from engaging in a desired course of action." See Rubin, *supra* note 235, at 40 (alteration added).

274. See *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

275. 403 U.S. 602 (1971).

religion.²⁷⁶ Soon after the test was announced, the Court quickly qualified it, noting that the three factors are “no more than helpful signposts.”²⁷⁷ Over time, several members of the Court have criticized *Lemon* as unhelpful in analyzing certain Establishment Clause questions, and at times, the Court has simply not applied it.²⁷⁸

2. *The Endorsement Test*

As *Lemon* proved dissatisfying to more and more Justices, the “endorsement test”—in reality, a gloss on *Lemon*—became a more palatable alternative to some. Justice O’Connor originally postulated the test in her concurrence in *Lynch v. Donnelly*,²⁷⁹ in part because the *Lynch* majority used the word “endorsement.”²⁸⁰ O’Connor subsequently codified the test in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,²⁸¹ with five Justices signing on to its basic principles.²⁸²

Essentially, the endorsement test asks whether a government action appears, to the reasonably informed observer, (1) to have the purpose or effect of (2) specifically endorsing or rejecting (3) a religion or a religious belief.²⁸³ Under this articulation, the first prong of *Lemon*—valid secular purpose—is refashioned into a threshold question, and the third prong of *Lemon*—entanglement—is essentially discarded. The test also mandates that the government’s action cannot render “adherence to a religion relevant in any way to a person’s standing in the political community.”²⁸⁴ In *County of Allegheny*, O’Connor laid out the key values underlying the test:

If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, *government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.*

An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, but *fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others*, would not, in my view, adequately

276. *Id.*

277. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

278. *See Van Orden*, 125 S. Ct. at 2860–61 (Rehnquist, C.J., plurality opinion) (declining to apply *Lemon* and cataloguing recent cases in which the Court has alternately applied and not applied *Lemon*); *McCreary County*, 125 S. Ct. at 2750–51 (Scalia, J., dissenting) (cataloguing instances in which individual Justices have expressly disapproved of *Lemon* as an analytical device).

279. 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

280. *Id.* at 683 (Souter, J., majority opinion).

281. 492 U.S. 573 (1989).

282. *See id.* at 623–37 (O’Connor, J., concurring); *see also id.* at 620 (Blackmun, J., plurality); *id.* at 642–43 (Brennan, Marshall & Stevens, JJ., concurring in part and dissenting in part).

283. *Id.* at 625 (citing *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)) (O’Connor, J., concurring).

284. *Id.* (quoting *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring)).

protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.²⁸⁵

Another way to lay out the test is to ask the following four questions: (1) As a threshold matter, is there a valid secular purpose for the government's action? If no, then the action establishes religion and is unconstitutional.²⁸⁶ If yes, then we apply the following endorsement analysis. (2) To the reasonable observer, does the government's action have the *purpose* of endorsing a religion or religious belief? If yes, then the action endorses religion and is unconstitutional. If no, then (3) to the reasonable observer, does the government's action show favoritism to particular beliefs or convey disapproval to others, such that it has the *effect* of endorsing religion? If yes, then the action endorses religion and is unconstitutional. If no, then (4) to the reasonable observer, does the government's action either create a class of outsiders or render a person's religious beliefs relevant to her standing in the political community? If yes, then the action endorses religion and is unconstitutional. If no, then the action is constitutional.

This series of questions synthesizes the basic elements underlying O'Connor's original endorsement test. The test was not immediately popular, and the conservative Justices never really signed on to it.²⁸⁷ Additionally, the Court initially struggled to determine what specific knowledge is imputed to the "reasonably informed observer."²⁸⁸ However, all Justices supporting the endorsement test agree that government actions "may not prefer one religion over another or promote religion over nonbelief,"²⁸⁹ which seems to be a reasonable position, considering the Court's longstanding precedent.²⁹⁰

285. *Id.* at 627–28 (internal cross-references omitted) (emphases added).

286. Although O'Connor's endorsement analysis does not undertake an express "secular purpose" analysis, Souter's majority opinion in *McCreary County v. ACLU*, 125 S. Ct. 2722, 2732–33, 2735–36 (2005), affirmed that the key threshold step is whether the government has articulated a sufficiently secular interest in undertaking the challenged action. Therefore, it is appropriate to include it here as the first question a reviewing court would ask.

287. *Cf.* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Scalia, J., plurality opinion) (adopting a form of the endorsement test and attempting to create a public-forum exception to it; this articulation failed to garner a majority of votes). Scalia's articulation of the test would have undermined it from within—his proposed public-forum exception would have permitted governments to erect religious displays of any type in any public forum; provided each display occurred in a public forum, the exception would supply no meaningful outer limit regarding what constitutes an impermissible religious display in that forum. This giant loophole was probably among the reasons that Scalia failed to gain a majority in favor of his proposed exception.

288. *Compare id.* 778–83 (O'Connor, J., concurring) (describing the reasonable observer as someone "deemed aware of the history and context of the community and forum in which the religious display appears," understanding the "'history and ubiquity' of a practice," and not "limited to the information gleaned simply from viewing the challenged display," *id.* at 780 (quoting *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring))), *with id.* at 800 n.5, 800–02 (Stevens, J., dissenting) (describing the reasonable observer as part of "the universe of reasonable persons[.] ask[ing] whether some viewers of the religious display would be likely to perceive a government endorsement" (alterations added)).

289. *McCreary County*, 125 S. Ct. at 2746 (O'Connor, J., concurring) (citing *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15–16 (1947)); *accord id.* at 2733 (Souter, J., majority opinion) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" (quoting *Epperson v.*

In *McCreary County* and *Van Orden*, the Justices began to synthesize the *Lemon* and endorsement tests within the broader framework of neutrality rules. In his *McCreary County* majority opinion, Justice Souter emphasized the values underpinning his dissent in *Van Orden*: (1) the impact of the display's religious content on the reasonable observer,²⁹¹ (2) the presence or lack of a larger coherent plan, of which the religious display constitutes but a part,²⁹² and (3) the significance or importance of the display's location, particularly when it is situated on civic or government property.²⁹³ Souter also affirmatively embraced the neutrality principle in his own *Van Orden* dissent.²⁹⁴

In *McCreary County*, Justice Souter placed additional weight on: (1) the coherence of the plan, (2) its original development and justifications, and (3) its subsequent evolution.²⁹⁵ Thus, a critical infirmity of the *McCreary County* displays was that they were originally erected with an expressly religious purpose that was covered up in subsequent iterations of the displays but never repudiated.²⁹⁶ As a result, Souter found the post-hoc secular justifications offered for the displays to be merely pretextual, reasoning that, if the government has nothing to hide, it should not need to change its justifications for an action after the action is challenged. When the government re-explains its purpose, it invites inquiry into its original purpose, motivation, or objective.²⁹⁷

Justice Souter noted that “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”²⁹⁸ The *McCreary County* majority took no position on whether this is a rational-basis standard or some form of heightened scrutiny. Certainly, the Court's language makes it seem reasonable to conclude that this test constitutes heightened scrutiny—e.g., “genuine,” “sham,” “merely secondary.” However, the Court was unclear about whether the secular purpose must be express and easily-identified, or whether any conceivable secular purpose will suffice. It might assume too much to

Arkansas, 393 U.S. 97, 104 (1968)); *Van Orden v. Perry*, 125 S. Ct. 2854, 2875 (2005) (Stevens, J., dissenting) (“The first and most fundamental of [First Amendment] principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another.” (citation omitted and alteration added)).

290. See, e.g., *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15–16 (1947) (“Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

291. *Van Orden v. Perry*, 125 S. Ct. 2854, 2893 (2005) (Souter, J., dissenting).

292. *Id.* at 2895–96.

293. *Id.* at 2897.

294. *Id.* at 2892 (citing *Everson*, 330 U.S. at 18).

295. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2727–28 (2005). This emphasis probably arose from the factual circumstances at hand: Each display had undergone three incarnations, but the express purposes of the displays, manifested in official county documents, was to post the Ten Commandments in the courthouses. At the time of the litigation, both displays had been integrated into larger displays designed to showcase historical sources of American law. *Id.* at 2727–32.

296. Note how much this sounds like “preservation through transformation.” See *supra* Part III.A.

297. See *McCreary County*, 125 S. Ct. at 2739.

298. *Id.* at 2735. See also *supra* note 286 (discussing the role of the secular-purpose inquiry within the larger context of the endorsement-test framework).

conclude that heightened scrutiny applies. Therefore, a rational-basis approach will be used for the substantive analysis below.²⁹⁹

Finally, Justice Souter provided the Court with a satisfying description of the “reasonable observer,” obtaining a five-Justice majority in support of the articulated definition. Accordingly, the reasonable observer: (1) is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show;”³⁰⁰ (2) is “familiar with implementation of government action;”³⁰¹ (3) inquires as to “the historical context of the statute . . . and the specific sequence of events leading to [its] passage;”³⁰² and (4) is “deemed aware of the history and context of the community and forum in which the religious display appears.”³⁰³

Concurring fully with Justice Souter’s analysis in *McCreary County*, Justice O’Connor wrote separately to identify the greatest danger when governments endorse religion—namely, that the endorsement will unduly influence, deter, or restrict the free exercise of all religious adherents, even those who otherwise agree with the substance of the government’s religious expression.³⁰⁴

In his dissent in *Van Orden*, Justice Stevens’s endorsement analysis focused primarily on the neutrality principle;³⁰⁵ he invoked it in criticizing the fact that the actual text inscribed on the display placed “the State at the center of a serious sectarian dispute,” because it made a definitive choice of language among the many available versions of the Decalogue.³⁰⁶ Finally, Stevens aggressively touted neutrality ideals when rejecting Justice Scalia’s “original meaning” position,³⁰⁷ opining that Scalia’s position “is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance.”³⁰⁸

299. See *infra* Part V.A.

300. *McCreary County*, 125 S. Ct. at 2737 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

301. *Id.* (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (internal quotation and citation omitted)).

302. *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987)) (alteration added).

303. *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment)).

304. See generally *id.* at 2746–47 (O’Connor, J., concurring) (“It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment.”).

305. *Van Orden v. Perry*, 125 S. Ct. 2854, 2874 (2005) (Stevens, J., dissenting); see also *id.* at 2876 (“[T]he Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith.”).

306. *Id.* at 2880 (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”)).

Also, Stevens noted that, due to its placement on the State Capitol grounds, reasonable observers might potentially perceive the Decalogue as representing the official belief of all Texans, which raises compelled speech issues under *Wooley v. Maynard*, 430 U.S. 705 (1977). See *Van Orden*, 125 S. Ct. at 2881.

307. See discussion *infra* Part IV.B.

308. *Van Orden*, 125 S. Ct. at 2887 (Stevens, J., dissenting).

While Justice Stevens's particular objection to the text of the *Van Orden* display garnered only the votes of himself and Justice Ginsburg, it leads to two instructive questions: (1) Does the government's action reveal that the state has *taken one side* in an ongoing sectarian dispute? (2) Does the government's action expressly or implicitly *attempt to resolve* the ongoing sectarian dispute? The answers to these questions seem relevant to addressing the broader issue of whether, even when the government did not have the express *purpose* of endorsing religion, the government's action has the *effect* of endorsing religion or of segmenting society into insiders and outsiders: If the government has taken a side in a sectarian dispute or attempted to resolve it, then necessarily, the government has chosen to lend its imprimatur to one set of religious beliefs over another. This effectively endorses the preferred belief system, which violates neutrality ideals by preferring one religion to another.

B. The Historical-Acknowledgement Test: A Free Pass to Christian Majorities

Like the liberals, the conservatives on the Court have combined two distinct modes of analysis in synthesizing what can only be characterized as an extremely deferential test. Grossly stated, the historical-acknowledgment test asks only whether the government action honors or acknowledges longstanding religious beliefs that have been held since the dawn of the Union. The only limit on this principle appears to be political will, which, in practice, supplies no meaningful constraint on these "acknowledgments." As a result, the test provides religious majorities—who, in America, happen to be Christian—with a free pass to concoct any "acknowledgement" they please, based primarily on the fact that they comprise the greatest number of believers in American society and always have.³⁰⁹

Recognizing the infirmity inherent in this conception of the Clause, the conservatives valiantly attempted to fashion a limiting principle, but the result was much more lenient and religion-favoring than either the *Lemon*-endorsement test or any of the Court's previous rules. The historical-acknowledgment test limits the government's authority in the following way: The Establishment Clause is only offended when the government's action (1) has a religious purpose that extends beyond the scope of its secular purposes³¹⁰ or (2) requires or coerces nonbelievers into either professing adherence to a religious doctrine or participating in a religious ceremony.³¹¹

1. "Unbroken History": Chief Justice Rehnquist's Test

Describing the Court's Establishment Clause jurisprudence as "Januslike,"³¹² Chief Justice Rehnquist cast the question before the Court as the need to navigate two lines of cases, one acknowledging the "strong role played

309. See *infra* Part IV.B.2.

310. This is the outer limit that Justice Rehnquist describes in his articulation of the test. See discussion *infra* Part IV.B.1.

311. Justice Scalia considers the outer limit to be compelled religious observation or participation. See discussion *infra* Part IV.B.2. Justice Thomas describes the outer limit as "actual coercion." See *supra* note 273.

312. *Van Orden*, 125 S. Ct. at 2859 (Rehnquist, C.J., plurality opinion).

by religion and religious traditions throughout our Nation's history,"³¹³ and one recognizing that "governmental intervention in religious matters can itself endanger religious freedom."³¹⁴ Rehnquist stated that the best reconciliation between these competing values is one that "neither abdicate[s] our responsibility to maintain a division between church and state nor evince[s] a hostility to religion by disabling the government from in some ways recognizing our religious heritage."³¹⁵

In a footnote, Rehnquist repudiated neutrality ideals, asserting that "we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion. . . . Even the dissenters do not claim that [we must] forbid all governmental acknowledgements, preference, or accommodations of religion."³¹⁶ Technically, Rehnquist is correct, but only because he used absolutist language. Rehnquist's criticism of the neutrality principle is an attack on a straw man, because there is no genuine doctrinal dispute on this point: The *Lemon*-endorsement test neither bars any and all governmental preference for religion nor forbids all governmental acknowledgements of religion. No one questions that the government can acknowledge religion (i.e., by erecting holiday displays),³¹⁷ that it can prefer religion (i.e., by giving tax-exempt status to all religious organizations, regardless of their belief systems),³¹⁸ and that it can accommodate religion (i.e., by recognizing Christmas as a federal holiday).³¹⁹ As such,

313. *Id.*

314. *Id.*

315. *Id.* (alteration added).

316. *Id.* at 2860 n.3 (alteration added). The first part of this statement overstates the scope of the neutrality principle, while the second part constructs and attacks an argument that was never made by either the *McCreary County* majority or the *Van Orden* dissenters. See also discussion *supra* Part IV.A.

317. *E.g.*, *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

318. *E.g.*, I.R.C. § 501(c)(3) (listing types of organizations eligible for tax-exempt status under federal law; includes churches and religious social-service groups).

We must be careful not to overstate the nature or permissibility of this "preference." The tax-exemption of churches is commonly considered to serve a two-fold purpose: (1) encourage tax-deductible donations to social-service and religious organizations; and (2) relieve churches of tax liabilities that would burden their delivery of social and religious services. The "preference" in question would not seem to constitute a preference for religion over irreligion, because Secularist societies are eligible for tax-exemption just like churches are. See *id.* Moreover, the general availability of tax-exemption to religious organizations does not favor one religion over another. *Id.* Finally, the secular purpose has commonly been understood as encouraging participation in religious and social-service organizations because of their civilizing effects on society. Again, this principle is inherently inclusive of all systems of both belief and non-belief.

Therefore, the word "preference" is being used in a subtly different way here than in everyday English: Notions of favoritism (i.e., the government "prefers" for people to be religious, or it "prefers" religion over irreligion) have been discarded in favor of recognizing the net-positive social benefits of encouraging support for these organizations (i.e., the government "prefers" for these organizations to enjoy public support and for them to be successful in their missions). This is not to say that future claims may not arise about the permissibility of giving tax-exemption to religious organizations generally. Instead, I merely note that the courts have thus far recognized several secular reasons for permitting such exemptions.

319. *E.g.*, 5 U.S.C. § 6103 (2000) (listing federal holidays, including Christmas Day, December 25). Christmas Day is the only federal holiday derived from the beliefs of a particular religion, *viz.*,

acknowledgments, preferences, and accommodations appear to be entirely permissible, provided they pass the basic neutrality test. Therefore, Rehnquist's characterization of the Court's neutrality precedent is simply incorrect, and his rhetorical sleight-of-hand fails: He is repudiating a position that no member of the Court appears to hold. The neutrality rule is not an absolute bar—instead, it is an inquiry as to whether the government's action has the purpose or effect of endorsing religion. This is a far cry from an outright ban on acknowledgment, preference, or accommodation.

Nevertheless, to support his characterization of the Clause, Rehnquist proceeded to recount the “unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”³²⁰ He also noted the role of functional acknowledgments or “ceremonial deism” encountered in several places in American government.³²¹ In applying this “unbroken history” test, Rehnquist characterized the displays as a “passive use” of the Decalogue,³²² noting that the government's interest in acknowledging the Commandments was coextensive—and therefore coterminous—with their religious significance.³²³

Because of the potential that net-positive secular effects flow from the admonishments found in the Decalogue, Rehnquist ultimately concluded that the secular purpose behind posting it on the grounds of the Texas State Capitol grounds was at least as great as the religious purpose, and that the display was therefore constitutional.

2. *The Framers and Original Meaning: Justice Scalia's Test*

Essentially, Justice Scalia sought to identify precisely what the Framers and Ratifiers intended the Establishment Clause to mean, paying specific attention both to their expressions of monotheistic beliefs at the time of the founding³²⁴ and to the role of ceremonial deism throughout America's history.³²⁵ Scalia angled to refute the neutrality principle by establishing that “the history and traditions” of the nation “reflect our society's constant understanding of” the

Christianity. No other religious holidays are codified in federal law as days on which the federal government is closed.

320. *Id.* at 2861 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (upholding a crèche and Christmas display installed on government property)).

321. *See id.* at 2861–62 (citing cases upholding government acknowledgement of religion and “official references to the value and invocation of Divine guidance” (quoting *Lynch*, 465 U.S. at 675)).

The Court expressly permitted “ceremonial deism” in *County of Allegheny*, 492 U.S. at 595 n.46 (Blackmun, J., plurality, in dicta) (noting that invocations and prayer have a “solemnizing” effect on public events and proceedings).

Currently, acceptable forms of “ceremonial deism” definitely include the national pledge (“one nation under God”) and motto (“in God we trust”), *see id.*, formalistic or traditional prayers, *see* *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (permitting non-denominational legislative prayer), and probably include historic installations of religious figures and symbolism on federal government buildings in Washington, D.C., *see Van Orden*, 125 S. Ct. at 2862–63; *id.* at 2894 (Souter, J., dissenting). It is unclear exactly where the outer limit lies, as it may be different for each Justice.

322. *Van Orden*, 125 S. Ct. at 2864.

323. *Id.*

324. *See* *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748–50 (2005) (Scalia, J., dissenting).

325. *See id.*

Establishment Clause not as generally requiring neutrality among religions, and certainly not as requiring neutrality between religion and *irreligion*.³²⁶ Paralleling Rehnquist's view, Scalia's conclusion seems to conflict with *Everson* and the Court's long-standing neutrality jurisprudence.³²⁷

Nevertheless, Scalia sought to cast doubt upon the line of cases that announced and reaffirmed the neutrality principle, criticizing *Lemon* as "brain-spun," incapable of consistent application, and a "mistaken interpretation of the Constitution."³²⁸ He subsequently offered up the proposition that an acknowledgement of religion is permissible when it either is constituted of "beliefs widely held among the people of this country,"³²⁹ or is "recognized across . . . a broad and diverse range" of religious groups.³³⁰ He then argued that, when balancing "the interest of [a religious] minority in not feeling 'excluded'" with "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a *people*, and with respect to our national endeavors," courts should recognize that "[o]ur national tradition has resolved that conflict in favor of the majority."³³¹

Conceding that the foregoing analysis had failed to win over a sufficient number of Justices, Scalia argued that, if *Lemon*'s secular-purpose prong is to be preserved at all,³³² the focus should remain on "the search for a genuine, secular motivation" and not turn into a "hunt for a predominantly religious purpose."³³³ It is not clear whether Scalia conceives of this test as a form of rational basis or heightened scrutiny, but it is probably safe to assume that, given his willingness to let majorities erect almost any acknowledgement they please, Scalia conceives of it as a form of rational basis—and a highly-deferential one, at that.

Furthermore, he proposed that any contextual inquiry should be presumptively satisfied if the religious portion of the display does not have "greater prominence" than the other portions,³³⁴ and the reasonable observer could discern from the context that the entire display has a "purely secular purpose."³³⁵ Scalia would not consider evidence of a prior improper purpose as "taint[ing]" a legitimate present purpose.³³⁶

In conclusion, Scalia announced that he would affirm a display's constitutionality when (1) "[n]o one [is] compelled to observe or participate in any religious ceremony or activity,"³³⁷ (2) the government does not "contribut[e]

326. *Id.* at 2750.

327. *See supra* Part IV.A.

328. *McCreary County*, 125 S. Ct. at 2750–52 (Scalia, J., dissenting).

329. *Id.* at 2753 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). Ostensibly, Scalia means only monotheistic beliefs in the Judeo-Christian-Islamic tradition. *Id.* at 2753, 2756.

330. *Id.*

331. *Id.* at 2756 (alterations added, quotation marks and emphasis in original).

332. *See id.* at 2758 ("I have urged that *Lemon*'s purpose prong be abandoned . . .").

333. *Id.*

334. *Id.*

335. *Id.* at 2759.

336. *Id.* at 2763 (alteration added).

337. *Id.* at 2762 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)) (alterations added).

significant amounts of tax money to serve the cause of one religious faith,”³³⁸ and (3) “[p]assersby who disagree with the message conveyed by th[e] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”³³⁹

The conservative wing of the Court has struggled mightily to insinuate its deferential, religion-preferring historical analysis as the primary method of conceiving of the Establishment Clause. While the *Lemon*-endorsement test generally prevailed in *McCreary County* and *Van Orden*, the recent turnover on the Court probably means that neither side has been given the last word on the matter. Nevertheless, as the law stands today, the *Lemon*-endorsement test is the lens through which we must critically evaluate same-sex marriage bans.

V. DO SAME-SEX MARRIAGE BANS PASS MUSTER?: APPLYING THE *LEMON*-ENDORSEMENT TEST

The analysis of same-sex civil marriage bans occurs in two major steps. First, a secular purpose must be identified. Without one, the bans cannot withstand constitutional scrutiny. As we will see, even under a rational-basis conception of the secular purpose requirement, some of the so-called secular purposes given for same-sex civil marriage bans are decidedly religious, while others lie on such unstable logical foundations that, while the proffered justifications may be secular purposes in and of themselves, none of them is rationally related to banning same-sex civil marriage.

Even conceding for the sake of argument that some yet-unidentified secular purpose is out there, the analysis is incomplete. The second step is to apply the endorsement test’s three remaining questions: To the reasonable observer, does the government action have (1) the purpose or (2) the effect of endorsing religion, and (3) does the action render a person’s religious beliefs relevant to her standing in the political community? As we will see, even assuming a secular purpose, the preservationists’ preferred definition of marriage cannot pass the endorsement analysis.

A. The Search for a Secular Purpose: Evaluating the Arguments Against Same-Sex Civil Marriage

“[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose.”

—Justice Tom C. Clark, in *School District of Abington Township v. Schempp*³⁴⁰

We must first determine whether the proponents of banning same-sex civil marriage have articulated a non-pretexual, genuinely secular interest for doing so. Without one, such bans are unconstitutional establishments of religion, rendering the inquiry complete. This inquiry is far-ranging and relatively

338. *Id.* (quoting *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part)) (alteration added).

339. *Id.* (quoting *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part)) (alterations added).

340. 374 U.S. 203, 222 (1963).

extensive, because it requires us to undertake a critical evaluation of the logical and secular foundations of the justifications offered for bans on same-sex civil marriage. Our search is for a purpose that is “genuine, not a sham, and not merely secondary to a religious objective.”³⁴¹ As such, we are permitted to pierce the veil of pretextual obfuscations designed to mask an invidious religious purpose—genuine-ness cannot be determined otherwise.³⁴²

The following analysis relies primarily on the arguments advanced in favor of the Federal Marriage Amendment (FMA), which are found in its legislative history and hearing transcripts. I have supplemented a handful of these arguments with statements written by several individuals who testified in favor of the FMA, as they are helpful in unpacking their claims. I assume for the ease of argumentation that the arguments raised and dismissed here are the same ones used to justify statutory and constitutional bans that have been enacted at the state level, and that therefore, those bans would suffer the same constitutional infirmities that exist within the FMA.

1. *The Federal Defense of Marriage Act (DOMA), Social Science, and a Bit of History*

In 1996, DOMA was passed with great religious fanfare, and supporters of the law did not hesitate to trumpet its explicitly religious underpinnings.³⁴³ The proponents of DOMA used religious beliefs about the immorality of homosexuality as a justification for blatant gay-bashing. In light of DOMA’s undeniably religious background, some commentators have argued that DOMA is an unconstitutional establishment of religion.³⁴⁴ Fast-forward to the present day. While explicitly religious arguments against homosexuality were used to support DOMA,³⁴⁵ there is a near-complete absence of such anti-gay religious rhetoric used to justify the FMA.³⁴⁶ The preservationists only mention religion in two contexts: (1) religious freedom³⁴⁷ and (2) the definition of marriage.³⁴⁸

341. *McCreary County*, 125 U.S. at 2735. See also *id.* at 2727–28.

342. As a literal matter, if a proposition is pretextual, it is not genuine. The adjectives “pretextual” and “genuine” are mutually exclusive, as they are contradictory—a proposition cannot be both false and true at the same time.

343. *E.g.*, 142 CONG. REC. S10,100–02, S10,109–11 (1996) (statement of Sen. Byrd) (during the DOMA floor debates, citing the Bible to condemn homosexuality and homosexual behavior). See also James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 349–53 (1997) (cataloguing the range of explicitly religious anti-gay rhetoric used during the DOMA debates, including congresspersons’ direct citations to the Bible).

344. *E.g.*, Donovan, *supra* note 343.

345. *E.g.*, *Defense of Marriage Act: Hearing on H.R. 3396 Before the House Comm. on the Judiciary Subcomm. on the Const.*, 104th Cong. 1, 247 (1996) (statement of Rep. Canady) (declaring the homosexual “lifestyle” to be an “inherently destructive” one from which homosexuals need to be “rescued”). Rep. Canady’s statements mimic the fundamentalist Christian groups who try to convince homosexuals that they can “convert” from homosexual to heterosexual through prayer and religious belief. See *infra* notes 363–65, 407–12 and accompanying text.

