And The Ban Plays On . . . For Now: Why Courts Must Consider Religion in Marriage Equality Cases

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

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

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1 Reverend F. Russell Baker, United Church of Christ, Benton Harbor, Michigan, March 29, 2005.
I. INTRODUCTION

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

\[\text{\footnotesize \cite{2} Louis Thorson, Comment, Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?, 92 MARQ. L. REV. 617 (2009).}\]

\[\text{\footnotesize \cite{3} Compare Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003) (holding that a ban on same-sex marriages violates the equal protection clause of the Massachusetts Constitution) with Dean v. Conaway, 932 A.2d 531 (Md. 2007) (holding that a ban on same-sex marriages does not violate the equal protection clause of the Maryland Constitution, Declaration of Rights, despite its overt similarities with the Massachusetts constitutional provisions).}\]
the claimants’ arguments are usually the same – banning same-sex marriage denies same-sex couples equal protection under the law.⁴

Surprisingly, one exceedingly relevant issue to the same-sex marriage debate is almost never considered. The pink elephant in the marriage equality courtroom is religion, yet it is extremely rare for same-sex marriage bans to receive First Amendment religious rights-based inquiry.⁵ In 2009, the Supreme Court of Iowa changed all that. In its opinion in Varnum v. Brien,⁶ Iowa’s highest court attacked the issue head-on despite that argument being generally avoided throughout oral argument and the appeals process.⁷ In ruling that Iowa’s ban on same-sex marriage was unconstitutional the Court stated that religious opposition to same-sex marriage could not be considered a factor in determining the constitutionality of same-sex marriage.⁸ The Iowa court was the first court in 17 years to consider the issue,⁹ and the decision to do so will

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

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

⁶ 763 N.W.2d 862 (Iowa 2009).

⁷ Id. at 904.

⁸ Id. at 904-05.

likely have lasting effects on the same-sex marriage debate. In *Varnum*, the court determined that religion could not be a basis for justifying a same-sex marriage ban. With that decision, the court opened the door for future courts to consider the reverse: Is religious opposition to same-sex marriage sufficient to overturn a same-sex marriage ban under the establishment clause of the First Amendment? This article will do just that.

Because the debate over same-sex marriage would not exist without the revolution that came before it, this article will first examine the history of gay rights and same-sex marriage in America. It will focus primarily on the marriage equality decisions of Massachusetts and Iowa—two states at the heart of the same-sex marriage debate. While this oft-argued issue is fodder for varied constitutional analyses, this article will focus solely on the issue of religious liberty and same-sex marriage. It will outline the legal history of the First Amendment establishment clause and its relevance to today’s marriage equality argument. This article will then analyze the constitutionality of same-sex marriage bans under the First Amendment of the U.S. Constitution.

10 763 N.W. 862 (Iowa 2009).
11 *Id.* at 904-05.
12 *See infra* Part II.
15 *See infra* Part IV.
16 *See infra* Part III.
17 *See infra* Part IV.
18 *See infra* Part IV.
This article calls for change. The time has come for courts to consider religion; to stop ignoring relevant constitutional principles simply because it is the popular religion that is supported through legislation; to recognize the impact of particular religious thought on the rights of America’s people; and to remedy the latent religious undertones of the same-sex marriage debate. The time has come for America’s courts to walk us down the aisle towards equality for all people.

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

“Everyone’s restless, angry and high-spirited. No one has a slogan, no one even has an attitude, but something’s brewing.”¹⁹ In the streets of Greenwich Village, in the early morning hours of June 28, 1969, the restlessness, anger, and high-spiritedness that once smoldered among the crowd outside the Stonewall Inn, began to burn hotter, and in the blink of an eye, ignited the gay rights movement as it is known today.²⁰ Prior to the Stonewall riots, America, as a whole, was generally anti-gay. As of 1961, all but one state²¹ criminalized consensual homosexual sexual conduct,²² late-night raids on gay bars and arrests of their patrons were not uncommon,²³


²¹ The only state not to criminalize homosexual sex was Illinois. CARTER, supra note 19, at 15.

²² Id.

