
From the Selected Works of Linsey L Krauss

2008

THE BIBLE CLOSET: THE DEBATE OVER SAME-SEX MARRIAGE

Linsey L Krauss



Available at: https://works.bepress.com/linsey_krauss/3/

**THE BIBLE CLOSET:
THE DEBATE OVER SAME-SEX MARRIAGE**

LINSEY L. KRAUSS*

INTRODUCTION	2
I. TWO STEPS FORWARD: GROWTH MADE TOWARDS EQUALITY	3
A. California Domestic Partnerships	3
B. Same-Sex Marriage in California	3
C. Same-Sex Marriage in Massachusetts: The Goodrich Decision.....	5
D. Connecticut Rules Prohibition on Same-Sex Marriage to End.....	6
E. Steps Made Outside the United States	7
II. THREE STEPS BACK: WHAT OPPONENTS HAVE DONE TO ENSURE EQUALITY WILL NOT EXIST	7
A. Defense of Marriage Act (DOMA).....	8
B. Federal Marriage Amendment	10
C. Marriage Protection Week 2003	10
III. SEPARATION OF CHURCH AND STATE: LEGAL MARRIAGE VS. RELIGIOUS MARRIAGE.....	11
A. Legal Marriage.....	12
B. Religious Marriage.....	12
IV. DEBUNKING THE ARGUMENTS OPPOSING SAME-SEX MARRIAGE.....	13
A. If the government begins to allow same-sex marriage, religious institutions will be forced to perform and recognize their marriages.	13
B. Gay Marriage will Undermine the Institution of Marriage.....	15
C. Marriage has always been between one man and one woman: Adam and Eve not Adam and Steve Theory	16
D. The Bible Says Homosexuality is Wrong and Immoral	18
E. Not All Religious Groups, Denominations or Clergy Feel this Way	22
V. PROBLEM WITH THE ARGUMENTS: THE BASIS FOR WHY THE RELIGIOUS ARGUMENT IS FLAWED AND WHY LEGAL MARRIAGE SHOULD BE EXTENDED TO HOMOSEXUALS	23
A. Why Homosexuals Should be Considered a Suspect Class.....	26
B. Homosexuals Are Similarly Situated Persons	28
C. There is No Compelling Interest to interfere with the Right in Question....	28
D. Over and Under Exclusivity Concerning Equal Protection	30
VI. WHY PUBLIC POLICY AND PUBLIC OPINION IS NOT AN EXCUSE	31
VII. THE FIGHT IS FAR FROM OVER	32

* Editor-In-Chief, Trinity Law Review, Vol. 16; J.D. Candidate, Trinity Law School, Santa Ana, CA, 2009; B.S., Political Science, Texas A&M University, College Station, 2005. I would like to thank my mother for giving me every opportunity to pursue my dreams. I would not be where I am today without you. To my niece, Katie, I hope I leave you a more accepting world for whoever you become. For the 18,000 same-sex couples in California who legally married, this article was written with you, your love, and your families in mind. To those of you who do not agree with the subject matter but helped to get this article published thank you and know that I am truly grateful. To all the people and organizations fighting for the right for equality in marriage: thank you, keep fighting, progress is being made and we will win, eventually.

“I honestly think it’s [gay marriage] the greatest threat our nation has . . . even more than terrorism or Islam.” –Oklahoma State Rep. Sally Kern speaking in reference to homosexuality¹

“Marriage-anything less is less than equal. I will not accept anything that is less than equal.” – Rev. Cecil Williams²

INTRODUCTION

Homosexuality has long been a topic of great debate posing legal, ethical, moral and religious questions. Recently in America, the topic of homosexual marriage has been a primary focus of discussion.³ “The U.S. Supreme Court long ago determined that the right to marry the person of one’s choice was a fundamental civil right, and therefore the government is generally not permitted to set up roadblocks or otherwise second-guess whether marriage is a good idea for any particular couple.”⁴ And yet, even today, after many Supreme Court decisions stating just this,⁵ a gay man can still marry any female yet is unable to marry his male partner of twenty years.⁶

Ideas surrounding the institution of marriage have changed and progressed throughout time.⁷ The institution of marriage and this country have been built on similar values including love, equality, freedom to choose, fairness and commitment.⁸

It’s hard to think of values that matter more to most of us—as human beings, as family members, or as Americans. They are the values central to most people’s definition of the right to marry, the values at the heart of the ongoing national conversation about ending the exclusion of same-sex couple from marriage.⁹

This debate has been pondered by both gay and non-gay Americans as they deal with the coming of age of a new civil rights struggle.¹⁰

During the last decade, there have been many significant setbacks for gay marriage as well as many obstacles overcome.¹¹ This article will focus on how the idea

¹ J. M. BRANUM, *Rep. Sally Kern’s Ugly Anti-gay Speech is Made Public on the Internet*, <http://jmbzine.com/2008/03/07/rep-sally-kerns-ugly-anti-gay-speech-is-made-public-on-the-internet/> (last visited Oct. 2, 2008).

² DAVINA KOTULSKI, *WHY YOU SHOULD GIVE A DAMN ABOUT GAY MARRIAGE* 71 (2004).

³ *See generally Id.*

⁴ *Id.* at 11.

⁵ *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶ *See generally* EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHTS TO MARRY* 9-13 (2004).

⁷ *Id.* at 3.

⁸ *Id.* at viii.

⁹ *Id.*

¹⁰ *Id.* at ix.

of marriage has grown and changed over the last ten years and how it affects not only homosexuals but also heterosexuals, and why everyone should be concerned about the outcome. This article will also focus on the arguments made by those who oppose gay marriage based on a religious platform and breakdown their rationale, while showing the flaws in their arguments. The purpose of this article is to prove there is no legitimate reason, religious or otherwise, to outlaw same-sex marriage in the United States.

I. TWO STEPS FORWARD: GROWTH MADE TOWARDS EQUALITY

A. *California Domestic Partnerships*

Effective as of January 1, 2005, California enacted AB 205 which sought to expand California's domestic partnership protections.¹² Under AB 205, couples registering as domestic partners have the following rights:

[T]he right to receive a portion of your partners property if he or she dies without a will; the right to use employee sick leave to care for a sick partner or partners child; the right to hospital visitation; the right to make medical decisions if your partner becomes incapacitated; the right to sue for wrongful death of your partner; the right to use stepparent adoption procedures to adopt a partners child; and the right to receive unemployment benefits if forced to relocate because of a partners job.¹³

The rights under the California legislation only exist under state law and do not apply to any federal rights that are granted to heterosexual married couples.¹⁴ While the legislation in California is a great step towards equality of relationships, many inequalities still remain. Most state benefits that married heterosexual couples receive under California law are extended to those in domestic partnerships.¹⁵ Of course, the main inequality of the new legislation is that it provides something less than marriage.¹⁶

B. *Same-Sex Marriage in California*

On May 15, 2008, the state of California ruled that it is unconstitutional to deny marriage licenses to same sex couples.¹⁷ "In clear, unequivocal language the California

¹¹ See generally SEAN CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS (2004).

¹² Press Release, American Civil Liberties Union, ACLU Cheers Decision by CA Appeals Court Removing Legal Challenge to Domestic Partnership Law (Apr. 4, 2005) available at <http://www.aclu.org/lgbt/relationships/12169prs20050404.html> (last visited Jan. 21, 2009).

¹³ California Domestic Partnerships, ACLU, <http://gbge.aclu.org/content/view/178/60/> (last visited Jan. 21, 2009).

¹⁴ Press Release, American Civil Liberties Union, ACLU Cheers Decision by CA Appeals Court Removing Legal Challenge to Domestic Partnership Law (Apr. 4, 2005) available at <http://www.aclu.org/lgbt/relationships/12169prs20050404.html> (last visited Jan. 21, 2009).

¹⁵ See generally KOTULSKI, *supra* note 2, at 59-65.

¹⁶ *Id.*

¹⁷ *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

Supreme Court ruled the state could no longer exclude same-sex couples from civil marriage.”¹⁸

[T]he court ruled in a 4–3 decision that laws directed at gays and lesbians are subject to strict judicial scrutiny and that marriage is a fundamental right under Article 1, Section 7 of the California Constitution, thereby holding unconstitutional the previously existing statutory ban on same-sex marriage embodied in two statutes, one enacted by the Legislature in 1977, and the other through the initiative process in 2000.¹⁹

Starting June 16, 2008, civil same-sex couples could receive a marriage license in California.²⁰

The California Court dealt with the equal protection issue and had to determine if the strict scrutiny test or the rational basis test should apply.²¹ The Court held that excluding same-sex couples from receiving a civil marriage license was a violation of their equal protection.²²

Under the strict scrutiny standard, unlike the rational basis standard, in order to demonstrate the constitutional validity of a challenged statutory classification the state must establish (1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a compelling state interest, and (2) that the differential treatment not only is reasonably related to but is necessary to serve that compelling state interest. Applying this standard to the statutory classification here at issue, we conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes – the interest in retaining the traditional and well-established definition of marriage – cannot properly be viewed as a compelling state interest for purposes of the equal protection clause, or as necessary to serve such an interest.²³

Holding same-sex couples to the strict scrutiny test was done for several reasons. First, the Court believed that it was necessary because “[I]n order to afford full protection to all of the rights and benefits that currently are enjoyed by married opposite-sex couples; permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution

¹⁸ John Esther, *Gay Lesbian Marriage Ok'd*, LESBIAN NEWS MAGAZINE, June 2008, at 33.

¹⁹ In re Marriage Cases, http://en.wikipedia.org/wiki/In_re_Marriage_Cases (last visited Sept. 2, 2008).

²⁰ Lori Arnold, *State Supreme Court Overturns Gay Marriage Ban: Pastors Call for 40-day Fast before November's Amendment Vote*, CHRISTIAN EXAMINER ORANGE COUNTY ED., June 2008 at 1.

²¹ *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008).