346. *E.g.*, House, *Musgrave Amendment I*, *supra* note 183, at 1–53 (containing almost no religiously-based anti-gay justifications for the FMA).

347. See discussion *infra* Part V.A.4; see also *supra* note 246 and accompanying text.

348. See *supra* note 16; *infra* note 568; see also discussion *infra* Part V.A.2.b; *supra* Part I.A.

While the FMA has the consequential effect of legitimizing discrimination against same-sex couples, it does not have the express purpose of doing so.³⁴⁹ The lack of a facially-discriminatory purpose lends an air of credibility to the arguments favoring the FMA, despite their subtextual religiosity. This is a remarkable modernization of discourse: The lessons of history have truly “channeled” the preservationists’ once-religious anti-gay arguments into more tolerable, secular-sounding ones.³⁵⁰ What happened? The preservationists have not abandoned their religious principles. Instead, they have turned to using pseudo-secular justifications and obfuscating free-exercise claims as cover for insinuating their religious beliefs into the law.

Secularization of religious preservationism is not costless. For example, a truly “fundamental” tenet of fundamentalist religious beliefs is proselytization and conversion.³⁵¹ As such, it is consistent with preservationist values to conclude that imposition of their religious beliefs on American society is a paramount goal.³⁵² Preservationists ardently decry the secularization of

349. See discussion *infra* Parts V.B.2–3.

350. See Eskridge, *No Promo Homo*, *supra* note 236, at 1332. Even more remarkable about this tactical change is that fifty-eight of the congresspersons who co-sponsored DOMA in 1996 have co-sponsored various versions of the FMA between 2002 and 2006.

351. *E.g.*, Southern Baptist Convention (SBC), On Evangelism (June 2005), available at <http://www.sbc.net/resolutions/amResolution.asp?ID=1150> (“Since salvation is a free gift of God and lost people matter to God, He has commissioned believers to share the gospel . . . ; we urge individual Southern Baptists to recognize their responsibility to reach lost people with the gospel of Christ”); see also Coral Ridge Ministries (CRM), About Coral Ridge Ministries, http://www.coralridge.org/about_crm.htm (“CRM’s three-fold mission is to evangelize, nurture Christian growth through biblical instruction, and act in obedience to the Cultural Mandate by applying the truth of Scripture to all of life, including civic affairs.”) (last visited Jan. 8, 2007); National Association of Evangelicals (NAE), Our Values, <http://www.nae.net/index/cfm?FUSEACTION=nae.values> (“The Evangelical Fellowship of Mission Agencies, an NAE affiliate, serves thousands of missionaries around the world by providing an integral liaison with the State Department of the United States of America and other governments around the world.”) (last visited Jan. 8, 2007). The SBC, CRM, and NAE respectively claim sixteen million, three million, and thirty million members.

352. See, *e.g.*, Traditional Values Coalition (TVC), Empowering People of Faith Through Knowledge, <http://www.traditionalvalues.org/about.php> (“Traditional Values Coalition is the largest non-denominational, grassroots church lobby in America. Founded in 1980, by Rev. Louis P. Sheldon, Chairman, TVC has sought to empower people of faith through knowledge. TVC speaks on behalf of over 43,000 churches”) (last visited Jan. 8, 2007).

In the interest of full disclosure, TVC opposes the FMA, but only because it does not go far enough. See Andrea Lafferty, *Constitution should ban gay marriage*, COLUMBUS DISPATCH (online ed.), June 24, 2006, <http://www.columbusdispatch.com/editorials-story.php?story=dispatch/2006/06/24/20060624-A12-00.html> (criticizing the FMA because it leaves open the possibility that a legislature might enact same-sex civil unions or domestic partnerships) (last visited Jan. 8, 2007). It is beyond dispute that TVC opposes same-sex civil marriage, and that, given the choice between the FMA or no ban at all, TVC would support the FMA. Lafferty is the Executive Director of TVC. Traditional Values Coalition, About TVC, <http://www.traditionalvalues.org/about.php> (last visited Jan. 8, 2007). See also WallBuilders, About Us, <http://www.wallbuilders.com/aboutus/index.htm> (last visited Jan. 8, 2007).

WallBuilders’ goal is to exert a direct and positive influence in government, education, and the family by (1) educating the nation concerning the Godly foundation of our country; (2) providing information to federal, state, and local officials as they develop public policies which reflect Biblical values; and (3) encouraging Christians to be involved in the civic arena.

America,³⁵³ vigorously claiming that America is a Christian nation founded on Christian beliefs.³⁵⁴ As such, a number of well-funded and highly-influential preservationist organizations have begun to vigorously advocate for explicitly Christian social and legal policies.³⁵⁵ The FMA is one of those policies.³⁵⁶

Id.; Center for Reclaiming America for Christ (CRAC), Our Mission, <http://www.reclaimamerica.org/pages/aboutus.aspx> ("To inform, equip, motivate, and support Christians; enabling them to defend and implement the Biblical principles on which our country was founded.") (last visited Jan. 8, 2007). CRAC is a ministry arm of CRM, *supra* note 351.

353. *E.g.*, Southern Baptist Convention, On Secularization of our Culture (June 2004), *available at* <http://www.sbc.net/resolutions/amResolution.asp?ID=1135> ("The cultural drift in our nation toward secularism obscures moral absolutes under the guise of tolerance . . ."); Southern Baptist Convention, *Resolution on Secular Humanism* (June 1984), *available at* <http://www.sbc.net/resolutions/amResolution.asp?ID=969>.

Secular humanism has penetrated leadership in public life in our own land, especially in the political, mass media, and educational arenas, so that religion (except for humanism) is more and more regarded as irrelevant to national affairs and as of private significance only . . . ; [we] encourage Christians to challenge the growing tendency of humanists to dilute biblical principles in public life while they promote humanistic alternatives . . . ; we [resolve to] pursue this reversal by Christian example and the penetration of secular society, and by seeking appropriate legislative and/or judicial action . . .

Id. (alterations added). *See also, e.g.*, BILL O'REILLY, *CULTURE WARRIOR* 1–2 (2006).

I have chosen to jump into the fray and become a warrior in the vicious culture war that is currently under way in the United States of America. And war is exactly the right term. On one side of the battlefield are the armies of the traditionalists like me, people who believe the United States was well founded and has done enormous good for the world. On the other side are the committed forces of the secular-progressive movement that want to change America dramatically: mold it in the image of Western Europe.

Id.

354. *E.g.*, WallBuilders, About Us, *supra* note 352.

WallBuilders is an organization dedicated to presenting America's forgotten history and heroes, with an emphasis on the moral, religious, and constitutional foundation on which America was built—a foundation which, in recent years, has been seriously attacked and undermined.

. . . .

. . . [W]e develop materials to educate the public concerning the periods in our country's history when its laws and policies were firmly rooted in Biblical principles.

Id. (alteration added). *See also supra* note 16.

355. *E.g.*, Alliance Defense Fund (ADF), Purpose, <http://www.alliancedefensefund.org/about/purpose/default.aspx> ("The Alliance Defense Fund is a legal alliance defending the right to hear and speak the Truth through strategy, training, funding, and litigation.") (last visited Jan. 8, 2007); American Center for Law & Justice (ACLJ), About ACLJ, <http://www.aclj.org/Content/?f=69> ("The ACLJ is specifically dedicated to the ideal that religious freedom and freedom of speech are inalienable, God-given rights. The Center's purpose is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law.") (last visited Jan. 8, 2007); Liberty Counsel, Restoring the Culture One Case at a Time by Advancing Religious Freedom, the Sanctity of Human Life and the Traditional Family, <http://www.lc.org/aboutus.html> ("Liberty Counsel provides pro bono legal assistance in the areas of religious liberty, the sanctity of human life and the traditional family.") (last visited Jan. 8, 2007). *See also* The Becket Fund for Religious Liberty, About Us, <http://www.becketfund.org/index.php/article/82.html> ("The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, interfaith, legal and educational institute dedicated to protecting the free expression of all religious traditions.") (last visited Jan. 8, 2007). The Becket Fund is not an expressly Christian organization, but it is tirelessly pro-religion.

Nevertheless, preservationists may not openly evangelize through facially sectarian laws, as this would violate the Establishment Clause outright; as such, they have had to make certain compromises of principle in obtaining their religious objective. Now, instead of making blatantly religious arguments, preservationists carefully couch their justifications in terms that are *just* secular enough that their invidious religious purpose is not revealed. As a result, preservationists have found some strange bedfellows in secularism.³⁵⁷

Moreover, making secularized arguments has required preservationists to stake out some intractable scientific and sociological positions against homosexuality, same-sex relationships, and same-sex parenting.³⁵⁸ Over the last several decades, scientific evidence has mounted that homosexual sexual orientation is a benign variation of human sexuality, probably caused by genetics, immunology, endocrinology, or a combination of these.³⁵⁹ Moreover,

356. Rubin, *supra* note 235, at 41–42 (noting that same-sex civil marriage bans “have no secular justification at all; they are simply enactments of [religious belief]. The post hoc secular justifications that have been offered for them are unconvincing as a general matter.” (alteration added)).

357. See Eskridge, *No Promo Homo*, *supra* note 236, at 1409. Eskridge writes,

Like gender-benders and sexual nonconformists, traditionalists have found themselves making arguments that not only slight their core religious or natural law beliefs, but also move them into analytical territory that is perilous for them. To medicalize or constitutionalize their concerns—as lawyers do—risks losing their meaning in the translation, and even altering their own self-understanding over time. For example, the fundamentalist who truly believes that same-sex marriage is contrary to the law of God now finds himself allied with the bigot who says “homosexuals are child molesters,” with the lawyer who says “spouses have a right to defend their marriages against homosexual assault,” and with the politician who says “normal people have a right not to associate with homosexuals and lesbians.” Not only do the latter statements ignore the deep spiritual component of the fundamentalist’s belief system, but the devout person’s association with those secularized arguments may change his or her belief system. My reading of the Gospels suggests that unfactual accusations about gay people and dependence on the state to bolster one’s faith are inconsistent with Jesus’s philosophy of love—and that the importation of these views into Christianity certainly changes and arguably corrupts the philosophy articulated by Jesus.

Id. Lest we forget, religion lies at the root of the beliefs held by each of the preservationists that Eskridge describes in this excerpt. See *supra* Part III.A. See also *supra* note 245.

358. See, e.g., Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997) (claiming that same-sex parenting is likelier than not to result in harm to children) [hereinafter Wardle, *Potential Impact*]. Wardle’s conclusions have been thoroughly discussed and rejected in the literature as scientifically suspect and logically unfounded. E.g., Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998).

359. See Ryan S. Higgins, “Mr. Chief Justice, Tear Down This Wall”: The Science of Immutability Is Eroding the Court’s Barrier to Heightened Scrutiny for Homosexuals 14 (May 8, 2006) (on file with author).

The weight of the scientific evidence compels the conclusion that male sexual orientation has a biological antecedent that is beyond conscious, contemporaneous control and is fixed in *utero* or shortly thereafter: Neuroanatomical studies suggest that sexual orientation has a biological substrate in the human brain that is not chosen and cannot be changed; pheromone studies indicate that sexual orientation is not a conscious, contemporaneous choice; and a plethora of studies suggest that genetics, endocrinology, and immunology are somehow implicated in the underlying “story” of male homosexuality. Indeed, the growing consensus among scientists, psychiatrists, and physicians is that while there may be many reasons for a person’s sexual orientation, homosexuals do not choose their sexual orientation and it cannot be changed. This is the essence of immutability.

many scientists have affirmed that, regardless of the origins of homosexuality, sexual orientation is fixed by an early age and is not the product of an individual choice.³⁶⁰ Attempts to change an individual's sexual orientation from homosexual to heterosexual are generally viewed as psychologically harmful.³⁶¹ Same-sex couples have also been shown to be effective, loving parents capable of raising well-adjusted, productive children.³⁶²

Faced with mounting scientific evidence against their anti-gay position, preservationists can only prevail if they rely on scientific arguments and research about homosexuality that rest on factual conclusions directly contrary to those consistently found by mainstream scientists. This research usually comes in two flavors: conversion therapy and homosexual parenting.

First, in the context of "conversion therapy"—a process by which (it is claimed) that homosexuals can become heterosexual³⁶³—preservationists have created an entire lobby of researchers whose outcome-determinative social-science evidence is manufactured to conclude that (1) homosexuality is a choice, (2) homosexuals who refuse to attempt to convert to heterosexuality are doomed to a life of misery, and (3) there is no need to give homosexuals any civil rights,

Id.

360. *E.g.*, Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 *SCI.* 1034 (1991); Ivanka Savic et al., *Brain Response to Putative Pheromones in Homosexual Men*, 102 *PROC. NAT'L ACAD. SCI.* 7356 (2005); Brian S. Mustanski, *A Genomewide Scan of Male Sexual Orientation*, 116 *HUM. GENETICS* 272 (2005); Dean H. Hamer, et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 *SCI.* 321 (1993); Sven Bocklandt et al., *Extreme Skewing of X Chromosome Inactivation in Mothers of Homosexual Men*, 118 *HUM. GENETICS* 691 (2006);

361. *E.g.*, American Psychological Association, *Answers to Your Questions About Sexual Orientation and Homosexuality*, <http://www.apa.org/topics/orientation.html> ("Some therapists who undertake so-called conversion therapy report that they have been able to change their clients' sexual orientation from homosexual to heterosexual. . . . The American Psychological Association is concerned about such therapies and their potential harm to patients.") (last visited Jan. 8, 2007); American Psychiatric Association, *COPP Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (May 2000), http://www.psych.org/psych_pract/copptherapyaddendum83100.cfm (last visited Jan. 8, 2007).

Psychotherapeutic modalities to convert or "repair" homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of "cures" are counterbalanced by anecdotal claims of psychological harm. In the last four decades, "reparative" therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, APA recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm.

Id. See also American Psychiatric Association, *Position Statement on Psychiatric Treatment and Sexual Orientation* (Dec. 1998), http://www.psych.org/psych_pract/copptherapyaddendum83100.cfm ("The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient.") (last visited Jan. 8, 2007).

362. *E.g.*, Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 *PEDIATRICS* 349, 358–60 (July 2006) (summarizing recent longitudinal studies of same-sex parents and their children; finding no difference in adjustment and psychosocial development outcomes). This article summarizes the findings of a committee commissioned by the American Academy of Pediatrics (AAP) to study the effects that continued exclusion from legalized family structures has on same-sex couples and their children. *Id.* at 349.

363. See also *infra* notes 407–12 and accompanying text.

because with enough willpower (and religiosity), they can always repair their brokenness.³⁶⁴ Scientists have continually debunked these studies, demonstrating that they are based on unsound scientific principles and conducted using faulty research methods.³⁶⁵

364. Of these researchers, among the most famous is Joseph Nicolosi, of the National Association for the Research & Therapy of Homosexuality (NARTH), <http://www.narth.com>. NARTH's primary claim is that "reparative therapy"—a process by which the sexual orientation of a willing subject is "repaired" by changing it from homosexual to heterosexual—is a viable treatment option for persons who desire to "grow out of homosexuality"; Nicolosi refers to these persons as "non-gay homosexuals." JOSEPH NICOLOSI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH 3-4* (softcover ed. 1997) (defining "non-gay homosexuals" as those men who experience same-sex sexual attractions but who desire to live their lives as heterosexuals); see also NARTH, *What do clinical studies say?*, <http://www.narth.com/menus/cstudies.html> (last visited Jan. 8, 2007).

One should not conclude that NARTH's theories are secular merely because the organization is not expressly religious: Buried deep within the NARTH website are links to several articles by religious medical associations. NARTH, *Homosexuality and Hope: Statement Of The Catholic Medical Association* November, 2000, <http://www.narth.com/docs/hope.html> (last visited Jan. 8, 2007); NARTH, "Michigan State Medical Society Caves in to Gay Activist Agenda," *Charges Catholic Medical Association*, December 2002, <http://www.narth.com/docs/caves.html> (last visited Jan. 8, 2007); NARTH, *Medical Association Offers Position Statement on Homosexuality*, <http://www.narth.com/docs/offersposition.html> (reporting on the September 2004 position statement of the anti-gay Christian Medical and Dental Association) (last visited Jan. 8, 2007).

Moreover, Nicolosi himself is a conservative Catholic who believes in religious natural-law theory. Sandra G. Boodman, *Vowing to Set the World Straight*, WASH. POST, Aug. 16, 2005, at HE1 (quoting Nicolosi: "Your true self is heterosexual. Look at your body: It was designed to fit a woman, not a man."). As discussed, much of religious natural-law theory was developed by Catholics, who are among its most ardent proponents today. See *supra* note 245 and accompanying text. See also *infra* Parts V.A.2.f; V.A.3.a.

Finally, NARTH disclaims all homophobic intent, but it opposes same-sex marriage, subscribing to the preservationist position that opposite-sex marriage is the "ideal environment" in which to raise children. NARTH, *NARTH Position Statements*, <http://www.narth.com/menus/positionstatements.html> (last visited Jan. 8, 2007).

365. Perhaps calling these pieces "studies" gives them more credit than they merit—most of the literature claiming that homosexuality is a chosen, mutable condition comes in the form of opinion pieces. For example, Exodus International—one of the earliest and most famous of the Christianity-based conversion-therapy groups—has a series of articles posted on its website that constitute nothing more than opinions written by various proponents of the "ex-gay" movement; many of these authors have chosen to remain anonymous, and most of the articles are un-cited and have not been peer-reviewed. Moreover, the religious content of these "studies" is beyond dispute. See Exodus International, *Library-Society*, <http://exodus.to/content/blogcategory/17/56/> (last visited Jan. 8, 2007). See also *infra* notes 407-12 and accompanying text.

To be fair, the preservationists have not commissioned every study that they cite. In 2003, one study claimed that a handful of individuals who had undergone "reparative therapy" had succeeded in maintaining "good heterosexual function" lasting at least five years. See Robert L. Spitzer, *Can some gay men and lesbians change their sexual orientation? 200 participants reporting a change from homosexual to heterosexual orientation*, 32 ARCHIVES SEXUAL BEHAV. 399 (Oct. 2003). Preservationists celebrated this study as a validation of their longstanding claims that homosexuality is a choice and that homosexuals can rid themselves of same-sex attractions—NARTH has fallen all over itself trying to defend Spitzer's study from criticism. See, e.g., Roy Waller & Linda A. Nicolosi, *Spitzer Study Published: Evidence Found for Effectiveness of Reorientation Therapy*, <http://www.narth.com/docs/evidencefound.html> (last visited Jan. 8, 2007); A. Dean Byrd, *Fordham University Dissertation Furthers Spitzer's Landmark Study on Sexual Re-orientation Success*, <http://www.narth.com/docs/fordham.html> (reviewing doctoral dissertation by Jay C.

Second, we have briefly noted the scientific evidence in support of homosexual parenting,³⁶⁶ nevertheless, preservationists persist in claiming that homosexual parenting is dangerous for children.³⁶⁷ I do not wish to delve deeply into the arguments for and against homosexual parenting; because the documented, positive effects of homosexual parenting do not enjoy the same longitudinal credibility as several thousand years of recorded heterosexual parenting, it is unlikely that the debate over homosexual parenting could be resolved within these pages. For our purposes here, it is enough to show that science has not provided us with a conclusive answer either way.

As such, we seem to be mired in an intractable “war of the studies”: Because science may never conclusively establish either the genesis of homosexuality or the effectiveness of conversion, or the effects of homosexual parenting on children, the preservationists get away with citing social-science evidence that is anti-gay, outcome-oriented, and patently non-objective. As a result, they have left no room for meaningful argumentation and dialogue based on nonpartisan, unbiased scientific research. Instead, advocates on both sides can only engage in a fruitless back-and-forth about whose evidence is more credible or accurate.³⁶⁸

Despite the universally-positive support for same-sex civil marriage coming from the mainstream scientific and mental-health community,³⁶⁹ opponents of same-sex marriage persist in manufacturing incredible, specious research to justify their anti-gay position. Because neither side appears to have gained the upper hand in this battle,³⁷⁰ I will, for the purposes of this analysis,

Wade) (last visited Jan. 8, 2007); Daniel E. Byrne, Yet Another Attempt to Discredit the Spitzer Study Fails, <http://www.narth.com/docs/yetanother.html> (last visited Jan. 8, 2007).

However, Spitzer himself noted that the only individuals who could reasonably be considered to have actually changed their sexual orientation were “extraordinarily religious” and “highly motivated” to change—indeed, the only reason for the change was religiosity itself. Boodman, *supra*, at HE1 (reporting that Spitzer claims his study has been misrepresented by the preservationists: “It bothers me to be their knight in shining armor because on every social issue I totally disagree with the Christian right.”).

Moreover, Spitzer’s study has been heavily criticized for its research methods. *E.g.*, Theo G.M. Sandfort, *Studying Sexual Orientation Change*, 7 J. GAY & LESBIAN PSYCHOTHERAPY 15 (2003) (noting the methodological deficiencies in Spitzer’s study); Charles Silverstein, *The Religious Conversion of Homosexuals: Subject Selection is the Voir Dire of Psychological Research*, 7 J. GAY & LESBIAN PSYCHOTHERAPY 31 (2003) (noting that “[e]xtreme bias in subject selection is identified as the primary motivation for the subjects to claim that they have religiously converted from homosexual to heterosexual” (alteration added)).

366. See Pawelski et al., *supra* note 362, at 358–60.

367. *E.g.*, Wardle, *Potential Impact*, *supra* note 358.

368. See, *e.g.*, Catá Backer, *supra* note 225, at 232–34 (listing studies arriving at polar-opposite conclusions regarding the impact of same-sex parenting and the influence of non-heterosexuals on children generally).

369. *E.g.*, Pawelski et al., *supra* note 362, at 361 (representing the position of the American Academy of Pediatrics); American Psychological Association, APA Supports Legalization of Same-Sex Civil Marriages and Opposes Discrimination Against Lesbian and Gay Parents, <http://www.apa.org/releases/gaymarriage.html> (last visited Jan. 8, 2007); American Psychiatric Association, Support of Legal Recognition of Same-Sex Civil Marriage, http://www.psych.org/edu/other_res/lib_archives/archives/200502.pdf (last visited Jan. 8, 2007).

370. See, *e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 7–8 (N.Y. 2006).

disregard *all* social-science evidence about conversion-therapy and homosexual-parenting as being non-authoritative. This certainly renders it more difficult to dispose of the preservationists' arguments, but it does not render the task impossible. To paraphrase Justice Breyer in *Van Orden*, nothing can adequately replace the exercise of sound legal judgment.³⁷¹

2. *Why We Have Opposite-Sex Marriage: Circularity, Question-Begging, and a Pound of Logic*

Preservationists rehearse several arguments about the nature of marriage to justify their position against same-sex civil marriage. As we will see, none of these arguments possess either a genuine or a rational secular relationship to banning same-sex civil marriage. This is not to say that there are no genuinely secular reasons whatsoever for having opposite-sex marriage; indeed, most of these arguments are outstanding justifications for having opposite-sex marriage. These “pro-marriage” arguments actually constitute a sedimentation of discourse: Instead of arguing *against* same-sex marriage, preservationists are now arguing *for* opposite-sex marriage.

This is a brilliant tactical move, because it serves as convenient cover for their anti-gay purpose: Whenever someone says, “But you’re being discriminatory!,” the preservationists can simply respond, “Ah, but no! We just love marriage, that’s all!” While this obfuscation may be strategically useful, such empty cheerleading serves only to distract—after all, who isn’t for “marriage”?³⁷² Isn’t “marriage,” indeed, the very thing that we are fighting about? *Both* sides are for “marriage”—it is disingenuous for one side to attempt to claim the moral high ground about the matter.

As we see, the question before us is not why we should have opposite-sex marriage. Rather, the question is why we should have opposite-sex marriage *but not same-sex marriage*. Therefore, the constitutional inquiry is whether there is a rational relationship between the proffered secular purpose and the government action in question, *viz.*, a ban on same-sex civil marriage.

Several of the arguments are based on two instrumentalist assumptions and a conclusion: (1) opposite-sex marriage serves *purpose X*; (2) same-sex marriage does not serve *purpose X* (and in fact, might harm it); and therefore (3) marriage should not be made available to same-sex couples. While these

[P]laintiffs . . . refer to social science literature reporting studies of same-sex parents and their children. Some opponents of same-sex marriage criticize these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households. What they show, at most, is that rather limited observation has detected no marked differences. More definitive results should hardly be expected, for until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing.

Id. (alteration added).

371. *Van Orden v. Perry*, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring in judgment) (“[O]ne will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment.” (alteration added)).

372. Cf. JAMIE WHYTE, *CRIMES AGAINST LOGIC: EXPOSING THE BOGUS ARGUMENTS OF POLITICIANS, PRIESTS, JOURNALISTS, AND OTHER SERIAL OFFENDERS* 75–77 (2005) (characterizing this style of argumentation as the “empty words” fallacy).

arguments appeal to many unquestioning lawmakers and voters, it is important to explore exactly what is illogical about them. Exposing the irrationality of these arguments will inform the rest of the discussion.

As an initial matter, all advocates for marriage make arguments that favor having marriage in the first place. In responding to the question, “what kinds of relationships should be included in legal marriage?,” advocates on both sides generally proceed on the following syllogism:

First Major Premise = Legal marriage should include relationships that serve *purpose X*.

First Minor Premise = *Purpose X* is served by *attribute A*.

Second Major Premise = *Purpose X* is served by *attribute A*.

Second Minor Premise = *Attribute A* exists in *Y-type relationships*.

Second Conclusion = Therefore, *purpose X* is served by *Y-type relationships*.

First Conclusion = Therefore, legal marriage should include *Y-type relationships*.

Note that the term *Y-type relationships* is broad enough to encompass both same-sex and opposite-sex relationships; thus, both narrow and broad definitions of marriage³⁷³ fit within this syllogism. However, because preservationists object to same-sex marriage on substantive grounds, they change the syllogism slightly, basing their arguments on a narrower iteration:

First Major Premise = Legal marriage should include relationships that serve *purpose X*.

First Minor Premise = *Purpose X* is served by *attribute A*.

Second Major Premise = *Purpose X* is served by *attribute A*.

Second Minor Premise = *Attribute A* exists in *Y-type relationships*.

Third Major Premise = *Attribute A* exists in *Y-type relationships*.

Third Minor Premise = *Y-type relationships* include only opposite-sex couples.

Third Conclusion = Therefore, *attribute A* only exists in opposite-sex couples.

Second Conclusion = Therefore, *purpose X* is only served by opposite-sex couples.

First Conclusion = Therefore, legal marriage should only include opposite-sex couples.

The fallacy with this syllogism is that one of the syllogism’s terms is self-defining: The Third Minor Premise begs the question of why *Y-type relationships* include only opposite-sex couples. This flaw in reasoning means that none of the syllogism’s subsequent conclusions are informed by actual arguments—the series of conclusions become mere restatements of the question.