²² *Id.*

²³ *Id.*

of marriage.”²⁴ By allowing same-sex couples to marry, it will not change civil marriages for heterosexuals.²⁵

The second reason for applying a heightened standard of scrutiny was by not allowing same-sex couples the right to enter into a marriage agreement, the partners and their families would be harmed.²⁶ The Court reasoned that not allowing homosexuals to participate in marriage would further discriminate and extend the “view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples.”²⁷

Another reason why strict scrutiny was held to be the appropriate test was because of the long standing tradition that gays have been historically discriminated against.²⁸ The final reason for the application of strict scrutiny was that holding same-sex couples to the term domestic partnerships and heterosexual couples to another term, marriage, treated the two couples distinctly different.²⁹ The Court then held that no compelling state interest exists to hold same-sex couples to a different standard.³⁰

C. *Same-Sex Marriage in Massachusetts: The Goodrich Decision*

In *Goodridge v. Dept. of Public Health*, the plaintiffs argued that the denial of marriage certificates to same-sex couples was unconstitutional.³¹ The court ruled that the marriage law banned same-sex couples from marrying giving the legislature 180 days to “take such action as it may deem appropriate.”³² Following the ruling on November 18, 2003, Gov. Mitt Romney ordered town clerks to begin issuing marriage licenses to same sex couples on May 17, 2004.³³

On the first day of issuing the marriage licenses, more than 1,000 were issued.³⁴ “Two-thirds of the applicants were women, and one-half of the applicants had been partners for more than a decade.”³⁵ Brian Lees, a sponsor of an amendment to ban gay marriage stated, “Gay marriage has begun, and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry.”³⁶ Allowing marriage

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

²⁸ *Id.* at 401-2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Goodrich v. Dept. of Public Health*, 798 N.E.2d 941, 950 (Mass. 2003).

³² *Id.* at 970.

³³ Same-sex marriage in Massachusetts, http://en.wikipedia.org/wiki/Same-sex_marriage_in_Massachusetts (last visited Sept. 2, 2008).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Same-Sex Marriage Wins in Boston*, CBS NEWS, Sept. 14, 2005, <http://www.cbsnews.com/stories/2005/09/14/national/main846230.shtml> (last visited Sept. 2, 2008).

licenses to same-sex couples has not changed life for those opposing or supporting same-sex unions.³⁷

Numerous platforms from the state's Republican Party began hoping to end the issuance of marriage licenses to same sex couples.³⁸ In contrast to his previous actions, "Governor Mitt Romney launched the "superslate" campaign in 2004, based on the idea that the state Republican party could use Conservative ideals and family values as a wedge issue and gain seats, spending millions of his own dollars and personally campaigning for Republican candidates in traditionally Democratic seats."³⁹ The efforts failed and the Republicans lost three seats in the 2004 election.⁴⁰

After the Court's ruling, there was also an endeavor to change the state's Constitution to outlaw homosexual marriages. On June 14, 2007, the "[E]ffort to amend the state constitution to forbid same-sex marriage was defeated by the legislature."⁴¹ Due to this ruling, "same-sex marriage will remain legal in Massachusetts until at least 2012, barring another decision by the Massachusetts Supreme Judicial Court or the United States Supreme Court on the topic or a Federal Constitutional Amendment banning such marriages."⁴² This is a step forward for homosexuals and proponents of same-sex marriage because it is leading to equality; at least in theory.

D. *Connecticut Rules Prohibition on Same-Sex Marriage to End*

By a 4-3 decision, the Supreme Court of Connecticut ruled that same-sex couples should not be denied the right to wed within the state.⁴³ On October 10, 2008 Connecticut became the third state to allow same-sex couples to legally obtain a marriage license.⁴⁴ The law suit was brought by eight couples in 2004 who claimed the prohibition on same-sex marriage constituted discrimination.⁴⁵

The same-sex couples argued that to deny a couple a right to marry triggered heightened scrutiny and by not allowing couples to marry violated their right to equal protection.⁴⁶ The Court sided with the same-sex couples stating that the opposing side failed to meet their burden of proof.⁴⁷ The majority of the Justices held that when classifying persons based on their sexual orientation a higher level of scrutiny should be

³⁷ Same-sex marriage in Massachusetts, http://en.wikipedia.org/wiki/Same-sex_marriage_in_Massachusetts (last visited Sept. 2, 2008).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Connecticut OKs Same-Sex Marriage*, CBSNEWS.COM (Oct. 10, 2008), available at <http://www.cbsnews.com/stories/2008/10/10/national/main4513234.shtml> (last visited Jan. 20, 2008).

⁴⁴ Rick Carlin, *Connecticut OKs Same-Sex Marriage*, TIMESUNION.COM (Oct. 10, 2008) available at <http://blogs.timesunion.com/capitol/archives/8951> (last visited Jan. 20, 2008).

⁴⁵ See generally *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

⁴⁶ *Id.*

⁴⁷ *Id.*

used and must serve an important government objective to allow discrimination.⁴⁸ As a matter of law, the majority held that same-sex couples should be allowed to marry because the State failed to prove an important government objective for not allowing same-sex couples to wed.⁴⁹

E. *Steps Made Outside the United States*

Outside of the United States, other developed countries have made steps to ensure the equality of marriage by allowing homosexuals to be married.⁵⁰ “These advances, though often overlooked in the United States, helped to frame the same-sex marriage debate as a human rights issue of equal access to legal rights.”⁵¹ In 2001, the Netherlands became the first country to allow same-sex marriages.⁵² Two years later, Belgium granted the right for same-sex couples to wed.⁵³ In 2005, same-sex marriage was legalized in Spain.⁵⁴

Closer to home in Canada, same-sex couples gained the right to marry beginning in June 2003.⁵⁵ The first provinces to allow same-sex unions were Ontario and British Columbia.⁵⁶ Other developed nations are beginning to recognize same-sex marriages.⁵⁷ Same-sex marriage is becoming more accepted and this is documented through new legislation in many countries which are simultaneously promoting equal rights and same-sex marriages.⁵⁸

“Same-sex unions have been recognized throughout history, in ancient Greece and Rome, Egypt, parts of China, Japan South East Asia, Australia, India, South America, Medieval Eastern Europe, and practically everywhere else in the world.”⁵⁹ This lessens the argument that because marriage has always been one way it should remain that way.⁶⁰ Marriage throughout the world, as in the United States, has at some degree in history changed to become open to more groups, classes, or races of people.

II. THREE STEPS BACK: WHAT OPPONENTS HAVE DONE TO ENSURE EQUALITY WILL NOT EXIST

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ KOTULSKI, *supra* note 2, at 127.

⁵¹ Mark E. Wojcik, Symposium, *The Wedding Bells Heard Around the World: Years from now, will we Wonder why we Worried about Same-Sex Marriage*, 24 N. ILL. U. L. REV. 589 (2004).

⁵² KOTULSKI, *supra* note 2, at 127.

⁵³ *Id.*

⁵⁴ Same-sex marriage in Spain, http://en.wikipedia.org/wiki/Same-sex_marriage_in_Spain (last visited Sept. 2, 2008).

⁵⁵ KOTULSKI, *supra* note 2, at 127.

⁵⁶ *Id.*

⁵⁷ KOTULSKI, *supra* note 2, at 131-132.

⁵⁸ *Id.*

⁵⁹ Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO L.J. 2103, 2115 (2008).

⁶⁰ *Id.*

A. *Defense of Marriage Act (DOMA)*

“Their first tactical move was the creation of the Defense of Marriage Act.”⁶¹ [hereinafter DOMA]. DOMA “defined marriage as a legal union between one man and one woman as husband and wife.”⁶²

On a stormy day in mid-January 1996, about twenty leaders of the Christian right wing met in the basement of a Baptist church in Memphis. Representing such large organizations as the Rev. Pat Robertson’s Christian Coalition, the Mississippi-based American Family Association and James Dobson’s Focus on the Family, the activists had come together to launch an anti-homosexual network, which they called the National Pro-Family forum. What drove them the most that day was their alarm over a growing friendliness in America to the idea of gay and lesbian marriages.⁶³

At the heart of this meeting, was what became known as the Defense of Marriage Act (DOMA).⁶⁴ “President Clinton signed the Defense of Marriage Act (DOMA), into law on September 21, 1996, at 12:50 a.m., less than six weeks before the November general elections. The timing suggests that Congress passed DOMA before other more legitimate legislation in order to raise an issue which could influence that election’s outcome.”⁶⁵

Among many problems with DOMA, for it “to be constitutionally valid under the Establishment Clause, this notion that heterosexual marriages require “protection” from gay and lesbian persons must spring from a secular and not religious source.”⁶⁶

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

⁶¹ KOTULSKI, *supra* note 2, at 109.

⁶² *Id.* at 110.

⁶³ ROBERT DREYFUSS, *The Holy War on Gays*, ROLLING STONES MAGAZINE, Mar. 18, 1999, available at http://www.pflagdetroit.org/Holy_War_OnGays.htm (last visited Sept. 2, 2008).

⁶⁴ *Id.*

⁶⁵ James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 336 (1997).

⁶⁶ *Id.* at 338.

DOMA's purposes are demonstrably a "sham." DOMA is an unconstitutional establishment of fundamentalist Christianity.⁶⁷

There has been great question to the role religion played in the enactment of DOMA. "DOMA supporters clearly envision marriage as a religious practice, and often go so far as to deny any credible role of government in its regulation at all. As such, DOMA's goal to protect marriage is transparently an effort to foster one particular religious perspective on families."⁶⁸

Based on the House Speakers it is clear religion played some role in the passing of DOMA.⁶⁹ "Representative Sensenbrenner notes that "[t]raditional heterosexual marriage . . . has been the preferred alternative by every religious tradition in recorded history."⁷⁰ The central issue is the authority by which marriages are formed. Representative Hutchinson from Arkansas believes "that marriage is a covenant established by God."⁷¹ Representative Talent from Missouri agrees: "The institution of marriage is not a creation of the State. . . . Rather, it has been sanctified by all the great monotheistic religions and, in particular, by the Judeo-Christian religion which is the underpinning of our culture."⁷²

During the House debate two representatives countered the religious attacks.⁷³ Rep. Jackson of Illinois warned that "religious groups may not govern who receives a civil marriage license. . . . [W]hen I came to Congress, I placed my hand on the Bible and swore to uphold the Constitution; now, I am being asked to place my hand on the Constitution and uphold the Bible."⁷⁴ Rep. Frank, who organized and led an admirable fight against DOMA, objected to the characterization of marriage as a sacrament. "We have no power to give anyone any sacraments. We are not in the business of dispensing sacraments, and I hope we never get there."⁷⁵

It is clear from both sides of the debate opponents and proponents of DOMA recognized a religious connotation of the act. After enacting DOMA at the federal level, some states have followed suit by enacting similar measures.