For example, nothing within the syllogism explains why (1) non-opposite-sex couples don’t possess *attribute A* (the Third Major Premise, leading to the Third Conclusion), (2) *purpose X* cannot also be served by relationship attributes other than *attribute A* (the Second Major Premise, leading to the Second Conclusion), or (3) *purpose X* is the only reason to have marriage in the first place (the First Major Premise, leading to the First Conclusion). These infirmities constitute the very substance of the due-process and equal-protection claims described above³⁷⁴—they go to the heart of what marriage *is*, which, as a legal matter, seems reducible to the *purposes* and *attributes* in play in the syllogism.

Same-sex marriage advocates face significant challenges in explaining why, under this syllogism, it is irrational to restrict marriage to opposite-sex couples only. Indeed, under rational-basis review, opponents of same-sex marriage can win this argument without expressly concluding that governments should ban

373. See *supra* Part I.A.

374. See *supra* Part I.A.

same-sex marriage. As revealed in *Hernandez v. Robles*,³⁷⁵ all a government must do is to establish why it makes marriage available to opposite-sex couples; it need not advance an affirmative argument *against* same-sex marriage—under rational-basis review, the point is to advance the interest somewhat, even if imperfectly.³⁷⁶ Given that opposite-sex marriage usually serves *purpose X* somewhat, a restriction (due process) or classification (equal protection) based on *purpose X* will probably pass muster.

So far, same-sex marriage advocates have prevailed only when the reviewing court determined that legal marriages may serve purposes other than *purpose X* or possess attributes other than *attribute A*. Said differently, advocates have only won when the reviewing court broadened the nature of the right. Such broadening truly constitutes the redefinition that preservationists so desperately seek to foreclose.

Lest these arguments distract us: our challenge vis-à-vis the Establishment Clause is to discern what secular reason exists for concluding that, because same-sex marriage does not possess the attributes of opposite-sex marriage, a government should be prohibited from granting such marriages. The syllogism in play here is the following:

First Major Premise = Legal marriage should include relationships that serve *purpose X*.

First Minor Premise = *Purpose X* is served by *attribute A*.

Second Major Premise = *Purpose X* is served by *attribute A*.

Second Minor Premise = *Attribute A* exists in *Y-type relationships*.

Third Major Premise = *Attribute A* exists in *Y-type relationships*.

Third Minor Premise = *Y-type relationships* include only opposite-sex couples.

Third Conclusion = Therefore, *attribute A* only exists in opposite-sex couples.

Second Conclusion = Therefore, *purpose X* is only served by opposite-sex couples.

First Conclusion = Therefore, *legal marriage should only include opposite-sex couples, and we should also ban legal recognition of all other relationships.*

Preservationists have extended the logical conclusion of the syllogism to include something—i.e., we should ban same-sex marriage—that the syllogism’s propositions do not rationally support. It is insufficient to simply say that opposite-sex marriage and same-sex marriage are different. Saying that opposite-sex marriage is better than same-sex marriage is a value judgment that requires a rational—and, as we will see, *permissible*—basis. Saying that “marriage is marriage” does not answer the question, “What is marriage?”; it merely repeats it in the form of a conclusion.

As mentioned, it is one thing to say that opposite-sex marriage should exist and to advance arguments in favor of having opposite-sex marriage. It is quite another to say that opposite-sex marriage should exist *to the exclusion of same-sex marriage*. This last shows that the claimed rational relationship between the First Major Premise and the First Conclusion has broken down. I call this the “Conclusion-Plus” fallacy: Preservationists are relying on something beyond the syllogism to justify the second half of the First Conclusion—banning same-sex marriage. The proposition that same-sex marriage should be banned *merely*

375. 855 N.E.2d 1, 7 (N.Y. 2006).

376. See *id.* at 11. See also *id.* at 22 (Grafteo, J., concurring).

because society benefits from having opposite-sex marriage cannot be logically derived from anywhere within the syllogism.

Where, then, does the “Conclusion-Plus” proposition come from? It primarily derives from religious beliefs about the immorality and spiritual dangers of homosexuality. Logically, the fallacy undermines the necessary rational relationship between the asserted government interest and the means used to serve that end; constitutionally, the religious beliefs undermine the necessary secular purpose. As we will see, then, the preservationists have failed to rationally articulate secular justifications for banning same-sex marriage.

a. *A Brief Summary of the Arguments*

This section briefly identifies the primary arguments—state interests, really—raised in favor of the FMA and same-sex marriage bans generally. Table 4 groups the preservationists’ propositions by topic—for comparative purposes, I have provided a key logical rebuttal to each argument.³⁷⁷

Rehearsing these arguments is not just a dry exercise in philosophizing. Note that a same-sex marriage ban serves the stated interests extremely poorly, if at all. As a result, we face the inescapable implication that *the stated interest is not the true interest*. First, each one of these propositions—with the possible exception of Proposition C³⁷⁸—is a rational reason for having opposite-sex marriage. Yet, without more information, we cannot establish a rational link between the claimed interest and banning same-sex civil marriage. As such, none of these interests constitute convincing reasons for adopting the FMA.

Second, each one of these propositions fills its purpose imperfectly; ostensibly, then, the FMA would perfect the interest, or at least to bring us closer to perfection—right? Well, no. As we will see, same-sex marriage has nothing to do with perfecting the interest. Instead, we would have to change something about the laws governing opposite-sex marriage. For example:

1. If the purpose of opposite-sex marriage is to encourage opposite-sex couples to procreate, then only opposite-sex couples who are willing and able to procreate—or, if infertile, willing to adopt—should be allowed to marry, and married couples should not be permitted to use contraception.
2. If the purpose of opposite-sex marriage is to ensure that as many children as possible grow up with a married mother and father, then married couples with children should find it harder to obtain a divorce.

377. Our discussion and rebuttal of these arguments will be limited to the Establishment Clause context. However, much can be said about these arguments from due-process and equal-protection perspectives. See generally Linda C. McClain, “*God’s Created Order*,” *Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 313 (2006).

378. Pew Forum on Religion & Public Life, Transcript, *The Ties that Divide: A Conversation on Gay Marriage with Andrew Sullivan and Gerard Bradley*, in Washington, D.C. (Apr. 28, 2004) [hereinafter Pew Forum, *The Ties that Divide*], available at <http://pewforum.org/events/print.php?EventID=56> (“[W]hen you’re coming down to saying that it’s not about procreation, it’s about procreative orientation, you’re coming very close to a complete tautology. You’re coming close to saying it’s not about being procreative, it’s about being *heterosexual*, even if that doesn’t mean being procreative” (emphasis and alteration added)) (statement of Andrew Sullivan).

TABLE 4. PRESERVATIONIST ARGUMENTS BY TOPIC.

<u>Proposition</u>	<u>Rebuttal</u>
<p style="text-align: center;">Civilization and Public Ordering</p> <p>1. We want to maintain long-standing social institutions.³⁷⁹</p> <p>2. We want to encourage the formation of unitary families and facilitate intergenerational values-transmission.³⁸⁰</p> <p>3. We want to encourage gender-complementarity in parenting and sex-role modeling.³⁸¹</p> <p>4. We want to create the ideal environment for child-rearing, which includes a giving each child a mother and father who are married.³⁸²</p>	<p style="text-align: center;">Civilization and Public Ordering</p> <p>We allow married couples to divorce, despite the fact that it works harm against all four interests.</p> <p>We allow single-parent childrearing and single-parent adoption, which, as mono-gendered parenting environments, work harm against interests #1, 2, and 3.</p> <p>We allow same-sex-couple adoption and second-parent adoption, which, as mono-gendered parenting environments, work harm against interests #3 and 4.</p>
<p style="text-align: center;">Responsible Procreation</p> <p>1. We want to encourage procreation within all marriages; for procreation to be “responsible,” couples should wait to have children until they are married.³⁸³</p> <p>2. We want to encourage unmarried persons who already have children to marry.³⁸⁴</p>	<p style="text-align: center;">Responsible Procreation</p> <p>We allow extramarital and premarital sex, but they could result in pregnancy at any time, thus working harm against interest #1.</p> <p>We allow fertile married couples to use contraception,³⁸⁵ but contraception results in temporarily- or permanently-delayed procreation, and thus works harm against interest #1.</p> <p>We allow marriages between infertile and sterile couples, even when they will never adopt or foster children, thus working harm against interest #1.</p> <p>We <i>require</i> certain marriages to be non-procreative;³⁸⁶ the couple will never have children, thus working harm against interest #1.</p> <p>We allow singles <i>who will never marry</i> and same-sex couples to undergo artificial insemination and in-vitro fertilization, resulting in procreation outside of marriage; this works harm against interests #1 and 2.</p> <p>We allow unmarried couples <i>who will never marry</i> to procreate or adopt, thus working harm against interests #1 and 2.</p>
<p style="text-align: center;">Procreative Orientation</p> <p>We want to encourage the “reproductive meaning” within a marriage through its “procreative orientation”—even if the couple is infertile or childless by choice.³⁸⁷</p>	<p style="text-align: center;">Procreative Orientation</p> <p>We allow marital partners to engage in non-procreative forms of intercourse (e.g., oral sex, anal sex),³⁸⁸ but these forms of intercourse cannot result in children and thus work harm against the interest.</p>

379. See *infra* Part V.A.2.b (discussing the definitional argument against same-sex civil marriage).

380. See *infra* Part V.A.2.c (discussing the intergenerational values-transfer argument against same-sex civil marriage).

381. See *infra* Part V.A.2.f (discussing the gender-complementarity argument against same-sex civil marriage).

382. See *infra* Part V.A.2.e (discussing the ideal-environment argument against same-sex civil marriage).

383. See *infra* Part V.A.2.d (discussing the responsible-procreation argument against same-sex civil marriage).

384. See *infra* Part V.A.2.d (discussing the incentivizing-marriage argument against same-sex civil marriage).

385. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (holding a statutory ban on contraception to be an unconstitutional violation of a married couple’s due process right to privacy in procreative decisionmaking).

386. *E.g.*, ARIZ. REV. STAT. ANN. § 25-101 (West 1996) (allowing first cousins to marry if one of them is sixty-five or older); WIS. STAT. ANN. § 765.03 (West 1979) (allowing first cousins to marry if the woman is fifty-five or older). See also Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN’S L.J. 337 (2004).

387. *E.g.*, See Pew Forum, *The Ties That Divide*, *supra* note 378 (statement of Prof. Bradley).

388. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a ban on homosexual sodomy). Note also that the sodomy ban struck down in *Lawrence* did not extend to non-procreative heterosexual intercourse, which *Lawrence* also constitutionalized by implication. See *generally id.*

3. If the purpose of opposite-sex marriage is to encourage “reproductive meaning” through penile-vaginal intercourse—thereby maintaining a “procreative orientation” within the marriage, then married couples should not be permitted to engage in non-vaginal intercourse or vaginal intercourse with contraception.

I will not run through the various permutations *ad absurdum*. These examples are sufficient to show that, aside from banning same-sex marriage, there is a rational way to advance all of the interests outlined in Table 4—a rational way *that no one wants to talk about!*

But according to the strictures of rational-basis review, merely identifying these alternative means of advancing the interest is not enough: We must also show that, because banning same-sex marriage bears such a highly-attenuated link to the interest itself, it is irrational to conclude that banning same-sex marriage advances the interest at all. In undertaking this analysis, we will discover that the preservationists are citing these interests to cover up an invidious religious purpose. It is identifying and dissecting this purpose to which we now turn.

b. *Identity Politics and the Definition of “Marriage”*

Preservationists frequently claim that the “one-man, one-woman” model of marriage should be “protected” from “redefinition,”³⁸⁹ because the man-woman paradigm has always been the only possible definition of marriage *per se*.³⁹⁰ The definitional argument was briefly discussed above,³⁹¹ but it is worth revisiting here in greater detail. The argument is a clever attempt to fix the meaning of marriage as an arrangement reserved exclusively for opposite-sex couples before any subsequent discussion takes place.³⁹² However useful such an argument might be rhetorically, the statement “marriage is marriage” fails logically because it is tautological: By claiming that a same-sex marriage, by definition, could never exist, preservationists have sidestepped the question (“Is marriage only between one man and one woman?”) by repeating it as a conclusion (“Marriage is only between one man and one woman.”). No attempt is made to explain why “marriage is marriage.” Thus, the definitional argument, while tactically useful, is an unsatisfying response to the question, “what is marriage?”

To take on one of the more colorful iterations of the definitional argument, Jeffrey Ventrella of the Alliance Defense Fund once wrote that, “without onions, [onion rings] cease to be onion rings. In the same way, marriage . . . consists of

389. This rhetoric is simply code for *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 981 (Mass. 2003). It bears noting here that the Massachusetts Court was applying *state* constitutional protections to *that state’s* definition of marriage. So much for federalism!

390. *E.g.*, 150 CONG. REC. H7898, H7901 (daily ed. Sept. 30, 2004) (statement of Rep. Hayworth) (“Whether a couple is a man and a woman has everything to do with the meaning of marriage.”).

391. *See supra* Part I.A.

392. *See, e.g.*, Jeffrey J. Ventrella, *Square Circles?! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681, 685 (2005) (“[I]f words lack fixed meaning, then debate itself becomes meaningless.” (alteration added)). *See also id.* at 688 (“Marriage law cannot be decontextualized merely to support someone’s trendy preferences.”).

two—and only two—persons [in] the union of a male and a female. Absent these essential components, the social construct ceases to be a marriage.³⁹³

The argument, in essence, is that $X = X$. This is undoubtedly true. But it is also mathematically possible that $X = Y$. It is this second equation that represents the root of our definitional crisis. In response to the possibility that $X = Y$, preservationists reply that, if the syllogism

$X = \text{marriage}$, and
 $\text{marriage} = \text{one man} + \text{one woman}$, ergo
 $X = \text{one man} + \text{one woman}$

is true, then the syllogism

$X = \text{marriage}$, and
 $\text{marriage} = \text{one woman} + \text{one woman}$, ergo
 $X = \text{one woman} + \text{one woman}$

could not also be true.

At first blush, *one man + one woman* „ *one woman + one woman* seems to be logically correct. But is it? What, other than a bare dislike of *one woman + one woman*, makes it logically—or, more precisely, *legally*—impossible for *one man + one woman = one woman + one woman*? Is it really beyond dispute that, given the existence of gender dysphoria, intersexuality, and transgenderism, the terms “man” and “woman” are impervious to multiple interpretations? It seems quite possible that the actors in our math-play are *legally* fungible: Since it is legal for one man to marry, over the course of a lifetime, many women (albeit one at a time), it is hard to imagine why, *without more*, he could not also marry many men in the course of that same lifetime. (Remember, the syllogism does not say “*marriage = only one man + one woman.*”)

If, as a matter of constitutional law, there are precious few areas in which women and men can be adjudicated to be inherently unequal,³⁹⁴ then it is unclear from the definitional argument exactly why or how *one man + one woman* is not the *legal* equivalent of *one woman + one woman*. Arguing from essentialism gets us nowhere, because we haven’t yet established that *one man + one woman > one woman + one woman*, or why, even if that is true, such an imbalance justifies banning *one woman + one woman*. I am not arguing that the definitional argument is *wrong*. But to determine that it is *right*, we need more information than the argument is willing to give.

Returning to the “onion rings” metaphor, we are thus left not with a discussion of the necessary ingredients to create an onion ring, but instead with the more basic question, “what is an onion?” Certainly, what an onion is cannot be without limit.³⁹⁵ However, defining the outer limits of the onion necessarily requires an inquiry beyond the onion itself. It seems that Ventrella’s argument is unassailable, not because it is correct, but because it is premised on faulty logic:

393. *Id.* at 684 (alterations added).

394. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”).

395. *See infra* Part V.A.3.c.

Major Premise = The onion is what it is.

Minor Premise = The onion has always been what it is.

Conclusion = Therefore, what the onion is cannot be questioned.

A more impenetrable tautology there wasn't yet.

Preservationists also find cold comfort in history: Governments have continually redefined what constitutes a valid "marriage";³⁹⁶ this means that marriage has never been—and is not now—an institution with a static definition. Claiming that one definition of marriage is *the only possible definition*, despite evidence to the contrary, is a factually-unsupportable proposition.

For historical evidence that marriage in America *has* included arrangements beyond "one-man, one-woman" marriage, one needs to look no farther than Mormon polygamy in the late 1800s.³⁹⁷ Concededly, Mormon polygamy always occurred within the confines of a man-woman paradigm. Some preservationists seize upon this fact to claim that comparisons to polygamy are inapposite—some preservationists even claim that, because polygamous marriages are bi-gendered, they would support polygamy over same-sex marriage.³⁹⁸

Logically, however, polygamous marriage cannot simultaneously support and subvert the preservationists' preferred definition of marriage. According to the teleological argument against same-sex marriage, marriage is as necessarily bi-nary as it is bi-gendered.³⁹⁹ Moreover, when preservationists invoke the "slippery slope," polygamy is cited as the very thing that they wish to avoid.⁴⁰⁰ It is a logical contradiction to say both "I am against *proposition X* because it leads to *bad consequence Y*" and "I prefer *bad consequence Y* to *proposition X*." *Bad consequence Y* is either worse than *proposition X* or it is not.

It is therefore logically inconsistent for preservationists to claim that polygamy's bi-gendered nature *supports* their definition of marriage while also claiming that polygamy's multi-nary nature *opposes* their definition of marriage—polygamy either subverts the preservationist definition of marriage or it does not. Said in the reverse, preservationists either oppose polygamy or they do not. They cannot logically have it both ways.

Despite its faulty logical foundations, the definitional tautology undergirds the preservationists' frequent appeals to identity politics. Many preservationists claim that gay and lesbian individuals have not actually been deprived of their right to marry, because they can simply "choose" to marry an individual of the opposite sex.⁴⁰¹

396. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (redefining marriage to permit persons of different races to marry); *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (same).

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

398. *E.g.*, Maggie Gallagher, *The Stakes: Why We Need Marriage*, NAT'L REV. ONLINE, July 14, 2003, <http://www.nationalreview.com/comment/comment-gallagher071403.asp> ("Polygamy is not worse than gay marriage, it is better. At least polygamy, for all its ugly defects, is an attempt to secure stable mother-father families for children.") (last visited Jan. 8, 2007).

399. *E.g.*, Ventrella, *supra* note 392, at 684 (opining that "marriage . . . consists of two—and only two—persons [in] the union of a male and a female" (emphasis added)).

400. *See infra* Part V.A.3.c.

401. *E.g.*, Card, *supra* note 65.

This argument concedes that *something* has to change before the definitional crisis can be resolved—the question is what or whom. It assumes that homosexuals are merely being obstinate about who they wish to marry, and so the definition of marriage need not be changed to accommodate their “trendy preferences.”⁴⁰² Identity-politicking serves two useful purposes for preservationists: (1) refuting claims of sex discrimination and (2) questioning the notion that homosexuality is a sufficiently immutable characteristic as to merit heightened constitutional protection.

First, there is a meaningful argument that same-sex marriage bans constitute unconstitutional discrimination based on sex. Grossly stated, the argument is this: (1) marriage is, after *Loving*, *Zablocki*, and *Turner*, an institution that affirms individual autonomy and decisionmaking vis-à-vis choice of partner; (2) bans on same-sex marriage are a restriction on individual autonomy, because they do not permit individuals to marry their choice of partner; (3) the restriction on individual autonomy is based on the sex of the individual who seeks to enter marriage (this renders irrelevant questions of class-based harms—i.e., harms to men or women as discrete groups); (4) because same-sex marriage bans draw lines based on gender, they thus require an “exceedingly persuasive justification”;⁴⁰³ and (5) same-sex marriage bans do not survive this heightened scrutiny.⁴⁰⁴ This claim renders the claimant’s sexual orientation to be irrelevant, because having a particular sexual orientation is not a prerequisite to marriage.

The claim succeeds or fails on whether the restriction is conceived of as working an individually- or group-based harm. If the restriction is conceived of as against the individual, the claim succeeds, because the individual’s autonomy is diminished based on her sex. If the restriction is conceived of as against an entire gender, the claim fails, because the legal handicap is the same for both genders, and it is generally-applicable to everyone—the restriction diminishes the autonomy of 100% of the population, so the persuasive force of any one individual’s claim is undermined.

Preservationists, predictably, take the position that homosexuals remain subject to the same gender-based line drawing that applies to heterosexuals, so no sex-discrimination claim can be stated. Identity-politicking helps in this regard, because it paints with a broad brush, delineating homosexuals as part of the larger class of males and females, not as individuals who, although similarly situated, are not permitted to marry the person of their choice solely on account of their individual genders.

Second, and more invidiously, the assertion that homosexuals can always choose to marry someone of the opposite sex is subtly intended to imply that sexual orientation is not a “choice”—at least not in the classic sense⁴⁰⁵—and therefore it is not deserving of heightened protection or scrutiny. While not directly related to the “definition” of marriage, this invocation of identity politics is deliberate and definitional—it intentionally questions whether a homosexual orientation results from nature or from choice.

402. See Ventrella, *supra* note 392, at 688.

403. See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

404. For a fuller explanation of the sex-discrimination claim, see generally Clark, *supra* note 67.

405. See *supra* notes 359–61 and accompanying text.

It is important to remember that religions—preservationists included—are not of one accord regarding the origins or moral consequences of homosexuality or homosexual behavior.⁴⁰⁶ For preservationists, there are two general schools of thought in this regard. One school believes that homosexuals (but curiously, not heterosexuals) have affirmatively chosen their sexual orientation, and that they have chosen incorrectly.⁴⁰⁷ This is the “reparative” school, and it is largely Evangelical. This school believes that a homosexual orientation can—and should—be changed to a heterosexual one through therapy and religious indoctrination.⁴⁰⁸ This belief is derived largely from the Bible passages that condemn homosexual behavior,⁴⁰⁹ and it drives the belief that homosexuals suffer from a sinful, unrepentant failure to choose the proper sexual orientation: heterosexuality.

The other school holds that the genesis of homosexuality is irrelevant—this is the “behavioral” school, which believes that, although homosexual behavior is sinful, homosexual desires are not. Accordingly, the story goes, even if an individual does not choose a homosexual orientation, and even if that orientation is immutable, individuals can choose whether to *act* on their homosexuality.⁴¹⁰ The Roman Catholic Church is the largest proponent of the “behavioral” school; unlike the Evangelical ministries, it does not aim to “change” an individual’s sexual orientation from homosexual to heterosexual—the goal instead is to encourage homosexuals to live a life of chastity and spiritual purity.⁴¹¹

Regardless of which school one follows, it is the underlying religious belief about the immorality of homosexuality that preservationists seek to insinuate

406. See *supra* Part I.B & Table 1.

407. As a logical matter, for this rationale to hold, it would mean that 100% of people choose their sexual orientation, and that 100% of the population is therefore susceptible of conversion to a different sexual orientation.

408. Representative religious organizations include: Homosexuals Anonymous, http://www.hafs.org/The_14_Steps (fashioned after the twelve-step program of Alcoholics Anonymous, but not affiliated with AA or any other recovery groups fashioned upon the AA model) (last visited Jan. 8, 2007); Love in Action, www.loveinaction.org (claiming to “restor[e] those trapped in sexual and relational sin through the power of Jesus Christ”) (last visited Jan. 8, 2007); Exodus International, www.exodus-international.org (“promoting freedom from homosexuality through the power of Jesus Christ”) (last visited Jan. 8, 2007); Pure Life Ministries, www.purelifeministries.org (“for men with sexual addictions or homosexuality”) (last visited Jan. 8, 2007). See also Traditional Values Coalition, Ministry and Counseling Resources For Those Struggling With Same-Sex Attractions And Other Gender Identity Disorders, <http://www.traditionalvalues.org/resources/index.php> (last visited Jan. 8, 2007).

409. See *supra* notes 242–44 and accompanying text.

410. Catholic Answers, Homosexuality, <http://www.catholic.com/library/Homosexuality.asp> (last visited Jan. 8, 2007).

Homosexual desires, however, are not in themselves sinful. People are subject to a wide variety of sinful desires over which they have little direct control, but these do not become sinful until a person acts upon them, either by *acting out* the desire or by *encouraging* the desire and deliberately engaging in fantasies about acting it out. People tempted by homosexual desires, like people tempted by improper heterosexual desires, are not sinning until they act upon those desires in some manner.

Id. (emphases in original).

411. Courage, Our Five Goals, <http://couragerc.net/TheFiveGoals.html> (last visited Jan. 8, 2007).

into the law through same-sex marriage bans. One theory is that banning same-sex marriage can actually incentivize heterosexuality: Because a ban on same-sex marriage will perpetuate heterosexual privilege in both law and culture, it might have the derivative effect of turning some homosexuals into heterosexuals, or at least of encouraging them to remain sexually chaste.⁴¹²

It is tempting to dismiss this claim as hogwash, but there is something to it: If a government can rationally determine that opposite-sex marriage is, on balance, better than same-sex marriage,⁴¹³ then there is little to stop it from rationally determining that heterosexuality is, on balance, better than homosexuality—right?

Well, not exactly. While rational-basis review may theoretically permit a government to incentivize heterosexuality, there still must be a legitimate basis for doing so at all.⁴¹⁴ In the Establishment Clause context, one would have to identify the government's interest in incentivizing heterosexuality and then determine whether that purpose is sufficiently secular. As shown here, the reasons for wanting to incentivize heterosexuality derive from religious belief. We might also question whether a government *ever* has a legitimate reason to incentivize or encourage a change in something so fundamental as an individual's sexual orientation.⁴¹⁵

At root, then, identity politics and the definitional argument both prove to be unsatisfying as secular justifications for bans on same-sex marriage. Identity politics is the cynical notion that homosexuality is so aberrant that the only reasonable response to it is to change homosexuals into heterosexuals, and failing that, to punish them for their aberrance by withholding civil rights. Because identity politics derives entirely from religious belief, it is an insufficiently-secular justification for banning same-sex marriage. The definitional argument fails because it does not make an argument; it merely

412. The idea that same-sex marriage bans would encourage chastity among homosexuals is somewhat absurd: Regardless of whether same-sex couples can legally marry, homosexuals will continue to form pair-bonds and to engage in sexual relationships. The question is whether they should be permitted to do so within the confines of a legal construct. The incentivizing-heterosexuality argument obfuscates, failing to address this question head-on.

413. See *Hernandez v. Robles*, 855 N.E. 1, 7 (N.Y. 2006) (“The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”).

414. Cf. *generally* *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional amendment prohibiting the state or local governments from passing anti-discrimination laws to protect homosexuals as illegitimate and based purely in animus against homosexuals as a group); *Lawrence*, 539 U.S. at 558 (invalidating a state statute criminalizing homosexual—but not heterosexual—sodomy as illegitimate and based purely in animus against homosexuals as a group).

415. See *Andersen v. King County*, 138 P.3d 963, 1032 n.5 (2006) (Bridge, J., concurring in dissent).

Rather than being merely an unchanging characteristic, “immutability” may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Courts and legislators therefore should not conclude that homosexuality is mutable because reasonable minds disagree about the causes of homosexuality or because some religious tenets forbid gays and lesbians from “acting on” homosexual behavior. Instead, courts should ask whether the characteristic is one *governments* have any business requiring a person to change.”

Id. (internal quotation and citations omitted).

states a definition. Asserting that religious marriage is the only possible definition of marriage defies both fact and reason—moreover, the proffered definition is insufficiently secular “because the tradition in question is a religious one.”⁴¹⁶

c. *Marriage as an Intergenerational Values-Transmission Device*

Preservationists often make an instrumentalist claim that opposite-sex marriage resulting in a household run by a mother and a father is the primary—and as some claim, the *only*—way that values and beliefs are transmitted across generations.⁴¹⁷ I will leave alone the incredible insult that such a claim hurls toward single-parent and same-sex parent families, focusing instead on the claimed secular relationship between marriage-as-a-values-transmitting-device and a ban on same-sex civil marriage. At the outset, it is worth asking why then, if marriage is so good at serving this noble purpose, same-sex couples should be barred from taking advantage of it? Why should same-sex couples not be allowed to pass on *their* values in such an effective way?

Values-transmission is a *really* good reason to have marriage at all; for civilizations to survive, they must necessarily have institutions that facilitate the intergenerational transfer of accumulated cultural knowledge, values, and beliefs. However, what the preservationists have failed to explain is why marriage’s ability to serve this valuable function inherently justifies limiting access to marriage to only opposite-sex couples.

So what else might be going on with this claim? What secular justification is there to prevent same-sex couples from taking advantage of values-transmission in the same way as opposite-sex couples? Under Prof. Siegel’s theory of transformation, the word “values” is pretextual code for “religious beliefs.”⁴¹⁸ Rhetorically, it is no accident that “values-transmission” and “family values” share the word “values.” It takes little digging to discover that what the preservationists mean by “values” is meant to signal religious opposition to homosexuality and same-sex relationships.⁴¹⁹

As a definitional matter, “values” encompasses both secular and sectarian morality. Exploiting this definitional ambiguity, preservationists attempt to lend an air of legitimacy to their arguments—and render them less susceptible to

416. Rubin, *supra* note 235, at 42; *see infra* Part V.B; *see also supra* note 37.

417. *E.g.*, Senate, *Less Faith*, *supra* note 184 (statement of Prof. Wardle) (“Marriage is the great prize. It is the primary mediating structure through which values are transmitted to society in general and to the rising generation, in particular. . . . [T]he institution of marriage is . . . crucial to the organization of society and the transmission of social values.” (alteration added)); 152 CONG. REC. S5415 (daily ed. June 5, 2006) (statement of Sen. Brownback) (“We know the values transmission that occurs in a marriage, what the parents say to their children and what they live in front of their children. We know the values transmission that takes place from grandparents, if they are surviving, to children, passing on those traditions and thoughts.”); 152 CONG. REC. S5519 (daily ed. June 7, 2006) (statement of Sen. Brownback) (“My parents have been married for over 50 years. You look at them and say: That is the way it should be, where two become one. Out of that union comes more people, more children, raised with a solid set of foundational values that you hope can be good citizens.”).

418. *See* Siegel, *supra* note 248, at 111.

419. *See also supra* Table 1.

Establishment Clause challenges—by conflating secular and sectarian morality and carefully couching their claims in secular-sounding terms.⁴²⁰

Nevertheless, it is not enough to merely identify the code words. To show that an irrational sectarian relationship between values-transmission and bans on same-sex marriage, we must engage the claim directly. Preservationists want to encourage opposite-sex marriage because it serves a valuable public purpose, *viz.*, intergenerational values-transmission. Returning briefly to our syllogism from above, let us make “values-transmission” equal *purpose X*. The attributes and relationships that the preservationists prefer include “a mother-father household” (*attribute A*) and “opposite-sex relationships” (*Y-type relationships*). All we have left to do now is to make the substitutions:

First Major Premise = Legal marriage should include relationships that serve *values-transmission*.

First Minor Premise = *Values-transmission* is served by a mother-father household.

Second Major Premise = *Values-transmission* is served by a mother-father household.

Second Minor Premise = A mother-father household exists in *opposite-sex relationships*.

Third Major Premise = A mother-father household exists in *opposite-sex relationships*.

Third Minor Premise = *Opposite-sex relationships* only include opposite-sex couples.

Third Conclusion = Therefore, a mother-father household only exists in opposite-sex couples.

Second Conclusion = Therefore, *values-transmission* is only served by opposite-sex couples.

First Conclusion = Therefore, legal marriage should only include opposite-sex couples, and we should also ban legal recognition of all other kinds of relationships.

Again, we find a basic circularity in the Third Minor Premise, which says that opposite-sex relationships include only opposite-sex couples. It is beyond dispute that opposite-sex relationships would be comprised of opposite-sex couples—indeed the very nature of the thing makes the syllogism true.⁴²¹ As Goodridge noted, such argumentation “singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”⁴²²

This argument is therefore unhelpful in answering the question why same-sex couples should be excluded from marriage. The claim cannot logically rest on the mere truism that same-sex couples are different from opposite-sex couples because they are, well, same-sex couples and not opposite-sex couples. *Without more*, all we can look to for justification is the underlying religious belief that homosexuals and same-sex couples suffer from an incurable moral and

420. *E.g.*, H.R. REP. 104-664, at 15–16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916 (House Committee on the Judiciary report on the 1996 “Defense of Marriage Act”) (DOMA “advances the government’s interest in defending *traditional notions of morality*” (emphasis added)).

Note how carefully this language walks the line between religious belief and secularism. It is crafted to signal religious belief to the “insiders” who know how to decode it, but the statement is just vague enough about its underlying religious precepts to render it safe from the challenge that it is overtly and impermissibly religious.

421. *Cf.* WHYTE, *supra* note 372, at 107–16 (2005) (discussing the logical fallacy of question-begging).

422. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

spiritual bankruptcy, and that, in light of this degraded state, the only reasonable thing to do is to deny them access to civil marriage.

Note what I am *not* saying: I am not claiming that intergenerational values-transfer is an ignoble purpose for marriage, or that opposite-sex marriages are incapable of fulfilling that purpose. Indeed, I am not even claiming that same-sex marriages are capable of fulfilling that purpose. Instead, I am concluding—based purely on logical reasoning and the argument’s face value—that there is no rational secular relationship between the claimed purpose and the proposed government action.

d. *Encouraging Responsible Procreation: Marriage as a Civilizing Force in Society*

A recent iteration of the “Conclusion-Plus” fallacy is that the state should ban same-sex marriage because it serves the state’s interest in encouraging “responsible procreation.”⁴²³ Concomitant with this claim is that marriage is a civilizing force in society, and that being married is good for everyone—married people are described as happier, healthier, better-off financially, and better-regarded in their communities.⁴²⁴ As noted above, these arguments present compelling reasons to have opposite-sex marriage, but they fail to answer the question, “Why ban same-sex marriage?”

Responsible procreation means that the state has an interest in incentivizing procreation within marriage; the assumption is that children being raised within a marriage are more likely than not better off than children being raised by single or unmarried parents. Fair enough: Encouraging propagation of the species is a noble state interest, and creating stable environments for child-rearing is a logical aim. Nevertheless, the responsible procreation argument is fallacious in its own right, for two reasons. First, the claimed interest is both over- and under-inclusive. Responsible procreation proves too much about the nature of opposite-sex marriage and opposite-sex couples’ interests in child-rearing: first, opposite-sex couples are not universally capable or desirous of having children; second, opposite-sex couples are not universally desirous of being married; and third, opposite-sex couples are not universally desirous of having children within a marriage. Additionally, responsible procreation does not reach children being raised in single-parent families, whether by death, divorce, or design. As such, the interest itself is significantly over- and under-inclusive, even without considering same-sex marriage as part of the equation.

Even so, we may assume that the state’s interest is rational. This leads us to the second fallacy in the argument: Banning same-sex marriage does not

423. The term “responsible procreation” comes from Lynn Wardle’s “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771 (2001). In essence, it is a reiteration of the procreation arguments made more obliquely in the “ideal-environment” and “gender-complementarity” contexts, see *infra* Parts V.A.2.e, f. Nevertheless, it is important to bring it up here in a separate analysis to show that reducing marriage to only procreation results in logical breakdown of the argument.

424. See *infra* note 531 and accompanying text (discussing the public-health argument against same-sex marriage).

incentivize opposite-sex marriage.⁴²⁵ One might respond by saying that legislatures may rationally decide that opposite-sex couples need marriage more than same-sex couples do—indeed, this is the very argument made in *Hernandez*.⁴²⁶ Nevertheless, it does not really answer the question before us. *Hernandez* was concerned with answering the question why the New York Legislature has heretofore failed to offer marriage to same-sex couples; *Hernandez* explicitly held that the New York Legislature has the discretion to “extend marriage or some or all of its benefits to same-sex couples.”⁴²⁷ Our question is a different one. Why should the New York Legislature—or any legislature, for that matter—be foreclosed from exercising its discretion in this regard? The responsible procreation argument offers nothing to explain why this should be so.

Moreover, marriage undoubtedly provides tangible and intangible benefits to the spouses. However, an inevitable question arises: Why should same-sex couples be precluded from taking advantage of these benefits? Said differently, why do same-sex couples not deserve these benefits? The preservationists have offered no rational or secular response to this question. It seems then, that their religious beliefs about the immorality of homosexuality are supplying the necessary link between the claimed interest and the means used to serve that interest. Such a justification is decidedly sectarian.

e. *Child-Rearing and the “Ideal Environment”*

Preservationists claim that the man-woman marriage paradigm is the “ideal environment” in which to procreate and raise children.⁴²⁸ This “child-centered” view is a relatively new development in family-values rhetoric.⁴²⁹ To

425. The only claim that same-sex marriage bans incentivize opposite-sex marriage is based entirely in private religious bias. See *infra* Part V.A.3.b.

426. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”).

427. *Id.*

428. *E.g.*, Senate, *supra* note 177 (testimony of Pastor Daniel de Leon, Sr.) (“Marriage between a man and a woman is the standard. A child is like a twig that is planted in the soil of our society that requires two poles to have the best chance of growing strong and healthy. Those two poles, if you will, are the parents, Dad and Mom.”); 152 CONG. REC. H5289 (daily ed. July 18, 2006) (statement of Rep. Gingrey) (“The ideal for children is the love of both a mom and a dad. No same-sex couple can provide that. The ideal for marriage is about bringing together moms and dads so children have a mother and a father to learn from.”); *id.* at H5302 (statement of Rep. Pitts) (“[T]he statistics still show that the best home for kids is still with a mom and dad who are married and love each other. That is the ideal we are talking about here: the best home for kids. By protecting marriage, this amendment promotes such an environment for our kids.” (alteration added)); *id.* at H5302 (statement of Rep. Graves) (“[T]he House needs to stand up and send a positive message to the American people about what is the best married environment to raise our children, and that is an environment that is a marriage between a man and a woman.” (alteration added)).

429. Thirty-five years ago, when *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), first brought the idea of same-sex marriage onto the national stage, society’s anti-gay rhetoric was frequently grounded in then-widely-held beliefs that homosexuals were “disturbed” or “perverted” individuals who suffered from mental illness. Indeed, it was not until 1973 that the American Psychiatric Association removed “homosexuality” from its list of pathologies. See American Psychiatric Association, *Homosexuality and Civil Rights: Position Statement*

support the claim, they frequently invoke social science evidence purporting to show that children who are products of “healthy” opposite-sex marriages are fundamentally better-off than children who are not.⁴³⁰

Without delving into the specific merits of the social science claim, it is easy to dispose of the “ideal-environment” interest as logically unsound. The stated interest is to ensure that as many children as possible are born into and raised in man-woman marriage paradigms. This is certainly a valid interest—governments frequently espouse such “aspirational” paradigms, and the “ideal environment” claim appears to fall neatly in that category: The operating assumption is that marriage acts as a stabilizing, civilizing force in adult relationships, in turn creating a more nurturing environment for children.

Said differently, the claim is that opposite-sex marriage is simply better for children than same-sex marriage. Well, so what? If the state’s interest is in providing a mother-father home for every child, there is a panoply of other steps that it could take to serve that interest directly, *viz.*, (1) enacting strict limitations on premarital and extramarital intercourse (minimizing the potential that an out-of-wedlock birth would result), (2) offering more financial incentives to unmarried opposite-sex couples if they marry, particularly if they already have or plan to have children (such incentives currently include, *inter alia*, certain tax breaks, pension rights, and Social Security benefits), or (3) more strictly regulating divorce (lessening the possibility that children would be exposed to parenting environments that are somehow less-than-“ideal”).

This is not to advocate for these measures in lieu of (or even more frighteningly, in *addition* to) bans on same-sex marriage. The point is this: the means used to serve the interest is a ban on same-sex marriage. There are many other reasonable steps that the government could be taking to incentivize opposite-sex marriage and encourage the formation of the “ideal environment,”⁴³¹ but the supporters of the FMA are choosing instead to ban same-sex marriage. Same-sex marriage bans are not of a kind with the regulations and incentives suggested above. Same-sex marriage bans are designed to *prevent* the formation of legal family units, as opposed to the changes suggested above, which are intended to *encourage* the formation of legal family units.

Moreover, as a matter of common sense, it seems irrational to conclude that the banning of one form of marriage would lead to the flourishing of another. Indeed, in *Lewis*, the State of New Jersey gave away this argument, noting that marriage’s sole purpose could not be to incentivize opposite-sex couples to procreate.⁴³² The absence of a rational relationship here belies the invidious truth

(Dec. 1973), http://www.psych.org/edu/other_res/lib_archives/archives/197310.pdf (last visited Jan. 8, 2007).

430. See Catá Backer, *supra* note 225, at 232–34.

431. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, § 401(a)(2), 110 Stat. 2105 (codified at 42 U.S.C. § 601(a)(2) (2000)) (“The purpose of this part is to increase the flexibility of States in operating a program designed to . . . end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage . . .”).

432. *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006).

underlying this claim: Advancing the “ideal environment” cannot be the preservationists’ true interest in banning same-sex marriage.⁴³³

That said, courts have thought otherwise. One of *Hernandez’s* key logical foundations was that “an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.”⁴³⁴ This rationale implies *sub silentio* that, in advancing the interest of creating the “ideal environment,” the New York Legislature could rationally single out the children of same-sex couples for disparate treatment—children who, *but for their parents’ sexual orientation*, fall squarely within the larger class of children intended to be protected by marriage.⁴³⁵

It is facetious to conclude that the government rationally advances its interest in *providing* all children with the security that marriage provides by *denying* an identifiable class of children that very security. It is perverse to punish children for the sexual orientation of their parents. If the preservationists care so much about children, why would they relegate a portion of them to a permanent underclass?

Some might say that rational-basis review allows us to count heads—or to *not* count heads—when making social policy.⁴³⁶ Under this reasoning, the children of same-sex couples don’t matter because there aren’t as many of them as there are children of opposite-sex couples.⁴³⁷ However we conceive of rational

The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving same-sex couples of the [rights of marriage].

Id. (alteration added).

433. *Cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down on Free Exercise grounds a generally-applicable, facially-neutral ordinance that was enacted with the facial purpose of protecting public morals and safety, but which was actually intended to burden the religious practice of only Santerian practitioners). A key aspect of this rule is that the law must be intended to discriminate; merely burdening one religious group over others is insufficient. *See Employment Div. v. Smith*, 494 U.S. 872 (1990).

434. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

435. *Cf.* 152 CONG. REC. S5527 (daily ed. June 7, 2006) (statement of Sen. Akaka).

Given the Marriage Protection Amendment’s broad and ambiguous language, it would have a potentially devastating effect on existing same-sex families. In particular, I am concerned how this amendment would impact the children currently being raised by same-sex parents. Not only would it curtail the States from granting equal marriage rights to same-sex couples, it could also, through their parents, deprive children of access to health insurance, life insurance benefits and inheritance rights.

Id. (emphasis added).

436. *Cf.* 125 S. Ct. 2722, 2747 (2005) (O’Connor, J., concurring) (“[W]e do not count heads before enforcing the First Amendment.”).

437. Nevertheless, many same-sex couples are raising many children throughout the nation. 150 CONG. REC. H7901 (2004) (statement of Rep. Baldwin) (“There are over 1 million children being raised in gay and lesbian families in the United States.”). Barring nationwide laws against homosexual parenting, it is foreseeable that they will continue to do so in ever-increasing numbers, particularly given the continuing development and wider availability of alternative reproductive methods. *See Rubin, supra* note 235, at 42–43. Therefore, if the ability or willingness to have and raise children is a predicate to receiving civil marriage benefits, same-sex couples have already fulfilled this requirement in spades.

basis, it is nevertheless unreasonable to conclude that a government rationally advances its interest through an action that affirmatively harms its interest.

Additionally, if the point of marriage is to encourage procreation, it is unclear how allowing infertile and sterile opposite-sex couples to marry—but not wholly-fertile same-sex couples—advances the stated interest. The argument is that same-sex couples need marriage less than opposite-sex couples do, because same-sex couples are less likely to have children.⁴³⁸ How does this logic not also apply to opposite-sex couples who are childless by chance or by choice? If the legal objection is childlessness, then the logical response would be to deny marriage to all couples who are highly likely to remain childless.

In response to this criticism, one might argue that the potential for these opposite-sex couples to adopt children is a sufficient justification for allowing them to marry, while still excluding fertile same-sex couples. Although this conclusion appears facially reasonable, it is mere obfuscation: How will preventing same-sex couples from marrying encourage infertile and sterile opposite-sex couples to adopt children? Assuming the existence of a causal link between the two is irrational.

At root, then, the words “ideal environment” suggest that other relationships—e.g., single parenting, same-sex parenting—are bad for children. The merits of this empirical claim lie beyond the scope of our inquiry. Instead, our focus is on rationality: If, *arguendo*, gays are bad for children, what is the logical remedy—banning same-sex marriage or banning homosexual parenting? Since banning homosexual parenting does not seem to carry as much currency as banning same-sex marriage,⁴³⁹ preservationists have chosen to fight the battle they can win. The “ideal environment” argument helps them in this regard: It signals the religious belief that, because homosexuals are immoral and

Rubin also raises the concern that the world may already be overpopulated as it is, rendering the necessity of reproduction a dead letter. *See id.* at 42. This appears to be a valid concern: In October 2006, the United States' population exceeded 300 million, giving American environmentalists significant pause. *See U.S. population now 300 million and growing*, CNN.COM, Oct. 17, 2006, <http://www.cnn.com/2006/US/10/17/300.million.over/index.html> (last visited Jan. 8, 2007).

438. *See Hernandez*, 855 N.E.2d at 7 (“[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”).

439. *But see* OKLA. STAT. tit. 10, § 7502-1.4(A) (2004), *cited in* *Finstuen v. Edmondson*, No. CIV-04-1152-C, 2006 WL 1445354 (W.D. Okla. May 19, 2006) (holding Oklahoma's ban on recognition of out-of-state adoptions by homosexuals to be unconstitutional under the federal Full Faith and Credit, Due Process, and Equal Protection Clauses); WEST'S F.S.A. § 63.042(3) (1977), *cited in* *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida's ban on homosexual adoption against federal due-process and equal-protection challenges), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005). *See also* Human Rights Campaign, State Legislation/Ballot Initiatives Affecting GLBT People: Parenting Record, <http://www.hrc.org/Template.cfm?Section=Parenting&Template=/CustomSource/Law/LawLegislationSearch.cfm> (continually updating a catalogue of state-level measures that impact homosexual parenting and adoption rights) (last visited Jan. 8, 2007). Most recently, legislatures in Ohio, Tennessee, and Utah have addressed suggested bans or restrictions on homosexual parenting. *Id.*

depraved, they are incapable of being good parents.⁴⁴⁰ The religious purpose underlying this preservationist claim—and same-sex marriage bans generally, is to discourage same-sex couples from becoming parents by punishing their children. This is decidedly sectarian.

f. “*Gender Complementarity, the Modeling of Sex Roles, and the Procreative Orientation of Marriage*”

On a related point, preservationists claim that “gender complementarity” is the only type of relationship model that the state should endorse as an appropriate example for children.⁴⁴¹ Preservationists frequently claim that children can only learn “proper” social and gender roles within a man-woman parenting paradigm.⁴⁴² Despite the overwhelming amount of scientific evidence that rebuts this claim,⁴⁴³ the merits of this empirical claim lie beyond these pages. The war-of-the-studies that inevitably results cleverly distracts us from the more invidious aspects of the “gender complementarity” theory.

One subtext of the theory is that, because same-sex relationships are, by their very nature, not bi-gendered, they are inferior to opposite-sex relationships as role models for children and are therefore undeserving of legal recognition. Moreover, the theory goes, giving legal recognition to same-sex relationships would “promote” homosexuality to children as “an acceptable lifestyle choice”—this would further harm the interest because children would be taught that it is acceptable not to conform to gender norms.

440. An even more invidious interpretation of “ideal environment” is that “we need children to be raised in heterosexual families because we have to keep them away from sexually predatory gays who, as everyone knows, are child molesters.”

This may seem like an extreme reading of “ideal environment,” but a number of preservationist interest groups take this stance as an official party line. *E.g.*, Traditional Values Coalition, Exposed: Homosexual Child Molesters, <http://traditionalvalues.org/urban/one.php> (last visited Jan. 8, 2007); Traditional Values Coalition, The Homosexual Movement and Pedophilia, http://www.traditionalvalues.org/homosexual_movement_and_pedophilia/ (last visited Jan. 8, 2007); Timothy J. Dailey, Family Research Council, Homosexuality and Child Sexual Abuse, <http://www.frc.org/get.cfm?i=IS02E3> (last visited Jan. 8, 2007); Tres Kerns, Concerned Women for America, ABC News Special on Catholic Pedophile Crisis Misses Mark, <http://www.cultureandfamily.org/article/display.asp?id=590&department=CFI&categoryid=cfreport> (last visited Jan. 8, 2007).

441. *E.g.*, Senate, *Examination*, *supra* note 195 (testimony of Christopher Wolfe) (“[G]ender complementarity is essential or integral to the meaning of the institution of marriage. Marriage is a union of two people whose physical union makes them, literally, a single unit, in the sense that this union of two complementary, engendered bodies is the ordinary way of bringing children into existence.” (alteration added)).

442. *E.g.*, 150 Cong. Rec. E1859 (2004) (statement of Rep. Tiahrt) (“While not everyone who enters into marriage desires children or is able to have children, the context of their marriage is an example of how a man and a woman should live together in a way where children could be raised and cared for.”). *See also* Lynn D. Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, 23 QUINNIPAC L. REV. 541 (2004).

We know that children of parents who smoke are more likely to smoke than children whose parents do not smoke; children of parents who are violent tend to be violent; children of Republicans tend to vote Republican. Is it not reasonable to expect that children raised by lesbigay parents will tend toward the same kinds of sexual behaviors and gender identity issues as their parents?

Id.

443. *E.g.*, Pawelski et al., *supra* note 362, at 358–60.

Citing these interests, the preservationists seek to prevent the “promotion” of homosexuality, claiming concern for the well-being of children generally. Nevertheless, as we will see, their impetus for making this argument is their religious beliefs about the immorality of homosexuality. This concern for *other people’s children* overreaches: If the end sought is to limit the exposure of their *own* children to homosexuality, preservationists already possess the autonomy to do that effectively,⁴⁴⁴ so no substantive legal changes appear to be necessary—preservationists may, according to the dictates of their consciences, teach their children whatever they wish about homosexuality, homosexuals, and same-sex relationships. If the end sought is more invidious—to dictate what information is available to *every* child or to limit *other* parents’ ability to educate *their* children as they see fit (or both)—then the interest cannot withstand scrutiny for two reasons: (1) such a restriction unconstitutionally infringes on others’ right to bring up their children as they see fit; and (2) the preservationists’ negative views of homosexuality are dictated solely by religious belief, which is a constitutionally-impermissible basis for creating public policy. As a result, this iteration of the “no promo homo” argument fails both because it overreaches and because it is not secular.

Moreover, the ends-means problem encountered in the previous section arises here as well. The stated interest of the “gender complementarity” claim is that marriage exists to encourage the formation of opposite-sex relationship models, premised on the assumption that these relationships are the ideal method for teaching children about healthy adult relationships. The means to that end is a ban on same-sex marriage. Again, the means fail to rationally serve the ends: It is irrational to conclude that the formation of opposite-sex relationships is the natural—or even logical—result of a ban on same-sex marriage.

As a result, it would seem that the “gender complementarity” theory must stand for something else—and so it does. Preservationists, and particularly Catholics, believe that penile-vaginal intercourse is the only appropriate form of intercourse, in part because of the “divinity” of the copulative sexual act,⁴⁴⁵ and in part because they believe that male and female genitalia are physiologically “complementary.”⁴⁴⁶ Therefore, “complementarity,” an otherwise innocuous word, is used equivocally to telegraph a belief in the “proper” copulative form of sexual intercourse—also referred to as the “procreative orientation” of

444. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the due process right to “liberty” includes the right to “bring up children . . . according to the dictates of [one’s] own conscience” (alteration added)); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (U.S. 1925) (holding that the due process right to “liberty” includes “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

445. E.g., Catechism of the Catholic Church, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm#2335 (“Each of the two sexes is an image of the power and tenderness of God, with equal dignity though in a different way. The *union of man and woman* in marriage is a way of imitating in the flesh the Creator’s generosity and fecundity”) (last visited Jan. 8, 2007).

446. E.g., Senate, *Examination*, *supra* note 195 (testimony of Christopher Wolfe) (“Marriage is a union of two people whose physical union makes them, literally, a single unit, in the sense that this union of two complementary, engendered bodies is the ordinary way of bringing children into existence.”).

marriage.⁴⁴⁷ Preservationists believe that oral and anal sex—the primary methods by which many homosexuals engage in intercourse—are deviant and sinful forms of sex.⁴⁴⁸ The basis for this belief is found in several Biblical passages that explicitly condemn non-vaginal forms of intercourse as disfavored by God and punishable by death.⁴⁴⁹

This religious belief was originally manifested in criminal sodomy laws, which have been used for centuries to punish non-procreative intercourse, particularly between men.⁴⁵⁰ Historical sodomy laws represented a commandeering of civil social policy by the church, and American sodomy laws perpetuated this conflation of sectarian and secular interests for hundreds of years. Many preservationists continue to believe that homosexuals should continue to be punished for engaging in these “deviant” forms of sex.⁴⁵¹

However, as a constitutional matter, the government may no longer punish individuals who eschew penile-vaginal intercourse for other forms of sex. If *Lawrence* means anything—and some argue it does not⁴⁵²—it certainly means that governments cannot punish individuals for consensually engaging in non-vaginal sexual intercourse.⁴⁵³

Therefore, if preservationists were to continue to punish homosexuals for their sinful forms of sexual intercourse, they had to find alternative forms of punishment. They discovered a gold mine in same-sex marriage bans, which have become a modern-day proxy for sodomy laws: Sodomy laws are designed to punish homosexual *conduct*, and same-sex marriage bans are designed to punish homosexual *relationships*. Because preservationists may no longer punish homosexual sex directly, they now seek to punish the relationships in which

447. *E.g.*, Pew Forum, *The Ties that Divide*, *supra* note 378 (statement of Prof. Bradley).