As of today, forty states have passed what is considered to be a "mini-DOMA."⁷⁶ The DOMA's at the state level do ensure that if same-sex marriage is legalized in another

⁶⁷ *Id.* at 373.

⁶⁸ *Id.* at 350.

⁶⁹ *Id.*

⁷⁰ James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 350 (1997) (citing Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 1 (1996)) (statement of Rep. Sensenbrenner).

⁷¹ *Id.* (citing 142 CONG. REC. H7442 (daily ed. July 11, 1996)) (statement of Rep. Hutchinson).

⁷² *Id.* (statement of Rep. Talent).

⁷³ *Id.*

⁷⁴ *Id.* (citing From: 142 CONG. REC. H7496 (daily ed. July 12, 1996)) (statement of Rep. Jackson).

⁷⁵ *Id.* (statement of Rep. Frank).

⁷⁶ DOMA Watch, <http://www.domawatch.org/index.php> (last visited Sept. 2, 2008).

state, “their state does not have to recognize those marriages.”⁷⁷ In effect, DOMA at the federal level is the law of the land preventing any gains towards equality at the state level from being recognized at the federal level.⁷⁸

B. *Federal Marriage Amendment*

During his first term, President George W. Bush supported many obstructions to equal marriage for same-sex couples.⁷⁹ In May of 2003, Rep. Marilyn Musgrave of Colorado introduced H.R.J. Res. 56 which would amend the U.S. Constitution.⁸⁰

The amendment would add the following two sentences to our Constitution: 1. Marriage in the United States shall consist only of the union of a man and a woman. 2. 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.⁸¹

The amendment would not only ban same-sex marriage but provision two would ban domestic partnerships rights such as those established in California.⁸² “The Federal Marriage Amendment would be the first time a restriction of the rights of a group of people was written into our Constitution since it was ratified in Philadelphia in 1789.”⁸³

In late 2003, Bush announced “his intention to introduce legislation that would further codify the ban on same-sex marriage.”⁸⁴ Vice President Cheney stated that his views of the amendment were different.⁸⁵ “He said he personally opposed the measure but supported Bush’s position out of loyalty to the president.”⁸⁶

“A constitutional amendment needs two-thirds votes to pass, but first had to get through the procedural cloture vote, which requires 60 senators to agree to end the debate and move toward final passage.”⁸⁷ The vote was forty nine to forty eight failing by eleven to go to vote.⁸⁸ Adding a constitutional amendment outlawing gay marriage failed; at least for the time being.

C. *Marriage Protection Week 2003*

⁷⁷ KOTULSKI, *supra* note 2, at 110.

⁷⁸ PBS.COM, *The Defense of Marriage Act*, http://www.pbs.org/newshour/bb/law/gay_marriage/act.html (last visited Oct. 2, 2008).

⁷⁹ *See generally* KOTULSKI, *supra* note 2, at 104-119.

⁸⁰ CAHILL, *supra* note 11, at 9.

⁸¹ KOTULSKI, *supra* note 2, at 111.

⁸² CAHILL, *supra* note 11, at 10.

⁸³ *Id.* at 12.

⁸⁴ *Id.* at 88.

⁸⁵ *Id.* at 90.

⁸⁶ *Id.*

⁸⁷ *Constitutional Amendment of Marriage Fails*, FOX NEWS.COM, June 8, 2006, <http://www.foxnews.com/story/0,2933,198511,00.html> (last visited Sept. 2, 2008).

⁸⁸ *Id.*

Opponents of equal rights for homosexuals based on religion have made gay marriage a top priority.⁸⁹ They declared the week of October 12-18, 2003 “Marriage Protection Week” which was then endorsed by President Bush.⁹⁰ On October 3, 2003 President Bush issued a statement claiming “Marriage is a sacred institution, and its protection is essential to the continued strength of our society.”⁹¹ Further in the letter written by President Bush he stated, “Marriage is a union between a man and a woman, and my Administration is working to support the institution of marriage by helping couples build successful marriages and be good parents.”⁹²

Clergy were asked to give sermons against homosexuality and marriages between same-sex couples.⁹³ Citizens were called upon to contact their representatives and community leaders to advocate against same-sex marriages.⁹⁴ “These organizations feel that marriage equality is a violation of their religious freedom and will do whatever it takes to deny Lesbian, Gay, Bisexual, and Transgender [hereinafter LGBT] people their rights.”⁹⁵

III. SEPARATION OF CHURCH AND STATE: LEGAL MARRIAGE VS. RELIGIOUS MARRIAGE

In the United States our law is based on the Constitution, not the Bible.⁹⁶ It is important to remember this when discussing same-sex marriage. The line between where religion ends and where the state begins governing is skewed in terms of the same-sex marriage debate. Opposition to gay marriage stems from religious convictions and doctrine.⁹⁷ If an amendment were to pass outlawing same-sex marriage, it would do so based in part on religious doctrine and monies donated by religious institutions.⁹⁸ The distinction in marriage must be made. There are two types of marriage: legal and religious.⁹⁹

“If we can get people to understand the difference, that our principle of separation of church and state in fact is not threatened by legalizing civil marriage rights for same-sex couples, then opposition to same-sex marriages dramatically decreases.”¹⁰⁰ By understanding the distinct difference in a legal marriage and a religious marriage it will be clear to see advocates of same-sex marriage are seeking a right to be legally married.

⁸⁹ KOTULSKI, *supra* note 2, at 112.

⁹⁰ *Id.*

⁹¹ *Id.* at 113.

⁹² *Id.*

⁹³ *Id.* at 112.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 116.

⁹⁷ Austin Cline, *Gay Marriage & Church/State Separation*, <http://atheism.about.com/b/2006/02/02/gay-marriage-churchstate-separation.htm> (last visited Sept. 2, 2008).

⁹⁸ *Id.*

⁹⁹ Deirdre Bourdet, *Separation of Church and State*, SF GATE, Aug. 6, 2003 available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/08/06/ED94325.DTL> (last visited Sept. 2, 2008).

¹⁰⁰ Josh Friedes, Symposium, *Can Same-Sex Marriage Coexist with Religion?*, 38 NEW ENG. L. REV. 533, 537 (2004).

“If we could just get people to understand the difference between religious and civil marriage, that, in fact, faith traditions will be able to continue to operate independently of the civil law as they always have, we will see dramatic increases in support for equal civil marriage rights for same-sex couples.”¹⁰¹

A. *Legal Marriage*

Legal marriage is a legal union in the eyes of the law.¹⁰² “Viewing marriage as a civil institution is by no means a new concept.”¹⁰³ “Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution and the decision whether and who to marry is among life’s momentous acts of self-definition.”¹⁰⁴

A legal marriage is recognized by obtaining a marriage license issued from the local court house or other official issuing agency.¹⁰⁵ “Marriage is also a relationship between a couple and the government. For example, couples need the government’s participation to get into and get out of a marriage.”¹⁰⁶ A legal marriage entitles its holders to tax breaks and other privileges and benefits from both the state and federal governments.¹⁰⁷ Once legally married in one state a married couple is entitled to have their marriage “recognized in all fifty states.”¹⁰⁸

B. *Religious Marriage*

Religious marriage is the sacrament, the ritual, standing before God (or whomever) and declaring love for one another. This is a vital part of the process for many people, and should no be demeaned”¹⁰⁹ It is important to see that religious and legal marriages are mutually exclusive. Two persons can have a legal marriage without having a religious marriage. In turn, two persons can have a religious marriage, consisting of a ceremony and not completing the marriage license application with the local issuing agency, without having a legal marriage.¹¹⁰ Because the two types of marriage are mutually exclusive, they must be held to a separate standard. A legal marriage is necessary for the rights and protections that the institution of marriage provides.¹¹¹

¹⁰¹ *Id.*

¹⁰² Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO L.J. 2103 (2008).

¹⁰³ *Id.* at 2137.

¹⁰⁴ *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003).

¹⁰⁵ Deirdre Bourdet, *Separation of Church and State*, SF GATE, Aug. 6, 2003 available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/08/06/ED94325.DTL> (last visited Sept. 2, 2008).

¹⁰⁶ WOLFSON, *supra* note 6, at 4.

¹⁰⁷ *Id.*

¹⁰⁸ Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO L.J. 2103, 2138 (2008).

¹⁰⁹ *Id.*

¹¹⁰ Shailla Dewan, *United Church of Christ backs Same-Sex Marriage*, NEWYORKTIMES.COM (July 5, 2005) available at http://www.nytimes.com/2005/07/05/national/05church.html?_r=1&oref=slogin (last visited Jan. 20, 2008).

¹¹¹ WOLFSON, *supra* note 6, at 4.

As far as the law is concerned, however, what counts is not what you do at the altar or whether you march down the aisle, but that you get a civil marriage license from the government and sign a legal document in the vestibule of the church, synagogue, temple, or mosque-or at the city hall, a court, or a clerk's office.¹¹²

A religious leader conducting a marriage ceremony is merely witnessing the couple's commitment.¹¹³ The distinction between religious "rites" and the "right" to marry is created through the idea of keeping church and state separate.¹¹⁴

IV. DEBUNKING THE ARGUMENTS OPPOSING SAME-SEX MARRIAGE

There are a few general arguments made based on religious grounds as to why same-sex marriages should be banned.¹¹⁵ These arguments are important because they help to show the blurring of the lines between a separate church and a separate state. It will also show the varying degrees of rejection and acceptance among those following a religious platform. This section of the article will first take a look at why some religious groups oppose same-sex marriage and then it will focus on other religious groups who support marriage for same-sex couples.