448. *E.g.*, New Advent, Catholic Encyclopedia: Lust, <http://www.newadvent.org/cathen/09438a.htm> (characterizing sodomy as “a consummated external sin”) (last visited Jan. 8, 2007); Southern Baptist Convention, On Same-Sex Marriage, <http://www.sbc.net/resolutions/amResolution.asp?ID=1128> (claiming that “the Bible calls [homosexuality] sinful and dangerous both to the individuals involved and to society at large”; citing *Leviticus* 18:22 and *Romans* 1:26–27, both of which condemn homosexual sexual intercourse (alteration added)) (last visited Jan. 8, 2007).

449. *E.g.*, *Leviticus* 20:13 (New Oxford ann., New Rev. Standard Version) (“If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.”).

450. *See* Eskridge, *No Promo Homo*, *supra* note 236, at 1351. *See also* An Acte for the punysshement of the vice of Buggerie, 25 Hen. 8, c. 6 (1534) (Eng.) (“the detestable and abhomyneable vice of buggery . . . [is] adjudged felonye” (alteration added)).

451. In *Lawrence v. Texas*, 539 U.S. 558 (2003), sixteen amicus briefs were filed in support of the State of Texas. Of these, only two were not filed by a fundamentalist Judeo-Christian religious group; even so, both of these non-religious briefs relied heavily on the preservationist arguments evaluated here. *See* Brief for the States of Alabama, South Carolina, and Utah as Amici Curiae Supporting Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), *available at* 2003 WL 470172; Brief for Texas Legislators et al. as Amici Curiae Supporting Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), *available at* 2003 WL 470181.

452. *See* Ventrella, *supra* note 392, at 706–07.

453. *See* *Lawrence*, 539 U.S. at 567 (“To say that the issue in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986),] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

homosexual sex is likely to occur.⁴⁵⁴ Flouting *Lawrence's* mandate, talk of “complementarity” telegraphs this invidious religious purpose.

3. *Of Slippery Slopes and Social Destruction: Consequentialism, Perversity, and Chicken Little*

One of the most popular tropes in favor of the FMA is that allowing same-sex marriage would cause American society to slide down a slippery slope toward total destruction—the theory is that same-sex marriage would set off a chain reaction of negative effects that will ultimately lead to the end of civilization as we know it.⁴⁵⁵ The legal conclusion, then, is to ban same-sex marriage before any court, legislature, or popular vote has the opportunity to begin such dangerous experimentation with the fabric of our society.⁴⁵⁶

The slippery slope comes in two primary flavors—consequentialism and perversity. The consequentialist argument is that same-sex civil marriage and marriage-like arrangements will devalue marriage and traditional family structures, resulting in a marriage-less society that is only steps from total social breakdown. The perversity argument is that legalizing same-sex marriage will lead to the legalization of other perverse relationship models that are even more depraved than same-sex couplings: If same-sex relationships were legalized, the argument goes, then proponents of these other relationships would be able to argue that their relationships, too, should be legally recognized.⁴⁵⁷

Of all the arguments made in favor of the FMA, the slippery slope is the only one that is made *against* same-sex marriage directly. All other arguments

454. This seems like an irrational course of action in and of itself, if only because homosexuals will continue to pair-bond and have sexual relationships even while marriage remains foreclosed to them. This conclusion hardly requires evidence: Pair-bonding has occurred among homosexuals for the duration of human history, yet marriage has also been foreclosed to them for almost the entirety of that history. The question before us, which the “gender complementarity” argument does not answer, is why marriage should continue to be foreclosed to homosexuals and same-sex couples.

455. *E.g.*, 152 CONG. REC. S5441–42 (daily ed. June 6, 2006) (statement of Sen. Brownback) (“[W]ith the weakening of the institution of marriage over the past 30 to 40 years, with this redefining of marriage, which would define marriage out of existence, which is what we have seen in other countries, you are going to harm your next generations and succeeding generations that you raise.” (alteration added)); 152 CONG. REC. H5304 (daily ed. July 18, 2006) (statement of Rep. Akin) (“[A]nybody who knows something about the history of the human race knows that there is no civilization which has condoned homosexual marriage widely and openly that has long survived.” (alteration added)).

456. *E.g.*, 152 CONG. REC. S5457 (daily ed. June 6, 2006) (statement of Sen. Hatch) (“[O]ur marriage laws permeate our entire culture and we need to be wary about letting the judiciary foist some untested and frankly, unwanted social experiment on an entire Nation.” (alteration added)); 152 CONG. REC. H5289 (daily ed. July 18, 2006) (statement of Rep. Foxx) (“The [*Goodridge*] decision represents that beginning of what could be a dangerous erosion of this sacred tradition [marriage] that we must protect.” (alterations added)).

457. *E.g.*, 152 CONG. REC. S5522 (daily ed. June 7, 2006) (statement of Sen. Inhofe).

[A]ll of those who are concerned about the very strong lobby, the homosexual marriage lobby, as well as the polygamous lobby, that they share the same goal of essentially breaking down all State-regulated marriage requirements to just one, and that one is consent. In doing so, they are paving the way for legal protection of such practices as homosexual marriage and unrestricted sexual conduct between adults and children, group marriage, incest, and, you know: If it feels good, do it.

Id. (alteration added).

are either arguments in favor of opposite-sex marriage or are arguments against same-sex parenting, or both. As such, the analytical method for these claims is somewhat different than before. First, these slippery slopes are secular, even though the fears driving their invocation are decidedly religious. This secularity does not end the inquiry, for the government's interest in avoiding the slide must still be rationally related to banning same-sex marriage. For each slippery slope, we therefore must establish two propositions: (1) that *allowing* same-sex civil marriage does not harm the state's interest and (2) that *banning* same-sex civil marriage does not advance the state's interest. As we will see, this analytical framework plays out slightly differently in each context.

a. *Consequentialism: Stanley Kurtz and the Scandinavian Dilemma*

In February 2004, conservative commentator and social theorist Stanley Kurtz published an article purporting to link the legal recognition of same-sex relationships in Scandinavia to both falling rates of opposite-sex marriage and rising out-of-wedlock birth rates.⁴⁵⁸ Specifically, Kurtz claimed that legalizing same-sex civil marriage or marriage-like relationships had more or less *caused* opposite-sex couples to stop marrying. I say “more or less” because Kurtz himself conceded that same-sex marriage had not *actually* undermined opposite-sex marriage, but instead had “further undermined the institution [of opposite-sex marriage]. The separation of marriage from parenthood was increasing; gay marriage has widened the separation. Out-of-wedlock birthrates were rising; gay marriage has added to the factors pushing those rates higher.”⁴⁵⁹

Preservationists rejoiced at this news, greeting Kurtz as their new anti-gay messiah. Kurtz's work supposedly confirmed their worst fears about the destructive path America will travel if same-sex relationships are ever legalized here. However, the preservationists apparently did not read Kurtz's work very carefully—had they done so, they might not have begun to repeat his conclusions *ad nauseam* in congressional debates and hearings.⁴⁶⁰ They would have discovered that Kurtz's work rests on some very shaky logical foundations, and that his conclusions have been roundly criticized from both ends of the political spectrum as unscientific and statistically suspect.⁴⁶¹ Nevertheless,

458. Stanley Kurtz, *The End of Marriage in Scandinavia: The “conservative case” for same-sex marriage collapses*, WEEKLY STANDARD, Feb. 2, 2004, at 26 [hereinafter Kurtz, *The End of Marriage*].

459. *Id.* (alteration added).

460. See, e.g., 152 CONG. REC. S5419–20, 5423–24 (daily ed. June 5, 2006) (statement of Sen. Brownback) (citing Kurtz's research); 152 CONG. REC. S5442–43 (daily ed. June 6, 2006) (statement of Sen. Brownback) (same); *id.* at S5450 (statement of Sen. Inhofe) (same); 152 CONG. REC. S5523 (daily ed. June 7, 2006) (statement of Sen. Inhofe) (same); 152 CONG. REC. H5315–16 (daily ed. July 18, 2006) (statement of Rep. Musgrave) (same); 150 CONG. REC. H7919 (2004) (statement of Rep. Pence) (same); 150 CONG. REC. S7908 (2004) (statement of Sen. Santorum) (same); *id.* at S7827–28 (statement of Sen. Brownback) (same); *id.* at S7954 (statement of Sen. Allard) (same); *id.* at S7967 (statement of Sen. Inhofe) (same); *id.* at S7980–81 (statement of Sen. Santorum) (same); *id.* at S7997–98 (statement of Sen. Brownback) (same); *id.* at S8003–07 (statement of Sen. Allard) (same); *id.* at S8088 (statement of Sen. McConnell) (same); House, *Musgrave Amendment I*, *supra* note 183, at 16 (statement of Judge Bork) (same); *id.* at 56–60, 84–102, 124–97 (reprinting several articles by Kurtz and related materials).

Nevertheless, merely repeating a falsehood over and over again does not make it true.

461. See 150 CONG. REC. H7913–15 (daily ed. Sept. 30, 2004) (written statement of Rep. Frank); M.V. Lee Badgett, *Prenuptial Jitters: Did gay marriage destroy marriage in Scandinavia?*, SLATE, May 20,

heartened by the preservationists' uncritical response, Kurtz has continued to write on the topic, amassing an extensive body of articles on the state of marriage in Northern Europe.⁴⁶²

According to Kurtz, the harm to state's interest boils down to this: "Gay marriage is one part of a new stage of marital decline that contains three basic elements: parental cohabitation, legal equalization of marriage and cohabitation, and gay marriage. My claim is that these three factors are mutually reinforcing."⁴⁶³ Kurtz's conclusions were drawn from his own meta-analysis of several studies that had traced marriage trends in Denmark, Norway, and Sweden, over the last several decades.⁴⁶⁴ All of these nations legalized same-sex relationships in some way during the late 1980s through the 1990s.⁴⁶⁵ Kurtz cited decreases in opposite-sex marriages and increases in out-of-wedlock births between 1990 and 2000 as evidence that legalizing same-sex relationships significantly contributed to the decline of marriage in Scandinavia.⁴⁶⁶

In regard to this last, Kurtz's own argument undermines the conclusion that he draws from the changes to marriage that occurred in the 1990s: "Scandinavia's out-of-wedlock birthrates may have risen more rapidly in the seventies, when marriage began its slide."⁴⁶⁷ This seems to be a tacit admission that the decline of marriage in Scandinavia began long before same-sex relationships were legalized there.⁴⁶⁸

It appears then that Kurtz's statistical conclusions suffer from the classic *post hoc ergo propter hoc* fallacy: The fallacy occurs when we assume that, if two events occur sequentially and in close proximity to one another (in either space or time), then the later-in-time event was caused by the first-in-time event. However, without more, it is logically irrational to conclude that, since opposite-sex marriage in Scandinavia declined *after* same-sex relationships were

2004, <http://www.slate.com/id/2100884/>; Nathaniel Frank, *Quack gay marriage science*, NEW REPUBLIC, May 3, 2004, at 20; Andrew Sullivan, *Kurtz Again*, DAILY DISH, Jan. 27, 2004, http://time-blog.com/daily_dish/index.php?dish_inc=archives/2004_01_01_dish_archive.html&PHPSESSID=893a9fbfa49b42caea86fa0d0ff640ae1 (last visited Jan. 8, 2007). *But see* Stanley Kurtz, *Unhealthy Half Truths: Scandinavia marriage is dying*, NAT'L REV. ONLINE, May 25, 2004, available at <http://www.nationalreview.com/kurtz/kurtz200405250927.asp> [hereinafter Kurtz, *Unhealthy Half Truths*] (responding to Badgett's criticisms); Stanley Kurtz, *Slipping Toward Scandinavia: Contra Andrew Sullivan*, NAT'L REV. ONLINE, Feb. 2, 2004 (responding to Sullivan's criticisms), available at <http://www.nationalreview.com/kurtz/kurtz200402020917.asp>.

462. See National Review Online, Stanley Kurtz, <http://www.nationalreview.com/kurtz/kurtz-archive.asp> (last visited Jan. 8, 2007). Not all of Kurtz's work in this area is catalogued in this archive, but this listing is sufficient to show that he has published extensively on this topic.

463. Kurtz, *Unhealthy Half Truths*, *supra* note 461.

464. The author of one of Kurtz's primary sources has publicly denounced Kurtz's conclusions as willfully misinterpreting his research. Darren R. Spedale, *Nordic Bliss*, http://www.freedomtomarry.org/document.asp?doc_id=1443 (last visited Jan. 8, 2007).

465. Kurtz, *The End of Marriage*, *supra* note 458.

466. *Id.*

467. *Id.*

468. And indeed, this was the case. See William N. Eskridge, Darren R. Spedale & Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, 2004 ISSUES L. SCHOLARSHIP No. 4, at 43-49 (2004) (tracing the change in marriage and out-of-wedlock birth rates in Denmark and Sweden; establishing that ongoing trends began early in the Twentieth Century), available at <http://www.freedomtomarry.org/pdf/ScandinaviaBEPRESSArticle.pdf>.

legalized, therefore opposite-sex marriage necessarily declined *because of* the legalization of same-sex relationships. This error in reasoning constitutes the very definition of the *post hoc* fallacy.

But as a matter of theory, is Kurtz right or wrong about what same-sex marriage might do to opposite-sex marriage? If he is, it might be considered rational to believe him, regardless of the methodological flaws in his work. Therefore, we must identify exactly what it is that Kurtz is claiming will happen. His syllogism is something like this:

Major Premise = Legalizing same-sex relationships delinks marriage from procreation and parenthood.

Minor Premise = Delinking marriage from procreation and parenthood leads to the end of marriage.

Conclusion = Therefore, legal recognition of same-sex relationships leads to the end of marriage.⁴⁶⁹

Kurtz's syllogism suffers from question-begging in both the Major and Minor Premises. First, nothing in Kurtz's work explains why legalizing same-sex relationships delinks marriage from procreation and parenthood—or more precisely, why legalizing same-sex relationships delinks marriage from procreation and parenthood *more than current laws already have*. Currently, procreation and parenthood may occur outside of marriage, and likewise, marriage may occur without procreation and parenthood.⁴⁷⁰ Second, nothing in Kurtz's work explains how delinking marriage from procreation and parenthood leads to the end of marriage. It seems that low exit-costs and a declining heterosexual interest in marriage have started America down that slippery slope already⁴⁷¹—and to a large extent, same-sex relationships aren't even legal in America, so they certainly couldn't be the cause.

Nevertheless, under rational-basis review, we must show that it is irrational to believe either that allowing same-sex marriage would harm the government's interest or that banning same-sex marriage would advance it. The first part—showing no harm to the interest if same-sex marriage is allowed—is difficult to do here, if only because Kurtz's argument has so unsuccessfully delineated the government's interest. If we assume, *arguendo*, that the government's interest is to incentivize marriage for procreation and parenting purposes, then we immediately find ourselves in familiar territory: As before, we find many alternative rational ways for the government to advance this interest aside from banning same-sex marriage, and we find a dearth of explanations for why same-sex marriage harms the interest.⁴⁷²

Still, we should take the substance of Kurtz's claim seriously, if only to show that it is irrational to conclude that fewer opposite-sex marriages will occur if same-sex marriage is permitted. If Massachusetts is any example, opposite-sex couples have continued to do quite well for themselves despite the existence of same-sex civil marriage: Although, in declining, its overall marriage

469. This articulation of Kurtz's syllogism is derivative of the one used in Eskridge, Spedale & Ytterberg, *supra* note 468, at 12–13.

470. *Cf. id.* at 16.

471. *See id.* at 19.

472. *See supra* part V.A.2.a.

rate has followed a nationwide trend that began in the 1950s,⁴⁷³ Massachusetts continues to enjoy the lowest divorce rate in the nation and it has for some time.⁴⁷⁴ Moreover, if we understand out-of-wedlock birth rates to stand as a proxy for the success of opposite-sex marriage, Massachusetts—like the rest of the nation—has enjoyed an out-of-wedlock birth rate that has remained “essentially stable” over the last sixty years.⁴⁷⁵ Since same-sex marriage was legalized there in 2004, we have not seen a precipitous drop-off in marriage rates or a concomitant increase in out-of-wedlock birth or divorce rates.⁴⁷⁶ As a factual matter, it is clear then that opposite-sex couples are having little trouble forming and sustaining healthy adult relationships in Massachusetts. The sky has not fallen.

The second part—showing no advancement of the interest if same-sex marriage is banned—is also a familiar question. As mentioned, it is hard to understand exactly how banning same-sex marriage will induce more opposite-sex couples to enter marriage and procreate—and to stay in marriage for many years. The chain of causation between the two is so attenuated that it is simply irrational to conclude that the banning of one leads to the flourishing of the other.

Finally, it is important to note one key difference between the United States and Scandinavia—and it is a difference that Kurtz himself calls out as highly relevant: The European nations with the lowest rates of family-dissolution and out-of-wedlock births are those which are “strongly dominated by the Catholic confession.”⁴⁷⁷ Scandinavia is a highly-secularized region of the world,⁴⁷⁸ but the United States is still a very religious nation.⁴⁷⁹ And indeed, the very reason same-sex relationships have caused such a furor in America is because of religious beliefs.⁴⁸⁰ The fact that so many religious believers feel so strongly about marriage itself militates against the rationality of concluding that legalized same-sex relationships would lead to lower rates of opposite-sex marriage.

473. See National Center for Health Statistics, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, 23 VITAL & HEALTH STAT. 2, 4, 11–12 (July 2002), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf [hereinafter NCHS, *Cohabitation*]; see also National Vital Statistics System, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2004*, 53 NAT'L VITAL STAT. REP. 6 (June 2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_21.pdf [hereinafter NVSS, *Births, Marriages, Divorces, and Deaths*]; National Center for Health Statistics, *Marriage and divorce rates by State: 1990, 1995, and 1999–2002*, <http://www.cdc.gov/nchs/data/nvss/mar&div.pdf> (last visited Jan. 8, 2007).

474. See NVSS, *Births, Marriages, Divorces, and Deaths*, *supra* note 473, at 6.

475. See National Vital Statistics System, *Births: Final Data for 2002*, 52 NAT'L VITAL STAT. REP. 8 (Dec. 2003), available at http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf [hereinafter NVSS, *Births: Final Data*]; NVSS, *Births, Marriages, Divorces, and Deaths*, *supra* note 473, at 6.

476. See NVSS, *Births: Final Data*, *supra* note 475, at 8; NVSS, *Births, Marriages, Divorces, and Deaths*, *supra* note 475, at 6.

477. Kurtz, *The End of Marriage*, *supra* note 458 (quotation omitted).

478. See *id.*

479. PEW CENTER, RELIGIOUS BELIEFS, *supra* note 9, at 26 (reporting that, as of October 2003, sixty-two percent of Americans rated religion as “very important” in their lives, with an additional twenty-four percent rating religion as “fairly important”).

480. *Id.* at 1–3.

All of this is not to say that a slide down the slope is impossible—we have already begun that slide to some degree, but this slide cannot be rationally attributed to same-sex couples, who are largely denied access to marriage and will be for the foreseeable future.⁴⁸¹ No, it is only to say that a slide is not inevitable, and that, for the reasons discussed, it is illogical to conclude from Kurtz's work that the consequentialist slippery slope constitutes a rational justification for banning same-sex marriage.

b. *Private Bias and the Cheapening of Marriage*

Before moving on to the slippery slope of perversity, it is worth pausing to consider what many claim to be the potential psychological impact of same-sex marriage on opposite-sex couples. Echoing the consequentialist argument dismissed above, many preservationists claim that allowing same-sex couples to civilly wed will result in fewer marriages overall, because opposite-sex couples would no longer perceive marriage as a special institution worthy of a life-long commitment. Some, like Jeffrey Ventrella, claim that evidence showing the deleterious effects of same-sex marriage on opposite-sex marriage could not reasonably be produced before those negative effects have already occurred.⁴⁸²

Ventrella is correct about our inability to precisely measure speculative harms *ex ante*: It is impossible to predict with any certainty what the long-term effects of *any* policy change will be—indeed, if this were the limiting principle on government action, nothing would ever change because of this very uncertainty. In light of this logical flaw, Ventrella's argument fails logical scrutiny: By assuming its conclusion—that a decline in opposite-sex marriage *will directly result from* same-sex marriage—the argument renders itself a solution in search of a problem.

To be fair, this version of the consequentialist argument says, “These potential harms are so bad that we don't even want to chance it.” In a different context, this argument may have persuasive legal force. However, this line of reasoning was used to oppose interracial marriage with little success; it has merely been recycled here.⁴⁸³

Interestingly, as a result of bans on same-sex civil marriage, harm to opposite-sex marriage has already begun: Some opposite-sex couples are now refusing to wed until civil marriage is made available to same-sex couples.⁴⁸⁴ Moreover, some members of the clergy are refusing to issue marriage licenses or solemnize marriages until same-sex couples have full access to civil marriage,⁴⁸⁵

481. Cf. Eskridge, Spedale & Ytterberg, *supra* note 468, at 20.

482. See Ventrella, *supra* note 392, at 717–21.

483. See Eskridge, Spedale & Ytterberg, *supra* note 468, at 20–21.

484. Kayleen Schaefer, *The Sit-In at the Altar: No “I Do” Till Gays Can Do It, Too*, N.Y. TIMES, Dec. 3, 2006, at 91 (reporting on the larger trend; noting that celebrity couples Charlize Theron and Stuart Townsend, and Angelina Jolie and Brad Pitt, have vowed not to wed until same-sex couples are allowed to marry); see also Erik Baard, *Standing on Ceremony: A Rites Issue: Straight Couples Who Refuse to Marry Because Gays Can't*, VILLAGE VOICE (online ed.), Dec. 10, 2003, available at <http://www.villagevoice.com/news/0350,baard2,49322,1.html>.

485. See, e.g., Ian Ayres, *A New Marriage Decision (for Heterosexuals)*, LESSIG BLOG, June 6, 2005, <http://lessig.org/blog/archives/002943.shtml> (chronicling several Connecticut and Massachusetts ministers who are refusing to solemnize any marriages until same-sex couples have nationwide

and at least for a time, Benton County, Oregon, stopped issuing civil marriage licenses to *anyone*.⁴⁸⁶ These examples show that, even if the preservationists' stated interests were rational, quantifiable harm to those interests is occurring as a *direct result of* continued marriage inequality. There is no reason to think that this harm would abate if marriage were constitutionally foreclosed to same-sex couples.

Nevertheless, this is not the key problem with this interest. It is that the interest is based entirely on assumptions about the subjective opinions, feelings, and perceptions of millions of individuals nationwide. Preservationists cannot adequately represent the opinions of all Americans within a claim for "freedom from" same-sex civil marriage—as we have seen, such a claim is factually inaccurate, for many Americans support same-sex civil marriage.⁴⁸⁷ Therefore, the preservationists must be understood only to represent their own interests, which by definition includes the religious belief that same-sex marriages would corrode the "holy state of matrimony."⁴⁸⁸

This claim lies in the "constitutional" layer of sedimentation, within which preservationists assert a right to be free from exposure to homosexuality.⁴⁸⁹ This claimed right apparently includes a concomitant right to be free from the very knowledge that legal same-sex civil marriages might exist somewhere else. Unfortunately, the preservationists have fundamentally misconceived the role of the Constitution in this regard: The First Amendment is not designed to abate "the offense that religious people feel about being compelled to witness the behavior of people who disagree with their beliefs."⁴⁹⁰ "[B]ruised feelings are a cost of living in an open, free society, but it is an inevitable cost that we accept."⁴⁹¹

Thus, the easiest way to understand the marriage-will-be-cheapened argument is through the lens of private bias. Without this perspective, it would be impossible to understand why an opposite-sex couple in Arizona would

access to civil marriage) (last visited May 8, 2006); Unitarian-Universalist Association, *Freedom to Marry: Ministers' Coverage in the Media and Written Comments*, <http://www.uua.org/news/2003/freedomtomarry/ministercoverage.html> (providing the names, locations, and comments of Unitarian-Universalist ministers who have refused to solemnize any marriage until same-sex couples have access to civil marriage) (last visited May 8, 2006).

486. See *Oregon county bans all marriages*, B.B.C. NEWS AM., Mar. 24, 2004, <http://news.bbc.co.uk/2/hi/americas/3564893.stm> (last visited May 8, 2006). On November 2, 2004, Oregon voters adopted a state constitutional amendment banning same-sex marriage. OR. CONST. art. XV, § 5a (adopted 2004). Even with the amendment in place, it is not entirely clear that Benton County has resumed issuing marriage licenses to opposite-sex couples. See Benton County, Oregon, Marriage FAQ, <http://www.co.benton.or.us/MarriageFAQ.php> (last visited Jan. 8, 2007); cf. *Li v. State*, 110 P.3d 91 (Or. 2005) (holding that the marriage licenses issued to same-sex couples by Multnomah County, Oregon, in February and March 2004 were void under OR. CONST. art. XV, § 5a; recognizing that § 5a (referred to as "Measure 36") rendered same-sex marriage unconstitutional under the Oregon Constitution).

487. See *supra* notes 6–10.

488. H.R. REP. 104-664, at 12 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2916 (House Committee on the Judiciary report on the 1996 "Defense of Marriage Act").

489. See Eskridge, *No Promo Homo*, *supra* note 236, at 1362–63.

490. *Id.* Cf. *Cohen v. California*, 403 U.S. 15 (1971) (holding that an individual's freedom to engage in offensive speech generally overrides others' right to be free from the offense caused by such speech).

491. Rubin, *supra* note 235, at 43 (emphasis and alteration added).

refuse to marry on account of a same-sex couple being permitted to marry in Massachusetts. For preservationists, this private bias arises exclusively from religious beliefs about the immorality of homosexuality—while this bias motivates them to adopt secular-sounding arguments, their religious beliefs will always be the essential factor motivating their opposition to same-sex marriage. Same-sex marriage bans effectively relegate homosexuals to a second-class legal status and prevent public recognition of their relationships. By preventing homosexuals from gaining recognition—and ultimately acceptance—within the public sector, preservationists serve their invidious religious purpose of punishing homosexuals for their depravity.⁴⁹² However, the Supreme Court has explicitly stated that the idiosyncratic beliefs giving rise to these private biases have no place in the American legal canon.⁴⁹³

c. *The Long Way Down: Perversity*

Preservationists love to trot out a parade of horrors that goes something like this: Unless the government draws the line before legal recognition of same-sex relationships, as a matter of logic, if it extended legal recognition to same-sex relationships, it would also have to give legal recognition to other relationship models that, to put it lightly, flout convention.⁴⁹⁴ Preservationists frequently cite bestiality, child marriage, polygamy/polyamory, and incest as exemplary of these “perverse” relationship models.⁴⁹⁵ The preservationists’ battle cry derives directly from religious beliefs about what makes these relationship models perverse.⁴⁹⁶ Putting aside this religious belief, all we must do is determine whether the government has a rationally secular purpose in wanting to prevent legalization of these other horrors—we need not mount an affirmative attack upon them.