This section of the article will focus on the main arguments against same-sex marriage based on the religious institution, acceptance by religious institutions, history and tradition of marriage, and the Bible. Opponents to equal rights have made homosexual issues, including same-sex marriage, a top priority.¹¹⁶ "Many of the groups leading the fight against same-sex marriage oppose any form of legal equality for gay people, including nondiscrimination laws, domestic partner benefits and civil unions, safe-schools initiatives aimed at stopping anti-gay harassment, and hate crime laws."¹¹⁷ Religion has played a major role by financially sponsoring anti-gay legislation and by pushing their ideals for both the Federal Marriage Amendment and Marriage Protection Week.¹¹⁸

A. *If the government begins to allow same-sex marriage, religious institutions will be forced to perform and recognize their marriages.*

Based on the first amendment: "Congress shall make no law respecting an establishment of religion."¹¹⁹ "Every church and religious organization is free to forbid or encourage whatever behavior they choose. If your church wants to forbid religious

¹¹² *Id.* at 5.

¹¹³ *Id.*

¹¹⁴ *Id.* at 105.

¹¹⁵ CAHILL, *supra* note 11, at 19.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 24.

¹¹⁸ *Id.*

¹¹⁹ Deirdre Bourdet, *Separation of Church and State*, SF GATE, Aug. 6, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/08/06/ED94325.DTL> (last visited Sept. 2, 2008).

marriage of same-sex couples, no government action can stop it.”¹²⁰ This is known as the separation of church and state.¹²¹ If a church or other religious institution fails to perform a same-sex marriage it is their prerogative under the First Amendment.¹²²

Under the Free Exercise Clause, a person is able to practice any religion of their choice without substantial government interference.¹²³ This prevents the government from interfering with a person’s right to practice their religion and burdening their beliefs or religious practices.¹²⁴ Based on the interpretation of the First Amendment through case law, persons are allowed to freely practice and determine their own beliefs, without interference from the government.¹²⁵ No religion will be forced to perform same-sex marriages. Unless their religious belief is that it is appropriate to marry same-sex couples, religious institutions will not be compelled to perform same-sex marriages.¹²⁶

The idea goes back to the distinction between religious and legal marriage. The government can only control the legal aspect, not the religious aspect of marriage. Religions are free to accept gay unions or reject them. That is their first amendment right. Take for example, a heterosexual couple who wish to marry in the Roman Catholic Church. Imagine that the man has been previously married and is now divorced. The couple is denied a church marriage because he is divorced, something prohibited in the Catholic Church. Just as this couple, one man and one woman who can get married legally in any state, cannot force the church to perform their religious marriage and accept their union, the government cannot step in and order the church to marry the couple in a religious service. Why? Because separation of church and state and the First Amendment to the United States Constitution allows persons to practice and form their own religious beliefs without fear of government interference.¹²⁷

Imagine now another church which holds a belief that same-sex couples should be married. A lesbian couple who attend wish to be married. The church has the freedom to conduct a religious ceremony in their church conferring on them a religious marriage under their church. This can happen even though the two women cannot legally be married or receive any of the legal benefits of being married. Why? The two women can have a religious marriage because the First Amendment gives their church the right to form their beliefs and the two women can freely practice these beliefs. This can be done without fear of government intervention.

There is a significant flaw in the argument that allowing civil same-sex marriages will compel churches to perform or acknowledge the existence of same-sex marriage. As established in the First Amendment, religious practice and belief is free from government

¹²⁰ *Id.*

¹²¹ KOTULSKI, *supra* note 2, at 92.

¹²² Josh Friedes, Symposium, *Can Same-Sex Marriage Coexist with Religion?*, 38 NEW ENG. L. REV. 533 (2004).

¹²³ See generally *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See generally WOLFSON, *supra* note 6, at 105-107.

¹²⁷ *Id.*

interference.¹²⁸ “In fact, the legalization of gay marriage under civil marriage laws in the U.S. would not change the religious freedom of conservative congregations to refuse to marry gay couples, just as the legislation of divorce does not prevent the Catholic Church from maintaining its policy of not recognizing divorces or second marriages of divorced Catholics who do not obtain an annulment.”¹²⁹

Every religion has the ability to freely choose to either accept or deny same-sex marriages.¹³⁰ The government will not impede upon this right.¹³¹ “The freedom-to-marry movement isn’t about forcing any religious institution – whether it supports marriage equality or opposes it – to change any of its views or tenets on this question or any other. This civil rights movement is about equal legal *rights*, not diverse religious *rites*.”¹³²

B. Gay Marriage will Undermine the Institution of Marriage.

Anti-gay groups claim that – permitting same-sex marriage will destroy or negatively impact heterosexual marriage.¹³³

They argue that the high divorce rate (about half of U.S. marriages end in divorce), marital infidelity, the increased prevalence of nonmarital births, widespread cohabitation by unmarried straight couples, and pornography have already weakened marriage, and that allowing gay couples to marry will be the straw that breaks the camel’s back.¹³⁴

The problem with this argument is stated above. Many problems are currently eroding the so called “institution of marriage.” There is no hard, significant, or relevant evidence provided by anti-gay activists proving that allowing same-sex couples to wed will damage the institution of marriage.¹³⁵

Will gay marriage really undermine the institution of marriage? Consider one of many examples of straight marriages gone wrong. “Straight marriage will be less meaningful, since Britney Spears’ [fifty-five]-hour just-for-fun marriage was meaningful.”¹³⁶ The institution of marriage is not modernly respected and honored. This type of heterosexual behavior undermines the institution of marriage in America, yet has nothing to do with homosexuals undermining the traditional notion of marriage.

¹²⁸ *Id.* at 108.

¹²⁹ CAHILL, *supra* note 11, at 36.

¹³⁰ WOLFSON, *supra* note 6, at 108.

¹³¹ *Id.*

¹³² *Id.* (alteration in original)

¹³³ CAHILL, *supra* note 11, at 27.

¹³⁴ *Id.*

¹³⁵ *Id.* at 27-28.

¹³⁶ Gator Gay-Straight Alliance, *12 Reasons*, <http://grove.ufl.edu/~ggsa/gaymarriage.html> (last visited Sept. 2, 2008).

Rev. Lou Sheldon, the leader of the Traditional Values Coalition¹³⁷ stated in a 2003 fundraising letter that homosexual activists are seeking to “abolish the idea of marriage altogether.”¹³⁸ This argument is extremely flawed because homosexuals are seeking to expand the institution of marriage to equally include all persons, not just select majority groups.

“In fact, U.S. Census data indicate divorce rates are lowest in Massachusetts—home of the only legal same-sex marriage in the United States in 2004 – and highest in the Bible belt states of the Deep South.”¹³⁹ How is this to be interpreted?

C. *Marriage has always been between one man and one woman: Adam and Eve not Adam and Steve Theory*

People who oppose same-sex marriage argue that because marriage has always been between a man and a woman, it should remain this way.¹⁴⁰ This theory is based on the history and tradition of marriage that has commonly been between one man and one woman. Narrowly interpreted, the theory is that because marriage has always been between a man and woman that is the only way, therefore making it the right way.¹⁴¹ This theory, that the old way is the right way, has been discredited in the recent past.

Throughout history there have been many definitions of marriage.¹⁴² Marriage has been noted to be a union between one man and one woman.¹⁴³ Marriage has also been described as “an association that promotes a way of life.”¹⁴⁴ Marriage can also be described as a foundation of society and of family which out of this there would not be civilization or progress.¹⁴⁵ Just like the Bible and the Constitution, marriage is hard to define because there are varying definitions. What is clear for most opponents and some proponents of same-sex marriage is the definition has usually included a man and a woman. This part of the definition, at least in history and tradition has usually been the main way of defining marriage.

“The current legal status of same-sex marriage cannot be understood without first understanding the history of marriage in general.”¹⁴⁶ There have been many changes to

¹³⁷ See generally <http://www.traditionalvalues.org/> (last visited Sept. 2, 2008); see Marriage Statistics, <http://www.biblenews1.com/marriage/marriags.htm#Total%20Marriages> (last visited Jan. 21, 2009) (This site contains U.S. Census data analyzing marriage and divorce rates and families living together without marriage from the 1940s through today).

¹³⁸ CAHILL, *supra* note 11, at 27.

¹³⁹ *Id.* at 28.

¹⁴⁰ KOTULSKI, *supra* note 2, at 92.

¹⁴¹ *Id.*

¹⁴² Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 254 (2007).

¹⁴³ *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (App. Div. 2005); see also BLACK’S LAW DICTIONARY 992 (8th ed. 2004) (defining marriage as “[t]he legal union of a couple as husband and wife”).

¹⁴⁴ Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 254 (2007).

¹⁴⁵ *Id.* (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

¹⁴⁶ *Id.* at 255

the institution of marriage throughout history.¹⁴⁷ “Cott noted that “[m]any of the historical changes to marriage were as or more radical in their day than marriage of same-sex couples is today.”¹⁴⁸ “Advocates on both sides of the same-sex marriage debate have emphasized the importance of the history of marriage, yet they have interpreted that history in diametrically opposed ways.”¹⁴⁹ Those opposing same-sex marriage rely on the definition that marriage has always been between one man and one woman and that this has been the case throughout history.¹⁵⁰

On the other hand, advocates of same-sex marriage underscore the protean nature of marriage, using the historical changes to buttress their argument that the right to marry should be extended to include same-sex marriage; just as it was extended to other previously excluded forms of marriage in the past. The most frequently cited example is the legalization of interracial marriage, which, according to same-sex marriage advocates, has clear parallels to the fight for same-sex marriage.¹⁵¹

For many years in America, history and tradition stipulated that marriage was between persons of the same race.¹⁵² In 1967, in the case of *Loving v. Virginia*, an interracial couple fought to overturn the state’s act prohibiting them from being married.¹⁵³ At this time in America, “seventy-two percent of Americans opposed interracial marriage.”¹⁵⁴ In 1967, “forty-eight percent of Americans believed interracial marriage should be classified as a crime.”¹⁵⁵ It also was at this time that the Supreme Court struck down a law allowing interracial marriages.¹⁵⁶

Times and ideas grow and change. Today in 2008, interracial marriage is more accepted than at the time the *Loving* decision was handed down. The same is true of homosexual marriage today. There are those who oppose same-sex marriage, because to them tradition controls, but this argument fails because the institution of marriage in this country has been ever changing.¹⁵⁷ In the history of American jurisprudence, laws stating who can marry whom have been enacted and many of those laws have been overturned.¹⁵⁸ Just because marriage has always been a certain way does not mean that it should not expand and transform just as the outdated notions of interracial marriage were transformed by expanded laws that accommodate modern life. The Supreme Court has

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² CAHILL, *supra* note 11, at 12-13.