492. Cf. discussion *supra* Part V.A.2.f.

493. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); *Cohen*, 430 U.S. at 21 (“The ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”).

494. E.g., House, *Musgrave Amendment I*, *supra* note 183, at 39–40 (colloquy between Rep. King and Rep. Frank) (argument regarding where, why, and how to draw the line between two-party unions and three-plus-party unions).

495. E.g., *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J. dissenting).

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

Id.

496. E.g., Jill Martin Rische, *The Pain of Polygamy*, 18 WATCHMAN EXPOSITOR No. 1, 2001, <http://www.watchman.org/lds/painpolygamy.htm> (making the Christian case against Mormon polygamy) (last visited Jan. 8, 2007). The Watchman Fellowship is a Christian anti-cult group that considers Mormonism to be a cult. See Watchman Fellowship, About Us, http://www.watchman.org/index.cfm?fuseaction=home.about_us (last visited Jan. 8, 2007). Nevertheless, the group’s views on polygamous practices are generally representative of those held within the larger Christian community.

As noted, the government's interest in avoiding a slide down this slope is secular. Our task is to show why it is irrational to believe that banning same-sex marriage is necessary to prevent the slide from occurring. Here, we must establish three things for each horrible: (1) the government has a genuinely secular justification for outlawing it; (2) same-sex marriage does nothing to undermine that justification; and (3) same-sex marriage poses no comparable concerns of its own.

Despite their other differences, advocates on both sides agree that marriage requires valid legal consent of the parties.⁴⁹⁷ Within this consent-based marriage model, same-sex civil marriage appears entirely permissible. Comparisons to bestiality and child marriage are easy kills: While animals⁴⁹⁸ and minors⁴⁹⁹ are incapable of giving legal consent (and will remain so for the foreseeable future), two adults of the same sex can give legal consent, particularly if—as many preservationists insist—they are capable of consenting to enter into a heterosexual marriage.⁵⁰⁰

Comparisons to polygamy also fail. At the outset, it is important to distinguish historical polygamy (used here to identify polygamy derived from historical—mostly Mormon—religious beliefs) from modern polygamy (used here to identify polygamy derived from both religious beliefs⁵⁰¹ and secular relationship arrangements).

Historical polygamy, which is entirely religious in nature,⁵⁰² has a checkered history in America, long having been associated with coercion, adult-child marriage, and child sexual abuse. Historical polygamy has persisted into the modern era, particularly among splinter groups such as the Fundamentalist Church of Latter-Day Saints.⁵⁰³ In refusing to legally recognize historical polygamy, the government has long stated a genuine secular interest in avoiding the coercive costs that historical polygamy poses,⁵⁰⁴ and modern courts continue to apply this coerciveness analysis to individuals seeking legal recognition of historical polygamous relationships, particularly when minors are

497. *Cf. Lawrence*, 539 U.S. at 558 (holding that the government could not punish non-procreative intercourse between individuals capable of giving meaningful legal consent).

498. *See, e.g., Tate v. Ogg*, 195 S.E. 496, 499 (Va. 1938) (holding that “the word ‘animal,’ in the language of the law, is used in contra-distinction to a human being, and signifies an inferior living creature”).

499. *See Valencia v. Gonzales*, 439 F.3d 1046, 1051 (9th Cir. 2006) (noting that minors are “legally incapable of consent”).

500. *Cf. Card*, *supra* note 65 and accompanying text (claiming that marriage is not foreclosed to homosexuals at all, because they remain free to marry members of the opposite sex).

501. Modern-day religious belief in polygamy is not limited to insular Mormon sects. A new polygamous movement has recently arisen among Evangelical Christians. *See Christian Polygamy INFO*, Christian Polygamy, <http://www.christianpolygamy.info/christian-polygamy/> (last visited Jan. 8, 2007).

502. *E.g., The Church of Jesus Christ of the Latter-Day Saints, Polygamy: Latter-Day Saints and the Practice of Plural Marriage*, <http://lds.org/newsroom/showpackage/0,15367,3899-1—36-2-539,00.html> (discussing the history of Mormon polygamy in America; describing the Church's position today) (last visited Jan. 8, 2007).

503. *See supra* note 42.

504. *E.g., Reynolds*, 98 U.S. at 166 (holding that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism”).

involved.⁵⁰⁵ Same-sex marriage does nothing to undermine this secular interest, and it raises no similar concerns of coerciveness.⁵⁰⁶

Insofar as they involve three or more consenting adults, neither modern polygamy nor polyamory⁵⁰⁷ raise the same issues of consent and coercion. Indeed, within a consent-based marriage model, the only real problem is that there are three or more members of the relationship unit. So what stops these individuals from claiming legal rights for their multiple-party relationships?

The government has historically been afforded the right to maintain “good order,”⁵⁰⁸ and this interest in orderly administration is genuinely secular. Moreover, the deference that federal courts afford states in regulating the family unit confirms that orderly administration of marriage is a significant area of state concern.⁵⁰⁹

Nationwide, family law (and particularly marriage) is founded on a two-party model. Legally recognizing modern polygamy and polyamory would require a dramatic overhaul in our current system of public ordering, reaching dozens of areas of law, including divorce, child custody, adoption, pension and ERISA benefits, property ownership and tenancies, derivative tort claims (e.g., loss of consortium or wrongful death), taxation, intestacy and survivorship, and probate administration. As such, the government’s secular interest in perpetuating a two-party model of legal relationships is not insubstantial.

It thus seems rational to conclude that, as a matter of public policy, three-plus-party relationships work harm against the existing two-party model of public ordering used throughout America. Moreover, until polygamy or polyamory is identified as a suspect characteristic deserving of some kind of heightened scrutiny—be it “rational-basis with bite” or otherwise—the

505. See, e.g., *State v. Holm*, 137 P.3d 726, 752 (Utah 2006) (“[Y]oung people should be protected from sexual exploitation by older, more experienced persons until they reach the legal age of consent and can more maturely comprehend and appreciate the consequences of their sexual acts.” (citation and quotation omitted)).

506. For a detailed refutation of the claim that allowing same-sex civil marriage would require legalization of polygamy, see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1579–94 (1997) (outlining the fundamental objections to polygamy based on legal theories of equality, liberty, and personhood).

507. Polyamory is an amorphous term, frequently used to encompass relationship arrangements resembling simple polygamy to more complex arrangements, such as those in which three or more individuals participate as equal partners in a single relationship. See The Polyamory Society, Introduction to Polyamory: What Is Polyamory?, <http://www.polyamorysociety.org/page6.html> (last visited Jan. 8, 2007). Here, “polyamory” is used to describe all adult, consensual, three-plus-party relationships that are arrangements other than simple polygamy.

508. *Reynolds*, 98 U.S. at 163 (affirming Congress’s definition of civil marriage on public policy grounds, noting that Congress has the right to regulate “good order,” particularly as it relates to public health, welfare, and a right to prescribe the conditions under which territories may join the union).

509. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (holding that “domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States” (citing *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce”); *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878) (“The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”) (alteration added)).

government's secular interest in maintaining the two-party system is likely to remain undisturbed.

Conversely, legally recognizing same-sex marriage poses no similar administrative hardship, because the same-sex marriage model is by definition a two-party institution. As a matter of law, resolving whatever *de minimis* administrative difficulties same-sex marriage might impose is a very simple task: A government must only pass a statute of general applicability to amend all mentions of "husband and wife," "man and woman," or "spouses" within its legal canon to include the parties to a same-sex civil marriage. This one-line statute would single-handedly operate to overcome objections that same-sex marriage would constitute an administrative inconvenience. As such, same-sex marriage works no evil against the government's interest in the orderly administration of family law.

Moreover, teleologically, same-sex marriage does nothing out of the ordinary, save for the biological sex of the individuals involved. Presumably, heterosexuals will continue to want to marry heterosexuals, so allowing men to marry men or women to marry women would not appear to work a decisive harm against ensuring that a sufficient number of marriageable individuals remain "in the market," so to speak. It seems that same-sex marriage is costless in this regard.⁵¹⁰

A polygamist, on the other hand, is really asking for "marriage-plus," because under a two-party consent model, she will always be able to marry one individual of her choosing; the only thing she will not be able to do is to legally marry another individual while she remains married to her first spouse. Concededly, this seems unsatisfying as an emotional explanation, given the potential that the legal spouse may begin to view the polygamist's relationship with the cohabiting "spouse" as inherently inferior, which possibly leads to tension within the arrangement. Nevertheless, the government's interest here appears to be both rational and secular; for these reasons, polygamists have a long road ahead of them before a three-plus-party marriage may be legally possible.

As for comparisons to consensual adult incest, a causal link between allowing same-sex marriage and a subsequent repeal of laws prohibiting incest cannot logically exist. While conflating incest and same-sex marriage is an

510. Some preservationists claim that allowing same-sex couples to marry would be prohibitively expensive for the government. However, the government is presently structured so that, at least in theory, it could afford to provide marriage benefits to every last eligible adult, regardless of any one individual's sexual orientation. Therefore, if every last eligible adult woke up legally married tomorrow morning, then every last eligible adult would have a cognizable claim to receive the legal benefits of marriage. In theory, then, it seems that the gender of the individual to whom one is married is irrelevant to the cost to the government, which must plan as though 100% of the eligible population might legally marry at any time.

Therefore, the claim that allowing same-sex couples to marry would be prohibitively expensive is a canard: If every homosexual adult married a person of the opposite sex tomorrow, the preservationists would raise no claim that the state's assets were being dissipated by these new marriages. Because—at least in this context—the preservationists' objection is therefore being lodged against same-sex couples as *same-sex couples* (and not as homosexuals), the argument that allowing same-sex marriage would cost society money is undermined by clear animus against same-sex couples as a class.

effective rhetorical device, it fails to acknowledge that (1) consanguinity laws already vary widely⁵¹¹ and (2) challenges to those laws began decades before widespread efforts to obtain same-sex marriage.⁵¹² Therefore, the idea that incest is a possible slippery-slope outcome is largely a red herring based on the *post hoc* fallacy of causation.

Still, we would do well to take the claim seriously: To be charitable, then, the preservationist position is probably closer to the claim that allowing same-sex marriage would undermine the legal justifications underpinning the few incest taboos that remain. This is a largely inaccurate perception of the law: The remaining taboos universally prohibit incest between nuclear family members, and many states still ban incest between first cousins.⁵¹³

Moreover, governments have consistently identified a genuinely secular interest in denying legal recognition to incestuous adult relationships. Under a consent-based model of marriage, the government wants to ensure that the parties to a marriage have the capacity to give meaningful legal consent to enter into marriage. The possibility of intra-family coercion casts a cloud over incestuous relationships—said differently, the government could legitimately question whether incest is ever *truly* consensual.⁵¹⁴ Moreover, the government wants to support relationship models that foster harmony within pre-existing intimate family relationships—as a society, we want family members to remain on good terms with one another for the sake of intra-family stability.⁵¹⁵ Like all relationships, incestuous relationships can end quite badly, and the government has a cognizable, secular interest in preventing legal arrangements that result in estrangement between close relatives.⁵¹⁶

Same-sex marriage does no harm to either of these interests: Generally, adults are presumed to have the legal capacity to consent to enter into marriage,

511. See McDonnell, *supra* note 386, at 361 (cataloguing incest provisions by state).

512. The historical taboo on incest is a complex social phenomenon, and this Article does not seek to respond to it in its entirety. For a detailed analysis, see Courtney M. Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1562–65 (2005). See also, e.g., *Israel v. Allen*, 577 P.2d 762, 764–65 (Colo. 1978) (challenge to incest law resulted in recognition of an equal protection claim on state constitutional grounds).

513. See McDonnell, *supra* note 386, at 361.

514. See McDonnell, *supra* note 386, at 354 (noting that “consent becomes harder to determine or even define given the authority relationships within the family”).

515. McDonnell is concerned that this breakdown may occur in part because the intra-family relationship becomes overly sexualized. *Id.* at 353.

516. Some might argue that recognizing same-sex marriages would nevertheless result in estrangement between close relatives. This is undoubtedly true, as many homosexuals and same-sex couples suffer from rejection by their parents, siblings, and close relatives.

For our purposes, it is important to identify *who* is being estranged from one another. In the incest context, the two parties to the relationship—who are both members of the same pre-existing, intimate family—are being estranged from one another. In the same-sex marriage context, one party to the relationship is being estranged from a family member who is not a party to the marriage. Paternalistically attempting to preventing estrangement because of such private, third-party biases against homosexuality or same-sex relationships may be a noble aim, but it cannot constitute the basis of an informed government policy. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

and, as in opposite-sex marriage, allowing two unrelated individuals to form a legally-recognized family relationship does not usually disrupt any pre-existing intimate family bonds. Moreover, we may assume that, if same-sex marriage were ever allowed, the same consanguinity restrictions currently applicable to opposite-sex couples would be applicable to same-sex couples.

Other slippery-slope concerns undoubtedly exist. However, our examination of these horrors has shown that same-sex marriage is not of a kind with them. Bans on bestiality, child marriage, polygamy/polyamory, and incest all implicate longstanding, rational secular government interests. Same-sex marriage does nothing to undermine these interests and raises no similar concerns of its own.

Preservationists' invocation of this parade of horrors must be disregarded as rhetorical scare tactics. Preservationists are attempting to tie the perceived valuelessness of these relationship models with a presumed valuelessness of same-sex relationships. As I have demonstrated, same-sex relationships inflict none of the negative costs that these other relationship models can impose. Thus, because its logical underpinnings crumble in the face of rational scrutiny, the slippery slope of perversity fails to gain legally-persuasive force.

4. *A New Slippery Slope: Religious Freedom and Sincerely-Held Beliefs*

Preservationists have recently begun to sound shrill alarms about the intolerably-high tariff that same-sex civil marriage will unconstitutionally exact from the preservationists' free exercise of religion.⁵¹⁷ Doctrinally, this may be a simple argument to rebut, but it is among the most emotionally-charged ones we will face. Simply stated, the operative syllogism is this:

Major Premise = The Free Exercise Clause forbids restrictions on religious practice.

Minor Premise = Religious practice is restricted by same-sex marriage.

Conclusion = Therefore, the Free Exercise Clause forbids same-sex marriage.

While we know that the Free Exercise Clause does not *actually* forbid same-sex marriage, it is not possible to respond to this substantive argument within our pre-existing framework. The very objection derives from religion—and no less but from that aspect of religion that is constitutionally-protected from state interference: free exercise. By striking meaningful compromises, however, we can identify ways in which same-sex civil marriage and freedom of religion can peacefully co-exist, such that allowing same-sex civil marriage would not burden religious practice.

517. *E.g.*, 152 CONG. REC. S5422 (daily ed. June 5, 2006) (statement of Sen. Brownback).

It is becoming increasingly apparent that same-sex marriage poses a significant threat to religious liberties. Scholars on both the left and the right agree that same-sex marriage has raised the specter of the massive and protracted battle over religious freedom. Where courts impose the same-sex marriage regime as a constitutionally guaranteed right, a multitude of new religious liberty conflicts will inevitably arise at every point where the law touches marriage and is applied to individuals, businesses, nonprofits, and even churches and synagogues.

A live case will help to clarify the values at stake. Maggie Gallagher—President of the Institute for Marriage and Public Policy (iMAPP),⁵¹⁸ a conservative Catholic, and author of a substantial body of preservationist literature⁵¹⁹—has made much hay over Catholic Charities of Boston’s (CCB) March 10, 2006 decision to stop providing adoption-placement services.⁵²⁰ The reason? CCB found itself between a rock and a hard place: On the one hand, it wanted to follow the Vatican’s teachings that homosexuals are unfit to be parents and thus withhold adoption-placement services from them wholesale; on the other hand, to receive a license to operate adoption services within Massachusetts, it had to pledge to follow state anti-discrimination laws—which prohibit, *inter alia*, discrimination against homosexuals in the provision of state-licensed social services.

What did CCB do? Initially, it sought a religious exemption from the anti-discrimination laws. When that failed, it took what it believed to be the most sensible course of action: Instead of compromising its doctrinal position in order to comply with the law, it chose to cease all adoption placements whatsoever and refused to seek licensure.

The preservationists are falling over themselves trying to claim that this “tragedy” was a direct result of *Goodridge*.⁵²¹ It seems somewhat disingenuous to claim that CCB was unexpectedly burdened with having to provide state-licensed services to same-sex couples seeking to adopt. For seven years before *Goodridge* was decided, same-sex couples in Massachusetts enjoyed anti-discrimination protections in all aspects of state life, save marriage. After *Goodridge*, same-sex couples now enjoy anti-discrimination protections in all aspects of state life, including marriage. As such, it would seem that CCB was subject to the same legal duty toward same-sex couples before *Goodridge* as it is now; the fact that some of CCB’s same-sex couple clients are now legally married doesn’t have any bearing on whether it is presently subject to the state anti-discrimination laws—it *always has been*. Moreover, whatever CCB found to be doctrinally intolerable about homosexual parenting on the day before *Goodridge* was decided is the same as what they find to be intolerable about homosexual parenting today. All that changed was the legal relationship between those homosexuals who were seeking to parent.

To be certain, Gallagher correctly observed that this conflict was inevitable. However, she incorrectly characterized its cause as deriving primarily from the

518. <http://www.marriedebate.com/> (last visited Jan. 8, 2007).

519. See The Marriage Law Project at The Catholic University of America, Marriage Document Database, <http://marriagelaw.cua.edu/resources/Marriage%20Database/Complete/cfm> (attributing twenty-six articles to Gallagher) (last visited Jan. 8, 2007).

520. See Gallagher, *Banned in Boston*, *supra* note 246, at 20. See also 152 CONG. REC. S5473 (daily ed. Jun 6, 2006) (statement of Sen. Brownback) (“If you do not define marriage as the union of a man and a woman, but define it to require that you have to recognize same-sex unions, that is the basis—one of the bases on which Catholic Charities was driven out of the adoption business in Boston. They were required by law to do something against the tenets of their faith.”); *id.* at S5479 (statement of Sen. Brownback) (“There is an argument that churches that do not perform same-sex unions will not be allowed to perform any marriages.”).

521. See Gallagher, *Banned in Boston*, *supra* note 246 (“Massachusetts law prohibited ‘orientation discrimination’ over a decade ago. Then in November 2003, the Massachusetts Supreme Judicial Court ordered gay marriage.”).

Goodridge decision itself. Rather, the conflict was inevitable regardless of how the case might have come down; *Goodridge* may have accelerated the timing of the conflict, but a storm was brewing long before same-sex couples were given the right to marry in Massachusetts.

The next steps in this debate are tricky indeed. It would beg the question to simply shrug and tell CCB that it needs to learn to tolerate homosexual parenting.⁵²² Indeed, the very (in)tolerability of homosexual parenting is the heart of the dispute. So what is the proper solution? At one end of the spectrum, we can totally privatize religion, requiring those religions that choose to venture out of their cages to operate in a world of enforced pluralism. At the other end of the spectrum, we can give religion a *carte blanche* exemption from complying with whichever social policies it dislikes, permitting religiously-motivated discrimination to go unchecked in the public square. As a constitutional matter, neither option is desirable or satisfying. As such, the proper answer is more nuanced than either of these positions, and it lies somewhere in between them.

One of the battle cries of preservationists is that legalizing same-sex relationships will, if not actually force churches to *perform* same-sex marriages,⁵²³ then at least coerce them into *remaining silent* about their objections to same-sex marriage, for fear that speaking out would threaten their tax-exempt status or eligibility for faith-based funding.⁵²⁴ The obfuscating rhetoric that usually

522. Cf. WHYTE, *supra* note 372, at 109–10 (“Everyone favors tolerance—but only, of course, of what should be tolerated. This qualification is the tricky bit; it is where disagreements tend to arise. And when they do, extolling the virtues of tolerance is of no help, because it can’t tell us what should be tolerated and what not.”).

523. See Gallagher, *Banned in Boston*, *supra* note 246 (“The problem is not that clergy will be forced to perform gay marriages or prevented from preaching their beliefs.”); see also Letter from Clergy for Fairness to Reps. Hastert and Pelosi (July 7, 2006), *reprinted in* 152 CONG. REC. H5309–10 (daily ed. July 18, 2006) (statement of Rep. Jackson-Lee).

Thoughtful people of faith can and do disagree on the issue of marriage. America’s many religious traditions reflect this diversity of opinion, as do we who sign this letter.

But we respect the right of each religious group to decide, based on its own religious teaching, whether or not to sanction marriage of same-sex couples. It is surely not the federal government’s role to prefer one religious definition of marriage over another, much less to codify such a preference in the Constitution. To the contrary: the great contribution of our Constitution is to ensure religious liberty for all.

Some argue that a constitutional amendment is necessary to ensure that clergy and faith groups will never be forced to recognize marriages of same-sex couples against their will. This argument is unfounded. Such coercion is already expressly forbidden by the First Amendment’s “establishment” clause, its guarantee of the right to “free exercise” of religion, and the Supreme Court’s doctrine of religious autonomy that is rooted in both religion clauses. These, and only these, are all the protection of religious autonomy—and of religious marriage—our nation needs.

Id. Clergy for Fairness is comprised of hundreds of clergy from dozens of religious denominations throughout the nation; the group has taken no unified stance for or against same-sex civil marriage, but it has taken a strong stance against the FMA. See Clergy for Fairness, About Clergy for Fairness, <http://clergyforfairness.org/about/> (last visited Jan. 8, 2007).

524. Gallagher, *Banned in Boston*, *supra* note 246 (“Even a slight risk of anything so damaging as the loss of tax-exempt status will persuade many [religious] groups to at least mute their marriage theology in the interest of preserving the rest of their activities.” (alteration added)).

accompanies this claim is that those churches who oppose same-sex marriage will be pilloried in the public square as if they were racist.⁵²⁵

And yet, it is actually within this battle cry that we begin to see our way through to resolving the underlying dispute. If there is one thing that everyone agrees about, it is that the government is unquestionably forbidden to dictate to its citizens (or to a group of its citizens) what their religious beliefs should be—such an action would clearly violate both the Free Exercise and Establishment Clauses, for unduly burdening religious practice and imposing religion, respectively. Therefore, the question turns on what constitutes a reasonable accommodation for religious belief, such that churches are neither forced nor coerced into compromising their doctrinal beliefs and practices.

One suggestion is to include, with every statute, judicial opinion, or ballot referendum that legalizes same-sex relationships, an exception that expressly exempts religious organizations from being compelled to participate in same-sex nuptials. Moreover, as argued here, there should be an express separation of the civil and religious aspects of marriage, so that churches can make a specific choice regarding whether to solemnize same-sex marriages or not. A bright-line separation would add certainty and stability to the law: (1) same-sex couples would know which churches welcome their religious celebrations; (2) churches would remain free to exercise according to the dictates of their beliefs; and (3) would-be spouses of all stripes would remain free to avoid the religious aspects of marriage altogether and simply obtain marriage licenses directly from the state. All told, this seems to be a straightforward resolution to the first substantive objection.

The second objection—coercion—is a thornier thicket. It is best dealt with in two parts: ministry and social service. The churches themselves are seeking to preserve their tax-exempt status while simultaneously reserving the right to speak out on doctrinally-compelling issues. Separating out the ministry function of churches helps us to see that, if same-sex civil marriage is allowed, nothing will change regarding what churches may say about it—even under a public-accommodations law outlawing discrimination based on sexual-orientation, it is extremely unlikely that a church would have to squelch core religious speech within its own four walls. The current framing of the freedoms of speech, association, and free exercise operates to protect these messages, whatever their content.

At last, then, we come to it: Because many churches operate social-service branches—e.g., the Catholic Charities—they often provide services on behalf of the state. Under the states' police powers, private organizations need not be classified as state actors to be subject to generally-applicable anti-discrimination rules. The question here is whether a limited religious exemption should be made available, if only for the issue of same-sex marriage.

On the one hand, it is tempting to take a hard line against the churches, saying, "If you want the money (or license, or access to public buildings, etc.), then just comply with the laws!" However, this begs the question before us

525. *Id.* ("Twenty years ago it would have been inconceivable that a Christian or Jewish organization that opposed gay marriage might be treated as racist in the public square. Today? It's just not clear.").

while disrespecting faith-based organizations on two levels: one, it shows indifference to their call to provide mission services at all; and two, it communicates to them that their deeply-held beliefs don't matter.

On the other hand, we have anti-discrimination laws for a reason—we think that, all other things being equal, certain groups of people should live secure in knowing that their minority characteristics will not render them vulnerable to either overt or invidious discrimination. We make these non-discrimination laws generally-applicable so that service-providers of all types aren't able to work harm against the interest based solely on idiosyncratically-held prejudices.

So how do we resolve this tension? One way is to create targeted, narrow exemptions one-at-a-time, or on an as-needed basis. Gallagher thought that a bill exempting religious adoption agencies from the strictures of Massachusetts' anti-discrimination laws might have done the trick, had it not died in the state Legislature.⁵²⁶ She was probably right.

Nevertheless, it seems rational to reserve the question. Legislatures and courts may take it up and resolve it with directness, nuance, or both, at any time. Foreclosing debate on the subject seems irrational—if the lines we draw today prove dissatisfying, then we can draw them differently in the future. With the FMA, those lines are drawn once, and we will see, once they are set, they are extremely difficult to move.⁵²⁷

As to this last it seems worth mentioning that the free-exercise claim may be best characterized as a hybrid slippery-slope and invidious-purpose argument. What would motivate someone to ossify the nuanced lines that courts are constantly drawing in around free-exercise claims? Logically, if that person had a religious belief that the line should be in one place forever, then it would make sense to attempt to fix the line early-on to minimize the possibility that it might be drawn differently in the future. Indeed, it seems that the preservationists' desire to harden ever-flexible constitutional boundaries has bled over from their public policy arguments into the free-exercise claim. Therefore, the religious purpose underlying the FMA seems to be twofold: (1) impose/endorse religion, and (2) exploit the free-exercise doctrine to heavily favor religion, while simultaneously making it as difficult as possible to change the law once it is passed.

5. *Warhorses: Public Health and Morals*

Preservationists have long cited public health, safety, welfare, and morals as reasons for banning same-sex civil marriage.⁵²⁸ Here, we divide the claim into two parts: public health and morals. First, the public-health interest is ostensibly that of slowing the spread of sexually-transmitted infections (STIs). This argument is premised on two obvious assumptions and an invidious one. First,

526. *See id.*

527. *See infra* note 641 and accompanying text.

528. *E.g.*, Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 *HOFSTRA L. REV.* 349, 374 (2003) (noting that several key reasons for marriage “include (1) safe sexual relations . . . , (4) healthy human development . . . , [and] (7) fostering civic virtue, democracy, and social order” (alteration added)).

the obvious assumptions: (1) limiting the spread of STIs furthers the public health; and (2) homosexuals as a class are disproportionately more likely to contract, carry, and transmit STIs than are other groups. Advocates both for and against same-sex marriage can easily agree that the first assumption is a worthy goal; it need not be discussed further.

The second assumption is, to be charitable, a debatable one, but we will nevertheless assume for the sake of argument that the preservationists are correct. We need not explore disease statistics before we can determine that the argument is irrational and not secular. Saying “the public health” is a *non sequitur* response to the posit, “Why ban same-sex civil marriage?” Here is the syllogism:

Major Premise = The public health is served by reducing the number of STIs.

Minor Premise = The number of STIs is reduced within opposite-sex marriage.

Conclusion = Therefore, the public health is served by opposite-sex marriage, and we should ban same-sex marriage.

Again, we find ourselves confronted with the “Conclusion-Plus” fallacy. First, as usual, the Minor Premise begs its conclusion why the number of STIs is reduced only within opposite-sex marriage. Moreover, the syllogism offers no justification whatsoever to explain how banning same-sex marriage serves the public health.

An individual’s capacity to marry is not premised on being free from STIs.⁵²⁹ Indeed, women are permitted to pass diseases on to their newborn children with impunity: A baby could be born with syphilis, gonorrhea, and HIV, and her mother’s legal capacity to marry will remain intact.⁵³⁰ As such, it would seem arbitrary and irrational to punish one class of persons—homosexuals—for the mere potential that they may harm the public health in *manner X*, while permitting another class of persons—heterosexuals—to harm the public health in *manner X* with impunity, with the only justification being that they are heterosexuals.

The third, more invidious premise underlying this argument is that homosexuals are disproportionately more likely to (1) engage in extra-relationship intercourse and (2) expose themselves to STIs in the process—ostensibly through unsafe sex. Again, this is a *non sequitur*. In terms of legal capacity to marry, it matters not at all—and it has never mattered—whether the would-be spouses are monogamous or whether they will, once married, routinely engage in unsafe sex with extramarital partners. The state just doesn’t get involved with asking people such questions before allowing them to marry. As such, refraining from extramarital sexual activities is not a predicate to getting married, and remaining free from STIs throughout a marriage is not a predicate to staying married.

529. See ELLMAN ET AL., *supra* note 87, at 74 (noting that, while several states require blood tests before a marriage license will be issued, that no state actually conditions the right to marry on the outcome of that test; reporting also that Louisiana and Illinois briefly flirted with mandatory HIV-testing, and that Utah once attempted to void all marriages where either party was infected with HIV).

530. Her constitutional right to procreate will also remain intact, despite the harm that the inter-generational spread of disease works against the state’s public-health interest.

Granted, some states require the parties to a marriage to submit to premarital blood-tests; however, regardless of what ancillary public-health benefits might obtain, the tests are not primarily done for the state's benefit. No one's capacity to marry is contingent on the results of a premarital blood-test. Instead, the state is at most interested in ensuring full disclosure between the parties regarding the presence of any diseases that each might transmit either genetically or through intercourse. Stated differently, the interest is to discourage disease-free individuals from marrying diseased individuals. This is a worthy public-health goal. Even so, it is not a rational justification for banning same-sex marriage.

Preservationists claim that, in regard to public health, the state's interest in encouraging marriage is that, because marriage is "the building block of society," it counsels stability, monogamy, and commitment between spouses.⁵³¹ This rationally leads to a reduction in STIs, because married couples are presumed to have fewer sexual partners throughout the course of their marriages, thus minimizing the risk that either spouse will contract an STI and transmit it to the other. Fair enough.

Assuming this is true, it is irrational to exclude same-sex couples from marriage on the ground of public health, as allowing same-sex marriages would seem to directly serve the interest at stake: Marriage would, presumably, do all the things for same-sex spouses that it does for opposite-sex spouses, *viz.*, counsel stability, monogamy, and commitment within the marriage. As a result, same-sex spouses would have fewer sexual partners during the marriage, thus minimizing the risk that either spouse will contract an STI and transmit it to the other.

Moreover, if homosexuals are as diseased as some preservationists would like to think, then it is irrational to think that preventing same-sex couples from marrying would slow the spread of STIs. Indeed, if the claimed public-health purpose—minimizing the spread of STIs—were the true interest, then it would seem that same-sex couples need marriage *more* than opposite-sex couples do. According to the argument's premise, same-sex couples are more prone to contracting and transmitting STIs; as such, marriage would civilize them for the betterment of *all society*: their relationships would stabilize, they would be less likely to engage in extra-relationship sexual activities, and they would benefit from increased commitment to one another.

531. Marriage also contributes to the overall health and well-being of the spouses themselves. See NCHS, *Cohabitation*, *supra* note 473, at 3 ("Compared with unmarried people, married men and women tend to have lower mortality, less risky behavior, more monitoring of health, more compliance with medical regimens, higher sexual frequency, more satisfaction with their sexual lives, more savings, and higher wages." (citation omitted)); see also 152 CONG. REC. S5479 (daily ed. June 6, 2006) (statement of Sen. Sessions) ("[A]lmost every category of individual character and wellness was better if you were married. That is the just the way it was. You had a longer lifespan, you ended up with more wealth, you had better health, you were happier, and there was less drug use, less criminality, and less suicide." (alteration added)).

If being married leads to such positive outcomes for the spouses, why then would preservationists want to prevent same-sex couples from becoming married? If we want these outcomes because they are good, then shouldn't we want them for everyone?

If the government's public-health interest is in slowing the spread of STIs, it is irrational to prevent same-sex couples from marrying. Without marriage, same-sex couples will presumably continue to engage in both safe and unsafe sexual intercourse. Without marriage, it is reasonable to assume that STI rates among homosexuals will remain the same or increase. Without marriage, it is reasonable to assume that partners will continue to infect one another at about the same rates, and that those individuals and couples who are predisposed to engage in extra-relationship intercourse—both safe and unsafe—will continue to do so at about the same rates.

Enter marriage. Assuming that marriage has the stabilizing, civilizing effects that opponents of same-sex marriage claim it does, it is rational to conclude that allowing same-sex marriage will actually cause infection rates to *fall*. While partners may continue to infect one another with STIs contracted prior to marriage, the overall rate of extra-relationship intercourse will presumably drop, due to marriage's wise counsel regarding monogamy and commitment. Moreover, because marriage *is* as special as the preservationists say it is (if it weren't, then why all the fuss?), homosexuals would suddenly have an incentive to wait until marriage to engage in sexual intercourse (which they do not have now), thus reducing the likelihood of either partner bringing an STI into the marriage.

This third aspect of the public-health claim—i.e., marriage is civilizing, but we don't want same-sex couples to have it—belies what is really going with this argument. The preservationists are constructing a tidy double-bind for same-sex couples. First, they condemn homosexuals for living lives of promiscuity and vice, but they also refuse to make the civilizing arrangement of marriage available to homosexuals. And then, when homosexuals say, "Okay, we want some respect now," the preservationists reply, "Well, no. Because you're promiscuous and live lives of vice, we don't think you deserve it because you're not morally worthy. Sorry."

So which is it? Do same-sex couples get to live lives of stability, monogamy, and commitment, or are they to be continually shunted into the second-best category, where the very relationship attributes they seek are the ones they are faulted for not already possessing?

In one study, homosexuals were castigated for failing to live up to the expectations of opposite-sexed, married society; this failure of outcomes was held up as the primary reason for keeping same-sex couples from marrying. For ease of use, Table 5 lists each argument opposite a key response.

This entire study deserves a resounding "Well, quite!"⁵³² Looking solely at the fact that same-sex couples are not allowed to marry, none of these outcomes is surprising—indeed, in responding to them, as we have seen, one need resort only to logic to show that they are inapposite and unfairly-characterized criticisms designed merely to perpetuate bias.

Nevertheless, it is useful to raise this study for two additional reasons. First, it is a sociological fact that any study dividing social groups along cultural lines will find significant variables between similarly-situated parties from

532. See WHYTE, *supra* note 372, at 111.

within each group. For example if the study had compared outcomes between Black and Hispanic couples (or rich and poor couples, or highly-educated and

Table 5. Comparative Study of Homosexual-Cohabiting and Heterosexual-Married Couples.

Claim	Response
Same-sex couples have relationships of shorter duration than married couples.	Marriage has higher exit costs than cohabitation; therefore, it would make sense for a population restricted entirely to cohabitation to have shorter relationships on average than marriage couples.
Homosexuals have a greater number of lifetime sexual partners than heterosexuals.	Marriage is available to heterosexuals for the entirety of their adult lives; given the likelihood that seventy-six percent of women will marry at least once by age thirty, ⁵³³ thereby logically reducing the number of the average heterosexual's lifetime sexual partners, it makes sense that homosexuals would have more sexual partners over the course of a lifetime—there is no concomitant life-long, stabilizing institution for homosexuals to enter. As such, the comparison seems inapposite.
Same-sex couples have lower levels of sexual fidelity within a relationship than married couples.	Without the disincentivizing social costs that infidelity imposes on an intact marriage, same-sex couples have been given no institutional incentive to remain monogamous for the duration of their relationships. Again, the comparison seems inapposite.
Same-sex couples raise fewer children per capita than married couples.	As preservationists love to point out when making their other arguments, ⁵³⁴ same-sex couples cannot procreate without outside assistance; therefore, it seems completely reasonable that the barrier to entry for becoming a parent—the necessity of involving a third party—operates to disincentivize parenthood.
Same-sex couples and homosexuals generally have greater "health risks" (the study only reviewed HIV and suicide risks).	It is not surprising that the preservationists behind this study chose to emphasize the two health risks that have historically troubled the LGBT community. If the preservationists were anti-Black, they might have chosen to emphasize sickle-cell anemia; if they were anti-Semitic, they might have chosen to emphasize Tay-Sachs disease; if they were anti-poor, they might have chosen to emphasize Type-II Diabetes (adult-onset) or obesity. Once more, the comparison seems inapposite. ⁵³⁵
Same-sex couples have higher levels of intra-relationship domestic violence. ⁵³⁶	This last is the only relationship characterization that presents us with even a modicum of difficulty. However, because of a deliberate statistical fallacy, the study's conclusions are not trustworthy. Let us assume that marriage counsels stability between the partners. It is reasonable, then, to assume that married couples would have less intra-relationship domestic violence. As such, the relevant comparison would only seem to be between same-sex couples and cohabiting (unmarried) opposite-sex couples. This analysis would render the finding more trustworthy, because it compares outcomes between similarly-situated groups—i.e., those who have not yet benefited from marriage's stabilizing counsel. ⁵³⁷ Nevertheless, the study groups married and unmarried opposite-sex couples into a single statistical group, which skews the relevant comparison, making it far less meaningful. As such, it is irrational to conclude that this statistic provides any insight into our comparison of outcomes.

533. NCHS, *Cohabitation*, *supra* note 473, at 11.

534. *See supra* Part V.A.2.c.

535. One cannot make a logical argument by first identifying undesirable traits that are more likely to exist in the disfavored community than in the favored one, and then faulting the disfavored community for possessing those traits while congratulating the favored community for lacking them.

536. Timothy J. Dailey, Family Research Council, *Comparing the Lifestyles of Homosexual Couples to Married Couples*, <http://www.frc.org/get.cfm?i=IS04C02&v=PRINT> (last visited Jan. 8, 2007).

537. On this point, the study is infirm for two additional reasons: first, it elides the meaning of the word "violence" to include everything from verbal shouting to physical assault, rape, and stalking; and second, it capitalizes on this equivocation by refusing to control for confounding factors in data-collection, such as a particular group's overall willingness or hesitancy to report. For

undereducated couples, etc.), significant differences would have been observed—perhaps not the same differences as those observed between same-sex couples and married opposite-sex couples—but significant differences nevertheless. As *Goodridge* noted, such argumentation therefore “singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”⁵³⁸

Second, if the institution of marriage has all of the stabilizing and civilizing effects that the preservationists claim, then it is irrational to fault same-sex couples for failing to match the outcomes of opposite-sex married couples, when same-sex couples have never been offered the opportunity to benefit from marriage’s stabilizing, civilizing forces. And why have same-sex couples never been offered the opportunity to benefit from marriage? Because of their failure to match the outcomes of those who have.⁵³⁹ This is truly impenetrable logic.

Encountering this circular double-bind feels about as rational as walking up to someone who’s obviously angry with you, asking them why they’re upset, and hearing them reply, “If you don’t know, then I’m *certainly* not going to tell you.” The preservationists have cleverly pieced together a closed-circuit feedback loop: No matter what homosexuals do to live the lives that the preservationists claim they should be living—i.e., lives of stability, monogamy, and commitment—it’s never going to be good enough. Why? Because preservationists believe that homosexuals are immoral, depraved, and redeemable only when they admit of self-hatred and unworthiness, and convert to heterosexuality.⁵⁴⁰

example, heterosexual men in a cohabiting or marital relationship are widely considered to constitute up to forty percent of domestic violence victims. There are two key confounding factor in obtaining actual rates: first, a cultural unwillingness to report, and thereby, to appear weak or vulnerable; and second, cultural notions of what constitutes “violence” varies significantly between men and women. See *Domestic Violence Against Men* (Oct. 12, 2006), <http://www.oregoncounseling.org/Handouts/DomesticViolenceMen.htm> (last visited Jan. 8, 2007).

538. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

539. From this line of reasoning, one could easily conclude that, if we found that same-sex couples *did* match the outcomes of opposite-sex couples, then the preservationists would simply say, “Oh, then *you* don’t need marriage like the *opposite-sex couples* need it—let’s make sure *they* have it first.” Cf. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

540. See Pew Forum, *The Ties That Divide*, *supra* note 378 (statement of Andrew Sullivan).

[W]hat I would like to ask Mr. Bradley is, if you don’t agree with our right as citizens to enjoy the very fundamental right that others do, what would you have us do? How would you like gay people to live their lives? Are we supposed to not have relationships? Are we supposed to have no social support for those relationships? The religious right, on the one hand, wants to condemn gay people from [sic] being, “promiscuous;” but, on the other hand, they want to condemn us for getting married. What are we supposed to do? Where would you like us to go? The answer is, We’d like you to disappear off the face of the earth.

....

You speak as if gay human beings don’t really exist or that you don’t need to have a proposal for them when you are simultaneously proposing to strip them of any basic civil rights for their relationships. That seems to me to speak volumes about where this argument is coming from, whether it’s coming from a desire for the common good or the common good only of people of whom you approve.

Id. (alterations added). See also *supra* notes 358–65, 401–15 and accompanying text (discussing the preservationist theories of “reparative therapy” and sexual-orientation conversion).

This last observation leads us to the final point in this section. A preservationist might encounter our argumentation here, concede all of it, and still throw up her hands, saying, “Well, so what? I just don’t like gay people. I think they’re immoral. Isn’t that rational enough? Isn’t that secular enough?” Indeed, this is a powerful claim. Norms of morality have guided American social-policymaking for the entirety of our history, and they will—and should—continue to inform our cultural discussion. The moral obligations we assume as a society are complex—too complex, indeed, for these pages.

Instead of considering the deontological range of rights and duties that we carry, let us instead briefly consider Mill’s *On Liberty*.⁵⁴¹ Prof. Mark Strasser boils down Mill’s “harm principle” to the following “taxonomy of conduct”:

- a) Those actions that are self-regarding are not appropriately subject to sanctions from either the state or society;
- b) Those actions which are hurtful to others without violating any of their legal rights may be subject to public condemnation, but are not thereby subject to legal sanction; and
- c) Those actions which violate the legal rights of others are subject not only to public condemnation, but also to legal sanction.⁵⁴²

Strasser believes that this taxonomy of conduct was a significant linchpin undergirding *Lawrence*’s reasoning—particularly the portion of *Lawrence* that suggested the existence of “a certain sphere which should be free from government interference.”⁵⁴³ However, Strasser does not stop his analysis there. He concludes that *Lawrence* may have actually exceeded Millian values when it “suggest[ed] that the relations are protected because they may be part of a more enduring relationship, [thus] ascribing some degree of positive constitutional value to same-sex relationships.”⁵⁴⁴

What does this have to do with preservationism? Well, it would be an overstatement of *Lawrence* to say that it applies some prospectively-helpful legal standard to our question—after all, *Lawrence* did expressly reserve the question of legally recognizing same-sex relationships.⁵⁴⁵ However, the Millian taxonomy, combined with *Lawrence*’s broader respect for same-sex relationships, goes a long way toward lessening the legal force of the “I just don’t like gay people” argument.

First, it is both rational and secular to conclude that same-sex couples are self-regarding—that is, one can conclude that they work no harm against public or private interests. Thus, in this first taxonomic world, it is rational and secular to conclude that same-sex relationships are costless to the larger society, and

541. JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859), cited in Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285 (2006) [hereinafter Strasser, *Lawrence, Mill, and Same-Sex Relationships*].

542. Strasser, *Lawrence, Mill, and Same-Sex Relationships*, supra note 542, at 287–88.

543. *Id.* at 292.

544. *Id.* at 294 (alterations added). See also *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (noting that the sexual conduct at issue was “but one element in a personal bond that is more enduring”).

545. See *Lawrence*, 539 U.S. at 578 (noting that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

that any resulting harm is entirely internalized by the parties. It is from this vantage point that one might begin an argument in favor of same-sex marriage.

Second, it is also rational and secular to conclude that same-sex couples “are hurtful to others” but do not “violat[e] any of their legal rights.” If same-sex marriage were allowed, same-sex couples would probably have to settle for living in this second taxonomic world for the foreseeable future. The second world acknowledges that there are a *lot* of people in the world who simply don’t like gay people, but it also provides same-sex couples with enough protection to ensure that their interests as a minority are not “insecure.”⁵⁴⁶ One could also begin to make an argument for same-sex civil marriage from this vantage point, making sure to highlight that same-sex civil marriage is no more harmful to public and private interests than are the other so-called victimless behaviors that we currently permit.

Third, it is an irrational and sectarian world that the preservationists are trying to construct for us. It is in this third taxonomic world that same-sex couples would find their interests to be the least secure yet—the claim would be that same-sex couples pose an irreparable harm to public and private interests, such that they should be punished, or—barring punishment—at least not given any civil rights. After all this argumentation and dissection, we see that it is this third world from which all preservationist arguments are being made.

At root, all that we have left is a bald dislike for homosexuals and same-sex couples. It seems that both *Romer* and *Lawrence* thus answer the question before us: Preservationism, stripped of its idiosyncrasies, is nothing but bare animus—*an illegitimate and irrational basis for public policy.*⁵⁴⁷

6. *Federalism, the Conflict of Laws, and Institutional Legitimacy*

Before leaving the secular purpose inquiry, there is one more question to answer: Why a federal constitutional amendment? Much of the impetus behind the FMA is due to the legalization of same-sex marriage in Massachusetts, and the FMA’s proponents do not mask their desire to overrule the *Goodridge* decision by any means possible.⁵⁴⁸ By calling into question the institutional legitimacy of judicial review, the preservationists may indeed have a broader purpose in mind.⁵⁴⁹ In the context of same-sex marriage, preservationists are

546. “If a majority be united by a common interest, the rights of the minority will be insecure.” THE FEDERALIST No. 51 (James Madison).

547. *Cf. generally* *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional amendment prohibiting the state or local governments from passing anti-discrimination laws to protect homosexuals as illegitimate and based purely in animus against homosexuals as a group); *Lawrence*, 539 U.S. at 558 (invalidating a state statute criminalizing homosexual—but not heterosexual—sodomy as illegitimate and based purely in animus against homosexuals as a group).

548. *E.g.*, 152 CONG. REC. S5408 (daily ed. June 5, 2006) (statement of Sen. Allard) (“[T]he most widely covered success in the effort to destroy traditional marriage[] came more recently in the state of Massachusetts where four judges ruled in the *Goodridge* case that marriage itself must be redefined to include same-sex couples” (alteration added)).

549. See Traditional Values Coalition, *Our Battle Plan to Take Back Our Courts: The Plan to Win over Judicial Tyranny*, <http://www.ourbattleplan.com/plan.php> (outlining a strategy for placing “constitutionalists”—code for religious conservatives—into a majority of positions on the federal bench) (last visited Jan. 8, 2007).

only attacking the institutional legitimacy of the Massachusetts Supreme Judicial Court because it ruled in favor of same-sex marriage.

This is not to say that preservationists have no other reasons to attack the institutional legitimacy of the courts.⁵⁵⁰ It is merely to say that, in the context of the FMA, the attack comes only when courts decide in favor of same-sex relationships. Preservationists do not object to litigating same-sex civil marriage rights⁵⁵¹—they only object to losing. This belies the truth that the preservationists' problem is not with the courts, but with same-sex relationships.

Why the flip-flopping? As a matter of constitutional structure and inherent powers, courts are either competent to decide same-sex civil marriage claims or they are not. Therefore, one can only assume it is because of a substantive objection to same-sex marriage—if the Massachusetts Court had ruled against the plaintiffs in *Goodridge*, it is clear that preservationists would be praising them for it.⁵⁵² In terms of the FMA, then, the substantive attack seems to be more upon same-sex marriage than upon the institutional legitimacy of courts to order it.

Procedurally speaking, then, proponents of the FMA claim that they merely want to “protect” marriage from “redefinition” by “activist” courts.⁵⁵³ Ancillary to this claim is the assertion that the definition of marriage should be left up to the people,⁵⁵⁴ and that a court order in favor of same-sex civil marriage in one

550. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion as a fundamental due-process right under the federal Constitution).

551. *E.g.*, Josh Richman, *Same-sex marriage handed a setback*, OAKLAND TRIB. (Cal.) (online ed.), Oct. 6, 2006 (reporting that Mat Staver of Liberty Counsel, who argued on behalf of the Campaign for California Families in the California marriage cases, was “eager to make his case to the Supreme Court”).

552. When the California Court of Appeal ruled in favor of that state's marriage ban, preservationists celebrated a “victory.” *See, e.g.*, Jesse McKinley, *California Court Upholds State's Ban on Same-Sex Marriage*, N.Y. TIMES, Oct. 6, 2006, at A16 (reporting that Mat Staver of Liberty Counsel had characterized the decision as “a crushing defeat to the same-sex marriage agenda”); Maura Dolan & Lee Romney, *Ban on Gays' Ability to Wed Upheld*, L.A. TIMES, Oct. 6, 2006, at 1 (reporting that “[c]onservative Christians involved in the litigation reacted with glee” (alteration added)); Lisa Leff, *Appeals court upholds California's ban on same-sex marriage*, BUFFALO NEWS (N.Y.), Oct. 6, 2006, at A7 (reporting that Monte Stewart of the Marriage Law Foundation claimed that the decision is “a victory for society's most consequential social institution, and that is marriage”).

553. *E.g.*, 152 CONG. REC. S5408 (daily ed. June 5, 2006) (statement of Sen. Allard) (“While recent court decisions handed down by activist judges may not respect the traditional definition of marriage, these decisions also highlight a lack of respect for the democratic process. . . . Any redefinition of marriage has been driven entirely by the body of government that remains unaccountable and unelected—the courts.”); 152 CONG. REC. H5299 (daily ed. July 18, 2006) (statement of Rep. Musgrave).

[M]ost legal experts expect DOMA to fall once a challenge finally reaches the high Court, which is why it would be the very height of foolishness to rely on the Supreme Court to protect marriage. Sadly, that august tribunal is part of the problem. Justice Scalia has already warned us that the Court's 2003 *Lawrence* decision was only the beginning of a road at the end of which is a radical redefinition of marriage at the hands of the Court.

Id. (alteration added).

554. *E.g.*, 152 CONG. REC. S5440 (daily ed. June 6, 2006) (statement of Sen. Allard) (“Democracy and representative government are at the core of this debate. . . . The will of the people should prevail.”); 152 CONG. REC. H5299 (daily ed. July 18, 2006) (statement of Rep. Musgrave) (“The American people want to settle this issue now. They don't want us to wait to see how much havoc the courts will wreak on the definition of marriage before we act to protect it.”).

jurisdiction would eventually result in a nationwide imposition of same-sex civil marriage in all jurisdictions.⁵⁵⁵

In response to the FMA, both opponents and advocates of same-sex civil marriage are crying “federalism.”⁵⁵⁶ On the one hand, opponents presume that the FMA will protect federalism for three reasons: (1) it forecloses the possibility that the Supreme Court would mandate a nationwide definition of marriage by court order, (2) it sends the question of defining marriage to the legislatures of all fifty states, and (3) it ensures that no conflict of laws questions arise between the states, as no state will be permitted to perform same-sex marriages that are legally enforceable.

On the other hand, advocates claim that the FMA undermines federalism for three reasons: (1) it forecloses the possibility that states might act as laboratories for change—it prevents a state legislature or popular referendum from, at some point in the future, legalizing same-sex marriage, (2) it federalizes an area of law—family law—that has historically been regulated by the states, thereby intruding on the scope of their Tenth Amendment authority by expanding federal power, and (3) it intrudes on individual autonomy and decisionmaking about where to live—the states will not be able to efficiently respond to demands for same-sex marriage coming from a desirable market constituency.

These arguments are based primarily on the constitutional structure and economic theory, but this should not distract from the point: Preservationists want to federalize marriage policy because it would overrule the *Goodridge* decision and prevent future courts from rendering *Goodridge*-like decisions in the future. Why is this? As discussed, it is because preservationists have a substantive, religiously-derived objection to same-sex civil marriage, and they are trying to honor that objection by imposing an ossified definition of religious marriage upon the entire nation.

Yet despite this religious intent, preservationists instead claim that the FMA merely prevents America from sliding down one of the slippery slopes. However, this claim is disingenuous and intellectually dishonest. Even if same-sex marriage advocates could prove beyond a shadow of a doubt that none of these slides would occur—i.e., that allowing same-sex civil marriage would have either a neutral or net-positive effect on social stability and culture—the preservationists’ substantive objections to same-sex marriage would not

555. *E.g.*, 152 CONG. REC. S5441 (daily ed. June 6, 2006) (statement of Sen. Allard) (“[S]ame-sex advocates have, through the courts, systematically and successfully trampled on laws democratically enacted through the States. If marriage is redefined for anybody, it is redefined for everybody. . . . If we fail to define marriage, the courts will not hesitate to do it for us.” (alteration added)); 152 CONG. REC. H5299 (daily ed. July 18, 2006) (statement of Rep. Musgrave) (“While the *Goodridge* case remains on the books, court dockets all over the country will continue to be ensnarled with same-sex marriage litigation as opponents of traditional marriage continue to fight to expand their agenda to the rest of the country.”).