¹⁵³ *Loving v. Virginia*, 388 U.S. 1, 2-3 (1967).

¹⁵⁴ CAHILL, *supra* note 11, at 13.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ KOTULSKI, *supra* note 2, at 92.

¹⁵⁸ *See generally* *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

not addressed the issue of same-sex marriage¹⁵⁹ but it is only a matter of time due to the changing views of society.¹⁶⁰

D. *The Bible Says Homosexuality is Wrong and Immoral*

At issue in the religious debate about same-sex marriage is the Word of God, and principally, that Word as recorded in the Bible and interpreted by those in authority of the principal Christian and Jewish sects.¹⁶¹ It is important to distinguish the flaws in this argument based on two distinctly different reasons: the Constitution and the Bible. This also relates to the idea that there are two different types of marriage: legal and religious.

Based on the First Amendment, each person can freely practice religion and hold beliefs based on their religious preference.¹⁶² Taking the opponents side, let us assume the premise that homosexuality is wrong in the eyes of their religion.¹⁶³ Their belief is allowed and can be accepted by any person choosing to hold this view because of the First Amendment.¹⁶⁴ For the same reason, others are allowed to hold the view that homosexuality is right based on religion or any other preference for the belief. Under the First Amendment, people can either choose to have a religious belief or choose not to have any religious belief.¹⁶⁵

The First Amendment gives the right to freely practice religion as well as abstain from practice or belief.¹⁶⁶ “Our government’s role is to guarantee the freedom and equality of every citizen under the law[;] however[,] a church’s teachings regarding the definition and “sanctity” of marriage have no place in federal law.”¹⁶⁷ This is the legal reason why the opponent’s argument is flawed. Legally, based on the First Amendment and the idea of separation of church and state, the Bible should not be used to deny gays

¹⁵⁹ Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 256 (2007).

¹⁶⁰ This is evident in the difference of how many people who voted against Proposition 22 compared to the number of people who voted against Proposition 8. More people voted No on Proposition 8 in 2008 than on Proposition 22 in 2000. See CA Proposition 22, <http://www.marriagewatch.org/media/prop22.htm> (last visited Jan. 21, 2008) (“Proposition 22 was ratified by an overwhelming majority of California voters, prevailing by a 23-point margin. Statewide, 4,618,673 votes were cast in favor of the proposition, comprising 61.4% of the total vote. Opponents garnered 2,909,370 votes, for 38.6% of the vote.”); and CA Secretary of State, Election Results, Nov. 4, 2008, <http://vote.sos.ca.gov>Returns/props/map190000000008.htm> (last visited Jan. 21, 2009) (Proposition 8 was passed with a 4.6-point margin in 2008. Statewide, 6,838,107 votes were cast for Yes on Prop. 8, for 52.3% of the vote. Whereas 6,246,463 votes were cast for No on Prop. 8, for 47.7% of the vote.)

¹⁶¹ Larry Cata Backer, Symposium, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221, 234 (2002).

¹⁶² U.S. CONST. amend. I.

¹⁶³ Deirdre Bourdet, *Separation of Church and State*, SF GATE, Aug. 6, 2003 available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/08/06/ED94325.DTL> (last visited Sept. 2, 2008).

¹⁶⁴ See generally *Sherbert*, 374 U.S. at 402-403, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁶⁵ *Id.*

¹⁶⁶ Deirdre Bourdet, *Separation of Church and State*, SF GATE, Aug. 6, 2003 available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/08/06/ED94325.DTL> (last visited Sept. 2, 2008).

¹⁶⁷ *Id.*

the right to wed. Just as the First Amendment guarantees the right to freely practice religion it also guarantees the freedom to refrain from practicing religion.¹⁶⁸

Interpretation of the Bible varies greatly, which is why it should not be used to make an argument against homosexual behavior because many people and groups have a different interpretation on what the Bible says, or do not accept the Bible as their religious guidebook for how to live their lives. Therefore, using any interpretation of the Bible is wrong for two reasons: one, because the Bible is not controlling law like the Constitution is, and two, because each religious faction interprets the Bible differently there is not a single controlling reading. This is not to say that the views holding homosexuality is wrong based on the Bible are not credited arguments. Everyone has a right to their view and to preach and believe as they so choose. The problem is not with the values or morals of which these groups subscribe. The problem arises when religion is mixed with politics; the boundaries of a separate church and state can no longer be drawn.

The Bible, like the Constitution, can be interpreted in many ways leading to different conclusions, ideas, and traditions.¹⁶⁹ Most people do not follow every passage of the Bible literally, or even follow all of their churches teachings.¹⁷⁰ Those who oppose same-sex marriage and homosexuality in general choose a few passages to dig their claws into order to establish their platform.¹⁷¹ In no way is this article setting out to disprove the fact that religious groups can believe and preach these opinions and values on homosexuals and same-sex marriage.

One of the major passages that many conservative Christian groups use to make a case against homosexual marriage is found in Leviticus 20:13. This section of the Bible reads, “If a man lies with a man as one lies with a woman, both have done what is detestable. They must be put to death; their blood will be on their own heads.”¹⁷² Conservatives interpret this to mean just that, when two men sleep together or have sex, they have committed a serious sin.¹⁷³ A more liberal interpretation would broaden this view by looking at the time in which the Bible was written.¹⁷⁴ During the time in which it was written a major issue was procreation and strengthening the population and therefore homosexuality was rejected because it defeated the superceding need to procreate.¹⁷⁵

Despite the variations in interpretation, “the same book of Leviticus condemns, and orders the same punishment for, adultery, eating seafood without fins, getting a tattoo,

¹⁶⁸ WOLFSON, *supra* note 6, at 105-106.

¹⁶⁹ This can be seen in the way different religions interpret the Bible and how some religions reject certain parts of the Bible and freely accept and follow other parts. This same issue arises when interpreting the Constitution. Scalia is said to be a textualist while Ginsberg reads the Constitution more liberally.

¹⁷⁰ WOLFSON, *supra* note 6, at 119.

¹⁷¹ FOR THE BIBLE TELLS ME SO (First Run Features 2007).

¹⁷² *Leviticus 20:13*.

¹⁷³ FOR THE BIBLE TELLS ME SO (First Run Features 2007).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

or wearing clothes made out of two different fabrics.”¹⁷⁶ The punishment for these acts is death.¹⁷⁷ There is not a religious movement to stop adulterers, those that eat shellfish, those who choose to get a tattoo, or those that who wear a cotton/polyester blend shirt.¹⁷⁸

Many interpret these passages as a part of history; however, Leviticus is still used by some to show that the Bible is against homosexual acts. It is still used by those that take the Bible in a literal interpretation, known as literalists, to condone homosexuality.¹⁷⁹ “Although these rules were written for a very specific time and place, literalists pick out Leviticus 18:22 and 20:13 to oppose homosexuality today. They apply no historical, medical, or cultural analysis that might lend insight into the text, including the fact that the passages ignore female homosexual activity entirely.”¹⁸⁰ Leviticus is still used by some people or groups and is evident in such places as a Facebook group.¹⁸¹ Again, this is not relied on by all or even most but it is evidence that Leviticus is relied on by some.

Along with the passages in Leviticus, religious groups focus on the first part of Romans.¹⁸² “And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.”¹⁸³ “In Romans 1:27, it seems as if Paul says God will punish people who do not worship properly, by confusing their sexual identities so that men sleep with men and women sleep with women.”¹⁸⁴ To not worship properly could mean working on the Sabbath.¹⁸⁵ Better yet, if you combine it with Romans 1:27, you could be punished by becoming a homosexual.¹⁸⁶ “Clearly some picking and choosing is required-and every religion does so,”¹⁸⁷ but why must certain religious groups push their beliefs on others and mix their religious values with politics?

Proponents of the same-sex marriage and homosexual acts have argued “that the individuals’ Paul is describing are being punished for unnatural acts and not that of

¹⁷⁶ WOLFSON, *supra* note 6, at 118.

¹⁷⁷ *Id.* at 117; See also CeCe Cox, Article, *To Have and to Hold – or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 LAW & SEXUALITY 1, 44-5 (2005).

¹⁷⁸ See generally WOLFSON, *supra* note 6, at 118-120.

¹⁷⁹ CeCe Cox, Article, *To Have and to Hold – or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 LAW & SEXUALITY 1, 45 (2005).

¹⁸⁰ *Id.*

¹⁸¹ Facebook group Homosexuality is Not OK,

<http://www.facebook.com/home.php#/group.php?gid=9537851226> Facebook Group: HOMOSEXUALITY IS NOT OK, (taken from their group page “other verses-Leviticus 18:22-30, Romans 1:26-27, 1 Corinthians 6:9, and Jude 7, Ephesians 5: 3-5”).

¹⁸² See generally *Romans* chapter 1.

¹⁸³ *Romans* 1:27 (King James).

¹⁸⁴ WOLFSON, *supra* note 6, at 118-119.

¹⁸⁵ *Exodus* 35:2.

¹⁸⁶ *Romans* 1:27.

¹⁸⁷ WOLFSON, *supra* note 6, at 118.

homosexuality because homosexual acts are not unnatural to homosexuals.¹⁸⁸ Opponents argue that there is no such thing as a homosexual desire.¹⁸⁹ The way proponents and opponents of same-sex marriage have varying views of the same passage show how biblical interpretation is different for the groups. Each group is entitled to their interpretation and their belief of what the Bible speaks to them.

Using the Bible to target a select group of persons is not a new idea.¹⁹⁰ In American history, the Bible has been used against both women and African-Americans to hinder equality.¹⁹¹ Leviticus was used during the Civil War to defend the institution of slavery.¹⁹² “From today’s vantage point, with our values, we see that religion has often been on the wrong side regarding the subordination of women, and interracial marriage as well.”¹⁹³ Hiding behind the words of the Bible proved not to work in the past.

The Bible has been used by opponent’s of same-sex marriage to hamper past civil rights movements and create a diversion away from equality.¹⁹⁴ Using the Bible has given these types of religious groups a platform from which to push discrimination. Attacking racial minorities and women is no longer allowed because using the Bible to attack such groups has now been discredited. Homosexuals are the new target. Any group differing from Christian opinion or value could theoretically be the next aim.

President Kennedy stated that “no religious body should seek to impose its will directly or indirectly upon the general populace or the public acts of its officials.”¹⁹⁵ Following this logic, no religion or religious institution should be “threatened by an end to government discrimination in marriage.”¹⁹⁶

Different religious groups have been pushing their will and religious beliefs on others both directly and indirectly.¹⁹⁷ Religious groups have directly pushed their religious beliefs by forming groups and raising large amounts of money.¹⁹⁸ Proponents of gay marriage have enlisted various groups and fundraising efforts to combat opponents. So what is the difference?

Religious groups are pushing their platform based on the Bible, and the religious beliefs and affiliation. By doing this they are closing the gap between the separation of church and state. The motivation is not one of pure discomfort with gays and lesbians

¹⁸⁸ Caycie Bradford, Liberty and Justice for Some, Not All 11 (Spring 2008) (unpublished manuscript, on file with the author).

¹⁸⁹ JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 194 (2005).

¹⁹⁰ WOLFSON, *supra* note 6, at 118.

¹⁹¹ *Id.* at 114.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 119.

¹⁹⁵ *Id.* at 115.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ The Right Goes All In to Stop Marriage Equality in California, <http://www.rightwingwatch.org/content/right-goes-all-stop-marriage-equality-california> (June 19, 2008, 5:30 pm).

but the intent is pushing their religious agenda to continue discrimination against homosexuals. The lines of a separate church and state are blurring.

Some people who use the Bible as a tool to preach strongly against same-sex marriage have had moral problems of their own including: Anita Bryant, Jimmy Swaggart, and Ted Haggard.¹⁹⁹ People might use a different Bible or religious book or may choose to use none at all. As Americans, under the First Amendment, this right is guaranteed.²⁰⁰ This means that persons wishing to rely on the Bible to discount homosexual relations are allowed to do so and in turn those wishing to hold a different view may do the same.

E. Not All Religious Groups, Denominations or Clergy Feel this Way

Not all religious institutions hold the same stance as those stated above. This is the beauty of having a country in which people can subscribe to many different religions. Religious organizations such as the Unitarian Universalist Association and the United Church of Christ, Reform Jews, and Reconstructionist Jews support both religious and legal marriages for same-sex couples.²⁰¹

There is a group of clergy and religious organizations who are members of the Religious Coalition for the Freedom to Marry [hereinafter RCFM].²⁰² “The RCFM began in 1997 when a handful of concerned and supportive clergy gathered at a prayer breakfast on the first National Freedom to Marry Day.”²⁰³ This organization is made up of clergy and people of faith who support the notion same-sex couple should be allowed to be married.²⁰⁴

Nearly “500 clergy from eighteen faith traditions”²⁰⁵ have signed a Declaration stating same-sex couples should have a right to be wed.²⁰⁶ They acknowledge that religious groups have the right to have their own beliefs and practices when marriage is concerned they feel “no religious community has the right to impose their particular beliefs and practices on others.”²⁰⁷ Groups including the Quakers and the Metropolitan Community Church have added their groups to the names of those in support of civil and religious marriages for same-sex couples.²⁰⁸ As stated in their declaration, these religious groups oppose relying on sacred texts such as the Bible to deny same-sex couple the right to marry.²⁰⁹

¹⁹⁹ FOR THE BIBLE TELLS ME SO (First Run Features 2007).

²⁰⁰ *Id.*

²⁰¹ Rabbi Devon Lerner, Symposium, *Why we Support Same-Sex Marriage: A Response from over 450 Clergy*, 38 NEW ENG. L. REV. 527, 530 (2004).

²⁰² Freedom to Marry, <http://www.freedomtomarry.org/> (last visited Jan. 20, 2009).

²⁰³ Rabbi Devon Lerner, Symposium, *Why we Support Same-Sex Marriage: A Response from over 450 Clergy*, 38 NEW ENG. L. REV. 527 (2004).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 530.

²⁰⁸ *Id.* at 531.

²⁰⁹ *Id.* at 528.

The RCFM believes religious groups opposing same-sex marriage do so based on the grounds that by allowing same-sex couples the right to marry will erode away “family and our society.”²¹⁰ Both sides seem concerned with the state of marriage and family as it is now.

Few would argue with Bishop O’Malley and other conservative and fundamentalist leaders who express grave concern about the general state of marriage and the family in this county. The almost fifty percent divorce rate, the huge number of single-parent families, the number of families living in poverty, and the rising rate of domestic violence are all disturbing trends that we should address, but this has nothing to do with same-sex civil marriage.²¹¹

Groups such as the RCFM are extremely important when discussing same-sex marriage because they are not only coming from a religious stance but they are portraying a different view on marriage from a religious perspective. The RCFM and those groups who have signed their declaration show that not all religious clergy or institutions are against the idea of same-sex marriage.²¹²

V. PROBLEM WITH THE ARGUMENTS: THE BASIS FOR WHY THE RELIGIOUS ARGUMENT IS FLAWED AND WHY LEGAL MARRIAGE SHOULD BE EXTENDED TO HOMOSEXUALS

The problem with the arguments is simple: they cannot be proven by anything but religious propaganda of which, under the First Amendment, is not enough.²¹³ There is no evidence to the contrary and “such claims are simply not warranted.”²¹⁴ Simply stated, the arguments for precluding same-sex marriage are mere opinions based mostly on religious doctrine. Just with any debate, there are differing opinions with some siding one way and others taking a different approach. Each religion takes a different approach on the issue, some supporting same-sex marriage while others fight against the idea.²¹⁵

Religion has become the crutch for expanding homophobia. Instead of stating that a person is uncomfortable with homosexuality, their argument is often backed up by a religion which is not accepted by all people. Do not hide behind the Bible. Come out of the Bible closet and face the reality of homosexuality.

²¹⁰ *Id.* at 529.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See generally *Sherbert*, 374 U.S. at 402-403; and *Wisconsin*, 406 U.S. at 214.

²¹⁴ CAHILL, *supra* note 11, at 27.

²¹⁵ See generally WOLFSON, *supra* note 6, at 103-122.

Admit that you feel being gay is unnatural or are just uncomfortable with the idea.²¹⁶ But be aware that homosexuals are not comfortable being in a committed partnership, relationship, or marriage with someone of the opposite sex.²¹⁷

The opposition to gay marriage stems ultimately from a deep-seated homophobia in American culture, borne out of religious prejudice. While many Americans do not realize that that homophobia exists to the extent that it does, it is a very real part of every gay person's life, just like racism is a very real part of every black person's life. It is there, it is pervasive, and it has far more serious consequences for American society than most Americans realize, not just for gay people, but for society in general.²¹⁸

There is a legal reason for allowing same-sex marriage: equal protection. All unions deserve the right to be protected and all persons deserve the right to have interests in their property, family, and medical decisions protected before the law.²¹⁹ Anything less is discrimination. "It cannot be denied that homosexuals, who are part of families and communities in the same culture with the same goals and values, are similarly situated when they are involved in exclusive, long-term relationships and desire to exercise their fundamental right to marry."²²⁰

Many people fail to support the equal protection claim.²²¹ The Equal Protection claim is valid based on the precedent set in *Turner v. Safley*.²²² The Justices laid out a four part test²²³ which outlined "important attributes of marriage."²²⁴

First, they said, marriage represents an opportunity to make a public statement of commitment and love to another person, and an opportunity to receive public support for that commitment. Second, the justices said, marriage has for many people an important spiritual or religious dimension. Third, marriage offers the prospect of physical "consummation," which of course most of us call something else. And fourth, the Justices said, marriage in the United States is the unique and indispensable gateway, the "precondition," for a vast array of protections, responsibilities, and benefits – public and private, tangible and intangible, legal and economic – that have real life importance for real people.²²⁵

²¹⁶ Scott Bidstrup, *Gay Marriage: The Arguments and the Motives*, www.bidstrup.com/marriage.htm (last visited Sept. 2, 2008).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ WOLFSON, *supra* note 6, at 13.

²²⁰ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 471-2 (1995).

²²¹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

²²² See *Turner v. Safley*, 482 U.S. 78 (1987).

²²³ *Id.* at 95-96.

²²⁴ WOLFSON, *supra* note 6, at 8.

²²⁵ *Id.*

This decision falls in line with previous marriage holdings in which the Court determined that marriage is a fundamental civil right.²²⁶ “And after weighing these attributes, the justices ruled – in a unanimous decision – that marriage is such an important choice that it may not be arbitrarily denied by the government.”²²⁷ Based on the holdings mentioned above, marriage should extend to homosexual unions.

The United States Supreme Court has yet to grant certiorari to a case dealing with homosexual marriage.²²⁸ The closest a case has come to the U.S. Supreme Court is *Smelt v. Orange County* which was filed in a United States District Court.²²⁹ Two men brought suit challenging the state of California’s prohibition against same-sex marriage and the Federal Defense of Marriage Act.²³⁰ “The lawsuit was brought by the two men, Arthur Smelt and Christopher Hammer, after they applied for but were denied a marriage license in Orange County, Calif. They sued in federal court, arguing that both the California law and the Defense of Marriage Act violate the U.S. Constitution.”²³¹ The case was thrown out.²³² “Writing for the court, Judge Ferdinand F. Fernandez said the two homosexual men lack legal standing to file suit [challenging] DOMA because they have no marriage license.”²³³

For a party to have standing they must prove injury in fact, caused by the defendant, which is redressable by the court.²³⁴ The plaintiffs suffered injury when they were denied a marriage license. Under the new California ruling, the Plaintiffs could be given a marriage license but would still have injury because their license is not recognized in all states. The injury was caused by the defendant, the County of Orange, because the county denied the men a marriage license. It is redressable by the court because there is a live case and controversy dealing with a federal question, the DOMA, and California’s prohibition against same-sex marriage. Do the men really lack standing or has their claim been thrown out because it is contrary to public policy and the courts would rather not get involved?