556. Compare generally Wardle, *Federal Constitutional Protection*, *supra* note 19, at 464–68 (arguing that the FMA advances federalism), with Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, 570 POL’Y ANALYSIS (Cato Inst.) 1 (2006) (arguing that the FMA damages federalism).

evaporate; their religiously-derived objections to homosexuality and same-sex relationships would remain unaffected.

As a result, it is difficult to believe that supporters of the FMA have absolutely no homophobic or discriminatory purpose in mind whatsoever—the very substance of their objection appears to be that same-sex couples might someday receive the rights and benefits of marriage, in addition to whatever social approval the state’s legal imprimatur might confer.

For their part, opposite-sex couples derive no direct benefit from—and suffer no hardships under—the FMA. However, the FMA directly impacts those same-sex couples who are seeking legal recognition for their relationships. By design, if not by language, the FMA singles out same-sex couples and imposes a unique legal handicap upon them: Under it, for same-sex couples to receive the legal recognition they seek, they must either (1) settle for “separate-but-equal” arrangements that mimic marriage (but which may only be enacted legislatively⁵⁵⁷) or (2) bring about such a substantial shift of opinion among Congresspersons and state legislatures as to repeal the FMA.⁵⁵⁸

Prof. Gerard Bradley, a drafter of the FMA,⁵⁵⁹ once suggested a third way for same-sex couples to obtain legal protections for their relationships: Under the FMA, same-sex couples would have to convince a legislature to declare that a particular right is no longer an “incident of marriage.”⁵⁶⁰ Thus, the right would

557. 152 CONG. REC. S5441 (daily ed. June 6, 2006) (statement of Sen. Allard) (“The amendment does not seek to prohibit, in any way, the lawful, democratic creation of civil unions or domestic partnerships. It does not prohibit private employers from offering benefits to same-sex couples. It denies no existing rights.”); *id.* at S5455 (statement of Sen. Allard) (“[W]e are limited the powers of the courts. We have not done anything to restrict the power of the legislature, except on the definition of marriage which is between a man and a woman.” (alteration added)); 152 CONG. REC. S5519 (daily ed. June 7, 2006) (statement of Sen. Allard) (“[U]nder my amendment, States remain free to address the issue of civil unions and domestic partnerships. Citizens acting through their state legislatures can bestow whatever benefits to same-sex couples they choose.”). *But see id.* at 5521 (statement of Sen. Levin) (“[T]he very language of this constitutional amendment would make it unconstitutional for the States to create civil unions or domestic partnerships in their constitutions with any of the same legal benefits currently afforded to marriage.” (alteration added)).

558. At the time of this writing, there are 440 Representatives listed on the House’s website. *See* <http://www.house.gov/house/MemberWWW.shtml> (last visited Jan. 8, 2007). There are 100 Senators in the Senate. *See* http://www.senate.gov/general/contact_information/senators_cfm.cfm (last visited Jan. 8, 2007). There are 50 states eligible to vote on federal constitutional amendments. Constitutional amendments must pass both houses of Congress with a two-thirds majority vote, or 294 Representatives and 67 Senators, and they must be ratified by three-quarters of the states, or 38 states. *See* U.S. CONST. art. V.

Assuming, then, that the FMA passed with the absolute minimum required number of votes, same-sex marriage advocates would have to convince at least one-third of each chamber of Congress, or 147 Representatives and 33 Senators, and at least one-half of the states, or 26 states (because of how the numbers work out), to reverse their votes on the FMA. This would require an incredibly costly political campaign that could easily take decades to complete.

559. Pew Forum, *The Ties that Divide*, *supra* note 378 (“I indeed was one of the radical natural-law ‘jurisprudes’ who drafted the Federal Marriage Amendment” (statement of Prof. Bradley)) (last visited Dec. 21, 2006).

560. *Id.* (“The legislature has to decide if something which hitherto has been an incident of marriage isn’t any longer, because we’re extending to any large number of people.”; “[I]nsofar as the legislature takes something which had been an incident of marriage and extends it to people who are

not fall within the purview of the FMA, and same-sex couples (and, according to Bradley, anyone⁵⁶¹) could take advantage of the right.

This is an odd argument—Bradley wants to have his cake and eat it, too. First, Bradley supports a federal constitutional amendment to say—rather emphatically—that same-sex couples may not “redefine marriage.” Yet, Bradley also claims that same-sex couples can receive legal protections because they can—and should?—petition legislatures to “redefine marriage” by determining that certain rights are no longer “incidents of marriage.” So, which is it? Do same-sex couples have the right to “redefine marriage,” or don’t they? Moreover, Bradley fails to acknowledge the incredible political burden that successfully defining away the “incidents of marriage” would impose upon same-sex couples and their supporters.

The problem with all of these procedural arguments is not that religious believers are civilly engaged in the marriage debate; I think most would agree that civic engagement is a good thing. Rather, the problem is that religious believers are trying to insinuate their religious beliefs into the law and impose those beliefs on the larger society, *without providing a genuinely secular justification for doing so*. While the procedural justification for the FMA is inherently secular, as we have seen, the entire reason for enacting it is not.

B. Applying the *Lemon*-Endorsement Test

“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”

—Justice David H. Souter, in McCreary County v. ACLU⁵⁶²

We have determined that the proffered purposes for the FMA—and for same-sex marriage bans generally—are neither rational nor secular. Nevertheless, the preservationists may soon divine an excuse for same-sex marriage bans that passes the threshold question of secular purpose. As such, it is important to briefly conduct a *Lemon*-endorsement analysis to determine whether, despite the existence of a yet-undiscovered secular purpose, same-sex marriage bans endorse or establish religion.⁵⁶³

At the outset, it is important to note that only the secular-purpose question can be characterized as a rational-basis inquiry with any confidence. The rest of the *Lemon*-endorsement test probably constitutes some form of heightened scrutiny, but it is unclear just how deferential this test is. For our purposes, the test’s heightened aspects will permit some additional poking and prodding, but

not married, well, then, yes, by definition it’s no longer an incident of marriage, at least in that jurisdiction.” (statements of Prof. Bradley) (alteration added)).

561. *Id.*

562. 125 S. Ct. 2722, 2733 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

563. It is important to remember that the FMA has been used throughout this Article as exemplary of all same-sex marriage bans. The arguments used to support the FMA are the same as those used to support other bans. Certainly, it may seem cognitively silly to test the constitutionality of a constitutional amendment, but the analysis presented here retains its legal force against all non-FMA bans, and as a method of argumentation generally. See also *infra* Part V.B.4.

the level of deference will remain remarkably close to the rational-basis scrutiny used earlier.

Now recall our three-part question from above: Does the FMA have the (1) purpose or (2) effect of either endorsing or establishing religion, and (3) does it divide society according to individual religious beliefs? Analytically, it is simplest for us to divide the “purpose” and “effect” inquiries into two separate parts for ease of application: It is one thing to have an express *purpose* of endorsing or establishing religion, while it is another to have a primary *effect* of doing so. The third and final part of the inquiry will focus on whether the government’s action segments society into insiders and outsiders based upon their religious beliefs.

1. *What Does the Reasonable Observer Know About the Context and History of Same-Sex Marriage Bans and the FMA?*

As a threshold matter, it is important to determine what the reasonable observer would know about the FMA, same-sex couples, preservationism, and the history of marriage. First, she is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.”⁵⁶⁴ Therefore, she knows the general history of the FMA and its various iterations. She is also familiar with the justifications given for the FMA in congressional debates and hearings, and she is well-versed in the preservationist arguments against same-sex marriage. She is also aware of the dispute among scholars regarding the exact meaning of the FMA—and particularly the dispute about its “legal incidents thereof” clause; she knows that there is not one overriding interpretation upon which a majority of commentators can agree. She is also aware of the explicitly-religious credentials of the FMA’s main proponents.

Second, she is “familiar with implementation of government action.”⁵⁶⁵ Therefore, she is aware of the history of federal same-sex marriage bans, including the legislative history and passage of the federal DOMA. She is aware of the religiously-based anti-gay justifications given in support of DOMA, and she is aware that such arguments have largely been discarded during the FMA debates and hearings in favor of more secular-sounding ones.

Third, she inquires as to “the historical context of the statute . . . and the specific sequence of events leading to [its] passage.”⁵⁶⁶ Therefore, she knows that the FMA is intended to constitutionalize marriage for two reasons: (1) to shore up any infirmities in the federal DOMA; and (2) to overrule the Massachusetts Supreme Judicial Court’s *Goodridge* decision. She knows that the FMA has come up for a vote twice in each chamber, that it has failed each time, and that the text of the amendment has not changed significantly since it was first introduced. She also knows that, despite nominal changes in language, each iteration of the FMA is intended to accomplish the same purpose as the very first: Ban same-sex marriage and impose a single, religiously-derived definition of marriage on the entire nation. She is also aware of any obfuscation used to

564. *Id.* at 2737 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

565. *Id.* (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (internal quotation and citation omitted)).

566. *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987)) (alteration added).

cover up the religious definition of marriage that the FMA contains—she understands intuitively what the preservationists are trying to do.

Fourth, she is “‘deemed aware of the history and context of the community and forum in which the religious display appears.’”⁵⁶⁷ Therefore, she is acutely aware of the impact that the FMA has as a federal constitutional amendment: As the Twenty-Eighth Amendment to the United States Constitution, it would dictate marriage policy to all fifty states, the federal government, and all extraterritorial jurisdictions that are subject to United States federal law. She understands that the “forum” of the FMA is the federal Constitution—the only document to which all legal systems in the Union must swear allegiance. She understands the process of both ratifying and repealing amendments to the Constitution; she understands how difficult it would be to repeal the FMA if it were ratified. She understands the political and social implications of using the Constitution as a rights-restricting instead of a rights-expanding document for the first time in the nation’s history.

As for the community, she understands that, as a federal constitutional amendment, the community of the FMA encompasses the entire nation. Therefore, she knows the history of same-sex marriage throughout America, including the case law, the state-level DOMAs and constitutional amendments, and the general religious sentiment against same-sex couples and homosexuality in general. She knows of the long history of commingling religious and civil marriage in America, and she is aware of the current diversity of opinion among religious groups regarding the morality of homosexuality and same-sex relationships. She is acutely aware of the ongoing sectarian debate within a number of major religions, and she knows that several major Christian and Jewish churches have made same-sex religious marriage available to gay and lesbian couples.

2. *Does the FMA Have the Purpose of Endorsing or Establishing Religion?*

Armed with this knowledge, she must now ask whether the proponents of the FMA have the purpose of endorsing or establishing religion. This is a tough question. Facially, the FMA is completely neutral regarding religion, religious belief, and homosexuality. Moreover, if asked, the proponents would probably say, “Of course, there are secular purposes for having the FMA!” As discussed above, the secular purposes underlying the FMA are tenuous at best—indeed, we have to assume the existence of one here just to permit the inquiry. Nevertheless, these facts give rise to the strong inference that the FMA does not have the *facial* purpose of endorsing or establishing religion.

Moreover, the reasonable observer knows how adamantly the FMA’s supporters have disclaimed a discriminatory purpose. Even so, she will discover that several of the FMA’s key supporters have announced that they endorse the FMA because it codifies a definition of marriage derived from a specific set of Judeo-Christian beliefs.⁵⁶⁸ This sends up red flags.

567. *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment)).

568. *See, e.g.*, 150 CONG. REC. S7968 (2004) (statement of Sen. Inhofe) (citing *Matthew* 19:4–6 as a justification for adopting the FMA’s definition of marriage); *id.* at S7980 (statement of Sen. Santorum)

As a result, she may be able to rationally determine that the law was developed with a specific religious objective in mind: To insinuate an identifiably-religious definition of “marriage” into the federal Constitution—and by extension, to impose a sectarian religious belief on the entire nation. However, to make this rational determination now might prove too much, because the law is not facially sectarian. Therefore, she is going to reserve judgment.

3. *Does the FMA Have the Effect of Endorsing or Establishing Religion?*

The reasonable observer must now discern whether the effect of the FMA is to endorse or reject a religion or religious belief. The effect inquiry requires her to know how various American religions conceive of marriage. She must then determine whether the FMA has cherry-picked from among these religious beliefs—the root of her inquiry to determine whether the FMA shows favoritism to particular beliefs or, said differently, whether the FMA conveys disapproval to others. If it does either of these, the government’s definition of marriage has effectively endorsed one religion’s definition of marriage over another’s.

Religions are not of one accord regarding the definition of marriage and the sanctity of same-sex marriages. From the brief survey of the major American religions that we conducted above,⁵⁶⁹ it is clear that no single definition of marriage prevails among religious believers.⁵⁷⁰ Two of these definitions are relevant here: (1) marriage can only be between one man and one woman, and (2) marriage is between two adults, regardless of gender. The beliefs that underpin these two definitions are theologically at odds with one another and are not easily reconcilable. It is unlikely that this theological crisis will be resolved anytime soon.

Linking this dispute to the Establishment Clause is simple: When the government takes sides in a serious theological dispute, it has effectively endorsed the religion with which it sides.⁵⁷¹ Moreover, when the government

(stating that the “definition of traditional marriage” is “truth that has been established in Biblical times”); 150 CONG. REC. H7912 (2004) (statement of Rep. Pence) (stating that marriage “was ordained by God”); *id.* at H7917 (statement of Rep. Hayes) (stating that marriage is a “covenant between one man and one woman”); 152 CONG. REC. S5458 (daily ed. June 6, 2006) (statement of Sen. Thune) (noting that states “define marriage as a sacred union between a man and a woman”).

569. See *supra* Part I.B.

570. Some preservationists argue that, if this diversity of belief is the ground upon which we allow same-sex marriage, then the government must logically accommodate *all* religious conceptions of marriage: If a religious group believes that five adults and six children should marry eight horses, then why should the government stand in their way?

This argument merely rehearses the slippery slope of perversity. See *supra* Part V.A.3.c. To briefly reiterate that discussion here: The government has a rationally secular interest in retaining a consensual, adult, two-party model of marriage. Adult-child-horse group marriage harms this interest because it involves (1) parties to a marriage who are incapable of giving legal consent and (2) a numerosity of parties to the relationship that harms the state’s rational interest in maintaining “good order.” Same-sex marriage does neither of these. Therefore, the secular interests that justify prohibiting adult-child-horse group marriage do not justify prohibiting same-sex civil marriage.

571. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2880 (2005) (Stevens, J., dissenting) (observing that, in light of the competing translations of the Ten Commandments, the use of one version of the

attempts to conclusively resolve the dispute, it broaches on free-exercise territory as well, because it is effectively telling the minority group what it thinks the answer should be.

As discussed, a sectarian dispute is raging about the definition of “marriage.” Same-sex marriage bans place the government in the middle of this dispute. By choosing to ban same-sex marriage, the government is undertaking a decidedly sectarian action—one that simultaneously discriminates against same-sex couples and the religions that support them. These religions are finding themselves told that their beliefs are less valuable to society because they are more inclusive of same-sex couples.⁵⁷²

Because the FMA enacts a religiously-derived model of opposite-sex marriage, the reasonable observer has an even stronger case to rationally conclude that it has the effect of endorsing those religions that believe in only opposite-sex civil marriage, while simultaneously rejecting those religions that believe in a broader definition of marriage. Indeed, she is getting very close at this point.

4. *Does the FMA Segment Society into Political Insiders and Outsiders Based Upon Their Religious Beliefs?*

“Government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.”

*—Justice Sandra Day O’Connor, in County of Allegheny v. ACLU, Greater Pittsburgh Chapter*⁵⁷³

We have briefly mentioned that there may be two separate Establishment Clause concerns with the FMA. The first claim is that the FMA is intended to impose a religiously-derived definition of marriage upon the entire nation; this

Decalogue impermissibly placed the Texas government “at the center of a serious sectarian dispute”).

572. To be fair, we should ask whether *allowing* same-sex civil marriage would implicate the Establishment Clause analysis undertaken here. For starters, the test would be the same—as such, the government would have to articulate a rationally-secular justification for allowing same-sex civil marriage. It is likely that the government would have very little trouble doing so: (1) we have identified a number of secular reasons for having civil marriage generally; (2) allowing same-sex civil marriage broadens the right to marry; and (3) allowing same-sex *civil* marriage does not dictate to any religion what it must believe or how it must practice that belief. Remember, even though civil marriage permits divorce and remarriage, because the Catholic Church does not believe in divorce, it is not required to perform *re*-marriage ceremonies.

Therefore, courts would probably perceive that, in allowing same-sex civil marriage, the government has a generally-applicable, non-invidious purpose in mind: Of the two available definitions, the preservationist definition fits within the advocate’s definition. As such, neither preservationists nor advocates would be excluded from the definition of marriage if the advocates’ definition were chosen. Conversely, under the preservationists’ definition, advocates are expressly excluded from the definition of marriage. It is this exclusionary effect that matters here: Because the advocates’ definition is not inherently exclusionary—even though the preservationists might find it offensive—it does not appear to be susceptible of the same concerns raised here.

573. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 627–28 (1989) (O’Connor, J., concurring) (internal cross-references omitted).

claim is the by far the more important of the two. However, the second possible claim arises here, in the neutrality context.

The second claim is that the FMA is intended to choose one form of religious marriage from all available definitions, and to then establish the preferred definition. We have also shown that, to at least some extent, this is the effect of the FMA. Choosing this religiously-derived definition of marriage runs afoul of the neutrality requirement: Because the FMA would be enacted within the context of an ongoing sectarian dispute, the reasonable observer cannot conclude that the government is treating religions neutrally when it expressly adopts the beliefs of some while rejecting the beliefs of others.

So what?, one might ask. The government needs *some* definition of marriage, does it not? Indeed, that is true. However, the definition of marriage that it adopts it must choose for rational, secular reasons. As discussed, the definition that the FMA has chosen is neither rational nor secular as related to the justifications given for the law. This is not to say that one-man, one-woman marriage is never rational or secular; it is only to say that, insofar as the FMA's proponents have explained themselves, they have not given a convincing account of why their definition is rationally secular.

Nevertheless, the reasonable observer's inquiry is not complete: She must finally determine whether the FMA creates a class of political outsiders. Specifically, she must determine whether adherence to religious belief generally is "relevant . . . to a person's standing in the community."⁵⁷⁴ She will have little trouble concluding that the FMA has the effect of creating a sizeable class of political outsiders—those who, whether for religious or irreligious reasons, do not ascribe to the religiously-derived "one-man, one-woman" marriage model. This includes same-sex couples, who by their very existence do not ascribe to the religiously-derived definition of marriage; it also includes several major Judeo-Christian groups. Finally, we cannot forget that it rejects the beliefs of the entire family of Secularist groups, all of whom support same-sex marriage.

Justice O'Connor's endorsement analysis sought to mitigate the "numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others."⁵⁷⁵ Civil marriage is a bundle of rights, benefits, and responsibilities that only the government can bestow. Its very existence evidences a belief that the government prefers certain relationship models over others. This is not inherently wrong: The government can offer up a number of secular justifications for holding this preference. The argument made here is that the FMA has failed to provide a rationally secular justification for having this particular preference.

Adopting the FMA's exclusionary definition of marriage constitutes the very favoritism that O'Connor sought to avoid. At best, the FMA conveys an undeniable message of disapproval religious believers who embrace the theological validity of same-sex unions. At worst, the FMA is designed to punish those religious believers for their beliefs by making them political outcasts.

574. See *id.* at 625.

575. *Id.* at 627–28 (O'Connor, concurring).

As discussed, the FMA was used in this paper as exemplary of *all* same-sex marriage bans, whether those codified in judicial decisions, state Defense of Marriage Acts, or state constitutional amendments. The preservationist arguments discussed here are rehearsed *ad nauseam* on a microcosmic scale within the states. Each ban has this same imposing purpose, makes this same sectarian choice, and has this same alienating effect. As discussed, no rational secular justification has been put forward to justify favoring the beliefs of one religion over another. We can only conclude, then, that same-sex marriage bans violate the Establishment Clause for their lack of neutrality toward religions and religious beliefs.

VI. CONCLUSION: RESOLVING OUR DEFINITIONAL PROBLEM

“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

—Chief Justice Warren E. Burger, in *Palmore v. Sidoti*⁵⁷⁶

We return now to the definitional question that opened this paper: What is “marriage”? As we have seen, “marriage” is what we make of it. The law is clear—if we are going to base our definition of marriage on a traditionally religious institution, we have to have a legitimate secular purpose for doing so.

The alternate course of action suggested here is to deliberately extricate civil marriage from religious marriage. In doing so, our task will be to identify normative reasons why a certain number and gender of individuals should be allowed access to civil marriage. As part of this process, the government should continue its course of re-conceiving of civil marriage as a legal system designed both to secure legal benefits for families and to transfer property, wealth, and inter-generational responsibilities. This secular, marriage-autonomy model tracks nicely with the free market that already exists for opposite-sex couples.⁵⁷⁷

Re-privatizing religious marriage should not sound scary: America’s free-exercise, free-speech, and freedom of association jurisprudence is strong. No matter what civil definition of marriage we ultimately adopt, religious marriage will always be free to continue in its own way, unfettered, because it will always be based on the subjective beliefs of the particular adherents—Catholics can continue to refuse to recognize divorce, Fundamentalist Latter-Day Saints can continue to believe in polygamy, and Unitarian-Universalists can continue to believe in same-sex religious marriage.

Several of the preservationist arguments raised and dismissed above, while being in and of themselves legitimate, are not rationally advanced by same-sex marriage bans. As discussed, this Article is concerned primarily with the case *against* same-sex marriage, not the case *for* it—as such, affirmative arguments in favor of same-sex marriage are distinctly lacking, and for good reason: They serve to distract from the laser-sharp perceptiveness that we must wield in identifying and exposing the religious foundations of same-sex civil marriage bans. Whether the cure for this constitutional infirmity comes in the form of civil

576. 466 U.S. 429, 433 (1984).

577. See *supra* note 54.

marriage, civil unions, domestic partnerships, or an as-yet-unknown legal relationship—that is a question for another day.

Sedimentation theory shows that the preservationists have begun to dig deep to find adequately secular justifications for imposing a sectarian definition of marriage on the entire nation. Because these justifications come up short every time, the invidious religious purpose underlying same-sex marriage bans is usually revealed upon even a cursory logical inquiry. According to *McCreary County*, this religious objective cannot be adequately extinguished by simply varnishing the truth—we must politely request that it retire itself to the private sector of religious belief. Brave same-sex couples around the nation have made incredible sacrifices in the process of starting this conversation about re-privatizing religious marriage.

One might question why it's such a problem to base our nation's definition of marriage on an historically religious one that reflects the religious beliefs of a majority of Americans. For those who believe that majorities should always have their way simply because they are majorities, there is no ready answer to this dilemma. So far, all of the supposedly secular reasons advanced to support an opposite-sex-couples-only definition of marriage appear to be mere pretexts for religiously-based anti-gay bigotry. Moreover, the arguments against same-sex marriage are becoming more and more attenuated; mere creativity or reinvention seems unable to eradicate the religious objective that originally underpinned these bans.

Invoking the Establishment Clause to strike down same-sex marriage bans, therefore, deports these religious beliefs back to the pews where they belong. As mentioned, this leaves religious beliefs unmolested, and religious adherents will remain free to believe whatever they choose about homosexuals and to practice those beliefs unfettered by government interference.

Additionally, denying same-sex couples access to a genuinely secular definition of civil marriage perpetuates bigotry and homophobia at a tangible cost to these couples and their families. As the Andrew Sullivan-Gerard Bradley debate demonstrates, opponents of same-sex marriage have offered up no response to explain why this hardship should continue. Whether their purpose is as invidious as Sullivan perceives it to be is not the point—when preservationists are asked what help they would give to strengthen same-sex families, they simply remain silent. Just as rational-basis review does not justify abdicating the judicial role, neither does utter silence justify perpetuating harm to children. If the children of heterosexual parents really do deserve better treatment and more security than the children of homosexual parents, it is important for preservationists to explain *why*.

Until they do, we will be left to wonder: Preservationists claim that marriage is about protecting children. If marriage is really about protecting children, then it would be about protecting *all* children, not just those of heterosexual parents—right? Preservationists claim that marriage is about encouraging the creation of families. If marriage is really about encouraging the creation of families, then it would be about encouraging the creation of *all* families, not just those falling within a vaguely-stated hetero-normative “ideal”—right? Preservationists claim that marriage is about social stability and values-transmission. If marriage is really about engineering social stability, then

we should be undertaking to prohibit divorce, adultery, and pre- or extra-marital sex—right?

It is not believable that the preservationists spouting off about “ideal environments,” “gender complementarity,” and “values transmission” in congressional testimony have genuinely secular objectives in mind. No Secularist has been put forward to lend credible support to the “family values” talk that preservationists are constantly regurgitating to Congress and state legislatures. Much like drawing a fish in the sand,⁵⁷⁸ this rhetoric is—and always will be—a coded message of bigotry passed between religious believers, conveniently cloaked in the secular-sounding rhetoric of pseudo-scientific claims about children and social stability.

It is likely that enforcing the Establishment Clause against same-sex marriage bans will remain politically unpalatable to judges for some time—particularly to those state-court judges who answer to their electorates. Should a court strike down a ban on Establishment Clause grounds, the initial backlash will not be easily withstood.

Preservationists may accuse me of being hostile toward religion. Nothing could be further from the truth. I believe in returning religion to its rightful sphere in which individuals practice autonomously-chosen beliefs in private, without being permitted to impose those beliefs on government, society, or the nation. I believe in the Framers’ ideal of keeping divine authority separate from secular authority. Adhering to this ideal is hardly hostile to religion—indeed, it is democracy-saving: Democracy suffers when *any* religion hijacks our secular government, even if that religion claims to represent the beliefs of the majority of Americans. Returning religion to the pews and returning secularity to the government is good for both. Giving legal force to religious ideology perverts both the law and religion, and religious tyranny in any form subverts the promises of our Constitution.

We *must* extricate civil marriage from religious marriage. If we are going to deny same-sex couples the right to marry, we must have a genuinely—and rationally—secular reason for doing so. As discussed, that ship has likely sailed, for the stain of a religious objective will not easily be bleached away: Preservationists would commandeer the government to impose their religious beliefs on the nation. Moreover, the government would choose between competing religious beliefs about the definition of “marriage” and then reward adherence to the chosen belief with “insider” status. This violates basic neutrality principles, endorses one religion over others, and creates a significantly-sized class of outsiders. The Establishment Clause cannot abide such an abuse of power: It is exactly the kind of religious tyranny the Establishment Clause was intended to prevent.

578. In the days of the early church, back when Christians were genuinely persecuted for their beliefs, they drew fishes in the sand to identify one another. One person would draw the top arc of the fish with his foot, and the second person would use his foot to draw the bottom arc of the fish. If the second person did not complete the drawing, the first person pretended that his own arc was just a doodle in the sand. Religious Tolerance.org, Christian Symbols: Fish (Ichthus), Cross & Crucifix, http://www.religioustolerance.org/chr_symb.htm (last visited Jan. 8, 2007).