Some argue that the right of marriage is being denied to the same-sex couple, not to the individuals who are trying to engage in the act of being married.²³⁵ This was in fact the holding of a case in Washington.²³⁶ The Court held the persons were not denied a marriage license based on their homosexual couple status but because they did not fall

²²⁶ See generally *Loving*, 388 U.S. at 11-12; and *Turner*, 482 U.S. 78.

²²⁷ WOLFSON, *supra* note 6, at 9.

²²⁸ The Legal Marriage Alliance of Wash., http://lmaw.org/freedom/tr_docs.htm#federal (last visited Sept. 2, 2008).

²²⁹ *Smelt v. Orange County*, 374 F. Supp. 2d. 861 (C.D. Cal. R. 2005).

²³⁰ *Id.* at 864.

²³¹ Michael Foust, *Appeals Court Panel Tosses Out Lawsuit Against Federal Defense of Marriage Act*, <http://www.sbc Baptistpress.org/BPnews.asp?ID=23203> (last visited on Sept. 2, 2008).

²³² *Id.*

²³³ *Id.*

²³⁴ Prof. Timothy Thurman, Trinity L. Sch. Const. Law Class (Fall 2006).

²³⁵ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 467 (1995).

²³⁶ *Id.* at 472.

within a certain definition of marriage.²³⁷ “The United States Supreme Court has stated that marriage is a fundamental right.”²³⁸ Because marriage has been determined by the Supreme Court to be a fundamental right, the Washington Court and other state courts should have to pass a strict scrutiny test when denying same-sex couples the right to wed.²³⁹

To pass a strict scrutiny test it must be established the persons are defined as a suspect class, the persons are similarly situated, and there is a compelling state interest to interfere with the right in question.²⁴⁰

A. *Why Homosexuals Should be Considered a Suspect Class*

For a group of persons to be considered a suspect class they must be politically powerless, marked by a “badge” of distinction, having suffered a long history of discrimination, possess a feature not related to their ability to “perform or contribute to society,”²⁴¹ and possess an immutable trait.²⁴²

Homosexual persons are a minority and because they are a minority they do not have the ability to “accomplish their objectives”²⁴³ against the majority; therefore, rendering them politically powerless.²⁴⁴ This is evident because if they were a majority or closer to a majority of the population they might have already won the right to marry.²⁴⁵

Homosexuals do have a badge of distinction because many are afraid to reveal their true identity as a gay person. Many feel they will be discriminated against by society as a whole and even by friends and family. This feeling leaves many homosexuals in the closet afraid to come out.²⁴⁶ This is evident by hate crimes against homosexuals.²⁴⁷ Many gays, lesbians, bisexuals and transgender persons have been subjected to hate crimes. Matthew Shepard²⁴⁸ is a perfect example of this. He was targeted because of his sexual orientation. More recently, a lesbian woman was the target of a sexual assault because of her sexual orientation.²⁴⁹ Many states now have hate crime legislation which includes enhanced sentences for those who target persons based in their sexual orientation.

²³⁷ *Id.*

²³⁸ *Id.* at 466.

²³⁹ *Id.*

²⁴⁰ *Id.* at 473.

²⁴¹ *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

²⁴² Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 474 (1995).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Matthew Shepard Foundation, <http://www.matthewshepard.org/site/PageServer> (last visited Jan. 20, 2009).

²⁴⁹ Lisa Leff, *Cops Investigate Brutal Rape of Lesbian*, AOLNEWS.COM (Dec. 23, 2008) available at <http://news.aol.com/article/cops-investigate-brutal-rape-of-lesbian/285582> (last visited Jan. 20, 2009).

Being gay does not affect one's ability or talent.²⁵⁰ A homosexual person is still able to perform and contribute to society. Being homosexual is unrelated to this. This is evident through the numerous persons who identify as homosexuals and still positively contribute to society.

The fifth and final element to being a suspect class is the most debated: immutable trait.²⁵¹ Dick Swaab, a researcher, discovered in 1990 that “a cluster of cells in the brain called the suprachiasmatic nucleus is dimorphic not by sex, but by sexual orientation.”²⁵² There have been other studies that show the hypothalamus which is a sexual activity organ is half the size in gay men compared to that of their straight counterparts.²⁵³ There is also another study that deals with twins.²⁵⁴ It was proven that identical twins were usually more likely to both be gay than fraternal twins.²⁵⁵

“Another argument for immutability is that no one has found a “cure” for homosexuality or has been able to eliminate it culturally or individually.”²⁵⁶ Homosexuality exists in almost every culture, at nearly the same rate and behavior in many diverse societies.²⁵⁷ Information gained from studies is helpful to both arguments but neither side can conclusively claim victory based on a study alone.

Proving an immutable trait is important to homosexuals because it would increase the scrutiny they would receive as a protected class. The decision in *City of Cleburne v. Cleburne Living Center*²⁵⁸ discusses the immutable trait of mental retardation.²⁵⁹ In *Cleburne*, the Court dealt with the issue of whether or not mentally retarded persons have an immutable trait for the purposes of equal protection. At stake was which type of scrutiny would be used, the same that is at stake for homosexual persons.

The Court held mentally retarded persons did not have an immutable trait because they are “different immutably among themselves.”²⁶⁰ If the Court held that mentally retarded persons had an immutable trait, a strict scrutiny test would be applied.²⁶¹ Instead, the Court reasoned that because mental disabilities vary on such a wide spectrum mentally retarded persons do not have an immutable trait.²⁶² This holding means the rational basis test will apply to mentally retarded persons.

²⁵⁰ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 474 (1995).

²⁵¹ *Id.*

²⁵² *Id.* at 474-5.

²⁵³ *Id.* at 475.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 476.

²⁵⁷ *Id.*

²⁵⁸ 473 U.S. 432 (1985).

²⁵⁹ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 476-7 (1995).

²⁶⁰ *Id.* at 477.

²⁶¹ *Id.*

²⁶² *Id.*

The analysis the Court followed in *Cleburne* “can be differentiated.”²⁶³ “Because homosexuals do not possess an immutable characteristic that is different within their class and because they are similarly situated with the majority, the reasons advanced by the Court in support of its decision are not relevant to the discussion of same-sex marriage.”²⁶⁴ Another distinction between the *Cleburne* analysis and the issue of equal protection for homosexuals is that “homosexuals do not have special laws to benefit them, as do retarded persons.”²⁶⁵

Homosexuals should be considered a suspect class with a high degree of scrutiny to protect their interests as minority citizens who face discrimination in their everyday lives. At this time the issue of an immutable trait is still up in the air. There are studies that find homosexuality is an immutable trait and studies which do not support the idea. What is clear is that homosexuality is not a new idea and has existed in almost every culture from the beginning of time. With this, homosexuals deserve the right to be protected equally before the law as a protected class of persons.

B. *Homosexuals Are Similarly Situated Persons*

“Homosexual and heterosexual behavior exist on a continuum – with strictly homosexual acts at one end, strictly heterosexual acts at the other, and much shared behavior between these two extremes.”²⁶⁶ What is being regulated when you look at it in this way is the act itself, not the couple who are engaging in the act. Is this not the question that the Court dealt with in *Lawrence v. Texas*?²⁶⁷ “The blurred distinction between heterosexual and homosexual behavior-not to be confused with how one defines oneself in a forced-choice culture-and society’s lack of knowledge regarding human sexuality and its development are sound and compelling reasons for states to protect individual rights rather than restricting the nature of an intimate couple.”²⁶⁸

C. *There is No Compelling Interest to interfere with the Right in Question*

In order to interfere with a fundamental right, the state must prove there is a compelling state interest.²⁶⁹ Marriage is a fundamental right.²⁷⁰ Therefore, to interfere with a person or groups right to be married, a compelling state interest must be proven. The most common interests used to prohibit same-sex marriages are procreation, family stability, and morality.²⁷¹

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 479.

²⁶⁷ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁶⁸ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 479 (1995).

²⁶⁹ *Id.*

²⁷⁰ See generally *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁷¹ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 482 (1995).

Procreation is a state interest because it will further the population and growth of the state.²⁷² Not all heterosexual couples choose to have children.²⁷³ Some couples remain childless by choices and others are unable to bear children. This does not limit a heterosexual couple from getting married. Procreation is therefore not a compelling state interest. “The idea that the survival of the race is a compelling state interest that is in jeopardy is simply ludicrous. This country is in no danger of becoming underpopulated.”²⁷⁴

Family stability has been used as a reason to not allow same-sex marriage.²⁷⁵ This argument also falls short of a compelling state interest. Family stability cannot be a compelling state interest when the divorce rate is nearing fifty percent.²⁷⁶ In *Braschi v. Stahl Assoc.*,²⁷⁷ the Court provided a definition of what constitutes a family and for the purposes of rent control, held that a same-sex couple did in fact meet the definition of a family.²⁷⁸ “The [C]ourt presented four elements to define a family including exclusivity and longevity of the relationship, emotional and financial commitment to the relationship, reliance for daily family service, and presentation as a family.”²⁷⁹ A homosexual couple and a heterosexual couple meet these elements in the same way; therefore, family stability is not a compelling state interest.

In *Cleburne*, Justice Marshall, in his dissenting opinion, discussed a right to establish a home.²⁸⁰ Justice Marshall recognized that the right to establish a home has been a protected right under the Due Process Clause.²⁸¹ He opined in *Cleburne*, mentally retarded persons are able to build a home because of the ability to enter a group home.²⁸² As mental institutions have decreased and mentally retarded persons have been able to join group homes, their right to be a part of the community has extended their freedom and their right to create a home.²⁸³ Because persons have a right to establish a home, the right to marry should be extended to same-sex couples.²⁸⁴ Since both heterosexual and homosexual couples have a right to establish a home, and only heterosexual couples can marry, homosexual couples face discrimination when creating their home.

Think back to the previous statement regarding the fifty-five hour Britney Spears marriage. Nicolas Cage and Lisa Marie Presley had a short lived three month and fifteen

²⁷² *Id.* at 468.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 468-9.

²⁷⁶ *Id.*

²⁷⁷ 543 N.E.2d 49 (N.Y. 1989)

²⁷⁸ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 469 (1995).

²⁷⁹ *Id.*

²⁸⁰ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 469 (1995).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

day marriage.²⁸⁵ Carmen Electra and Dennis Rodman called it quits after five months.²⁸⁶ These are just a few examples of the many short lived marriages. Erik Menendez married Tammi Menendez while serving a prison sentence for killing his parents.²⁸⁷ Do these marriages promote a stable family?

States have an interest in “preserving public morals”²⁸⁸ and this has been used as a compelling state interest to prohibit same-sex marriage. “The interest of morality seems to speak to the sexual acts that are the primary basis for the definition of homosexuality.”²⁸⁹ This discussion has already taken place in the decision of *Lawrence v. Texas* and the Court held that sodomy is a fundamental right.²⁹⁰ Some of these same types of sexual practices occur in the bedrooms of heterosexuals.²⁹¹

A compelling state interest in prohibiting same-sex marriages does not exist. In their previous decisions, the Supreme Court has held marriage is an important fundamental right.²⁹² These arguments are absurd and more bluntly stated “if gays can have children but cannot marry, what kind of bastardized definition of family is society imposing on their offspring?”²⁹³ It is ironic how a same-sex couple can raise a family and portray themselves as a family, but yet this family cannot have the guaranteed right of marriage and receive the state and federal benefits of actually being a family.

D. *Over and Under Exclusivity Concerning Equal Protection*

For equal protection purposes, when a law is over-inclusive it consists of individuals that are a part of a group which are not similarly situated.²⁹⁴ “The legislative prohibition against same-sex marriage is over-inclusive because it includes homosexuals who are similarly situated to heterosexuals and whose marriage may not further the same state interests of procreation, family stability, and morality put forth as reasons to prohibit homosexual marriages.”²⁹⁵ Gay and lesbian couples are similarly situated to their heterosexual counterparts because they wish to get married for the same reasons. Both homosexual and heterosexual couples wish to have their relationship recognized by the state so that they may obtain the numerous benefits afford to married couples. “Therefore, because homosexuals are so similar to heterosexuals who are capable of and

²⁸⁵ Sharon Supriya, World’s Shortest Marriages, ONEINDIA.COM, <http://living.oneindia.in/relationship/marriage-and-beyond/2008/worlds-shortest-marriages.html> (last visited Jan. 20, 2009).

²⁸⁶ *Id.*

²⁸⁷ Wife of Erik Menendez Talks about Relationship, MSNBC.COM (Dec. 22, 2005) *available at* <http://www.msnbc.msn.com/id/10573267/> (last visited Jan. 20, 2009).

²⁸⁸ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 469 (1995).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 463.

²⁹³ *Id.* (citing Eloise Salholz et al., *For Better or For Worse*, NEWSWEEK, May 24, 1993, at 69.).

²⁹⁴ Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 482 (1995).

²⁹⁵ *Id.*

often do violate the state interests put forth to prohibit homosexuals from marriage, they fall into an over-inclusive category, which violates the Equal Protection Clause.”²⁹⁶

When a law applies to a select part of a large group of similarly situated persons it is said to be under-inclusive.²⁹⁷ “[T]he legislative prohibition against same-sex marriages is under-inclusive because it does not ban marriage to heterosexuals who are not similarly situated to each other.”²⁹⁸ The right of marriage is extended to heterosexual couples even if their marriage serves no state interest.²⁹⁹ Some heterosexual couples choose not to raise children, some couples have affairs.³⁰⁰ “There are heterosexuals who spread diseases and who perform sexual acts against the majority’s sense of morality. None of these reasons, however, prevent heterosexuals from receiving a marriage license.”³⁰¹

Because laws prohibiting same-sex couples from marrying are not properly tailored, the laws should be invalidated. “If one cannot be forced to stay within one’s classification (race) in regard to marriage, the one should not be forced to stay outside of one’s classification (sexual orientation) in regard to marriage.”³⁰²

VI. WHY PUBLIC POLICY AND PUBLIC OPINION IS NOT AN EXCUSE

This article has dealt with why a few religious arguments for not allowing civil same-sex marriage are flawed. It also addressed why same-sex marriage should be legal under an equal protection analysis. Another argument put forth from people opposing same-sex marriage is that same sex marriage does not conform to public policy and public opinion. This public policy and public opinion argument is also flawed based on previous judicial decisions.³⁰³

For example, many major Supreme Court decisions have been contrary to public policy and opinion at the time the decisions were handed down.³⁰⁴ In *Brown v. Board of Education*, the Supreme Court held that separate schools for African-Americans were not equal.³⁰⁵ This decision paved the way to end segregation and began the push towards equality in terms of civil rights.³⁰⁶ “The Court called on Americans to change a system defended by religious institutions, politicians, and many Americans as a part of their values and way of life.”³⁰⁷ In 1954, when the decision was handed down, it did not receive a warm welcoming from many Americans and institutions.³⁰⁸

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 482-3.

²⁹⁸ *Id.* at 483.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ WOLFSON, *supra* note 6, at viii.

³⁰⁴ *Id.*

³⁰⁵ *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

³⁰⁶ *See generally Brown*, 347 U.S. at 483.

³⁰⁷ WOLFSON, *supra* note 6, at viii.

³⁰⁸ *Id.*

Rather, what followed was – in the words of the time – legislatures in a swath of states declaring “massive resistance” and adding new layers of discrimination in their state laws and constitutions; billboards demanding “Impeach Earl Warren,” the then Chief Justice who wrote the decision; members of Congress signing resolutions denouncing “activist judges” and, of course, the marches, Freedom Rides, organizing summers, engagement, hard work, violence, legislations. . . pretty much everything we today think of as the civil rights movement-all after *Brown*.³⁰⁹

This began with one landmark decision at a time when it was contrary to the majority of views.³¹⁰ This decision has been created with “helping our nation transcend the passions of the moment and the prejudices of the majority and rise to the true meaning of American values then obscured by prejudice, tradition, and fear.”³¹¹

The civil rights movement for equality began at a time when equal rights for African Americans were not a welcomed idea. If this decision was not handed down, our country might not have grown and moved towards racial equality.³¹²

In terms of equality in marriage, when the decision in *Loving v. Virginia* was handed down, the public was against interracial marriage.³¹³ When the Court ruled on the *Loving* case, forty-eight percent of Americans believed marriage between different races should qualify as a crime.³¹⁴ Without the decision in *Loving*, the expanded concept of marriage would not have progressed to what it is today.³¹⁵

Ideas dealing with controversial subjects often grow and change.³¹⁶ The institution of marriage has grown and changed not only in our own country but through time. “But marriage has weathered centuries of skirmishes and change. It has evolved from an institution that was imposed on some people and denied to others, to the loving union of companionship, commitment, and caring between equal partners that we think of today.”³¹⁷ The argument that same-sex marriage is against public policy is flawed for these reasons. Marriage, as well as other institutions such as religion, education, and the prison system have, and will continue to evolve and change throughout time.

VII. THE FIGHT IS FAR FROM OVER

³⁰⁹ WOLFSON, *supra* note 6, at ix (emphasis added).

³¹⁰ *Id.* at viii.

³¹¹ *Id.*

³¹² *Id.*

³¹³ CAHILL, *supra* note 11, at 13.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ WOLFSON, *supra* note 6, at 8.

³¹⁷ *Id.* at 7.

“The same-sex marriage debate will not go away overnight.”³¹⁸ Many strides have been made towards equality.³¹⁹ While in the process of writing this article the Supreme Court of Connecticut ruled that homosexuals have a right to marry.³²⁰ During the same time initiatives in California, Florida, and Arizona passed adding to the list of states with mini-DOMA’s. This of course means that the progress made this summer in California has back tracked and same-sex marriage has been discontinued. Marriage equality is no where near complete. Opponents will continue to fight until every state has a mini-DOMA and until the Constitution has an amendment outlawing same-sex marriage. Proponents will continue fighting for the right to be married and to be seen as equal under the law. Marriage is the right being fought for but it boils down to equality.

At its core, the freedom-to-marry movement is about the same thing every civil rights struggle has been about: taking seriously our country’s promise to be a nation its citizens can make better, its promise to be a place where people don’t have to give up their differences or hide them in order to be treated equally.³²¹

Marriage equality is an issue that will have long-term implications for those on both sides of the debate. This article set out to prove that marriage equality should exist under the current framework of the Constitution. The intent of this article is to show religion is not a proper crutch for disallowing same-sex marriage. Marriage is a loving union between two people; regardless of the parties’ gender.³²²

The goal of this article is not to judge those who believe religion is the foundation to why homosexuality is wrong or why same-sex marriage should not be allowed. The beauty of America is that opinions are allowed to be shared and freely voiced. As Americans, it is important to remember the theory of a separate church and a separate state.

“While one may personally support same-sex marriage, that does not give one the right to denigrate the sincerely held religious belief of another who does not support same-sex marriage. And vice versa.”³²³ The goal of this article is not to belittle any person or groups religious views. The intent of this article is to provide a legal solution for “preventing injustice to either side.”³²⁴ Keep the church and state separate; do not mix religion with politics. “Dividing civil marriage from religious marriage, keeping the

³¹⁸ Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO L.J. 2103, 2140 (2008).

³¹⁹ See generally *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

³²⁰ Justin Ewers, *As CT Allows Same-Sex Marriage, the Debate Continues in CA*, USNEWS.COM, Nov. 13, 2008, <http://www.usnews.com/articles/news/national/2008/11/13/as-connecticut-allows-same-sex-marriage-the-debate-continues-in-california.htm> (last visited Jan. 21, 2008).

³²¹ WOLFSON, *supra* note 6, at 185.

³²² Rabbi Devon Lerner, Symposium, *Why we Support Same-Sex Marriage: A Response from over 450 Clergy*, 38 NEW ENG. L. REV. 527, 532 (2004).

³²³ Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO L.J. 2103, 2141 (2008).

³²⁴ *Id.*

church out of the state and the state out of the church, is the best method for preventing injustice to either side.”³²⁵

“Love is love. It is gender blind.”³²⁶ – Rabbi Devon Lerner speaking at the *Can Anyone Show Just Cause Why These Two Should Not Be Lawfully Joined Together* Symposium at the New England School of Law

³²⁵ *Id.*

³²⁶ Rabbi Devon Lerner, Symposium, *Why we Support Same-Sex Marriage: A Response from over 450 Clergy*, 38 NEW ENG. L. REV. 527, 532 (2004).