²³ Id. at 79-83.
and homosexuality was considered a mental illness. Gays and lesbians were unwilling to fight for rights in court, anticipating the almost assured legal loss and the scrutiny they would face from a judgmental public. The Stonewall riots changed all that. Stonewall was followed immediately by the formation of numerous national and local gay rights organizations. The gay community “showed an increasing willingness . . . to assert legal claims challenging discrimination based on sexual orientation” and the American public began to show signs of acceptance. Shortly after Stonewall, a Minnesota gay couple even filed a mandamus proceeding to obtain a marriage license, an act that constitutes the first attempt to legalize same-sex marriage through the court system. Still, the gay rights movement was fighting an uphill battle.


28 Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). In Baker, the Supreme Court of Minnesota ruled that same-sex couples were not entitled to marriage, and that such a restriction was not unconstitutional under the First, Eighth, Ninth or Fourteenth Amendments to the United States Constitution. Id. at 187.
battle. The law in almost every state remained anti-gay, and it would take years of continued discrimination, even from the nation’s highest court, before any of that would change.

A. Bowers v. Hardwick

Seventeen years after Stonewall, in 1986, the United States Supreme Court heard oral arguments in *Bowers v. Hardwick*, a landmark case that many expected to be a major turning point in the gay rights movement. In *Bowers*, Michael Hardwick, who was charged with a crime after committing a consensual homosexual sex act in his own home, challenged the constitutionality of Georgia’s criminal sodomy statute. Hardwick argued that, as “a practicing homosexual, . . . the Georgia sodomy statute, as administered . . ., placed him in imminent danger of arrest, and that the statute for several reasons violate[d] the Federal Constitution.” Hardwick argued that he had a constitutional right to privacy and that the Fourteenth

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

32 *Bowers*, 478 U.S. at 188.
Amendment protected his behavior.\textsuperscript{33} In a 5-4 decision, the U.S. Supreme Court held, among other things, that “[t]he [U.S.] Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.”\textsuperscript{34} It was a severe blow to the gay rights movement, the residual effects of which would linger for years to come, as some legislatures and courts used the \textit{Bowers} decision to perpetuate discrimination against gays and lesbians.\textsuperscript{35}

Despite the disappointing \textit{Bowers} decision, and the resulting defense of sexual orientation discrimination that flowed therefrom, in the years that followed, several states repealed their criminal sodomy statutes.\textsuperscript{36} Although American society seemed to acknowledge the flaws of the \textit{Bowers} decision, the gay and lesbian community remained saddled with an unfavorable legal landscape.\textsuperscript{37}

\textbf{B. Lawrence v. Texas}

It took seventeen years for the U.S. Supreme Court to consider gay rights after the Stonewall riots, and the Court got it wrong. It took seventeen more for the Court to try again; this time it got it right. In 2003, the U.S. Supreme Court revisited gay rights issues in \textit{Lawrence v. Texas}.\textsuperscript{38} At the time, Texas law provided that “[a] person commits [a criminal] offense if he

\textsuperscript{33} \textit{Id.} at 190.

\textsuperscript{34} \textit{Id.} at 186.


\textsuperscript{36} \textit{Lawrence v. Texas}, 539 U.S. 558, 573 (2003).

\textsuperscript{37} Pfitsch, \textit{supra} note 35, at 59-60.

\textsuperscript{38} 539 U.S. 558 (2003).
engages in deviate sexual intercourse with another individual of the same sex.”

“Deviate sexual intercourse” consisted of oral or anal sexual contact, even when it occurred between consenting adults. The defendants, charged under the Texas statute after being caught mid-coitus by a police officer responding to a bogus “weapons disturbance,” challenged the constitutionality of the statute. The Court determined that individuals “are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Lawrence overruled Bowers, gave the gay rights movement a much-needed boost, and blew the winds of change towards a new goal: marriage equality for same-sex couples.

C. The Modern Concept of Marriage

Modern marriage is embedded in its historic tradition as a religious institution. Even today, marriage has not fully emerged as a secular legal status. Vestiges of the religious origins of marriage

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40 Id. at § 21.01(1).
42 Id. at 578.
43 Id. Justice Anthony Kennedy, delivering the opinion of a 6-3 majority of the Court stated that: “Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.” Id.
44 “Lawrence was thought to be a sweeping victory; it opened up doors in the gay movement and granted a number of rights, all which seemed unattainable under the previous . . . regime.” Shulamit H. Shvartsman, “Romeo and Romeo”: An Examination of Limon v. Kansas in Light of Lawrence v. Texas, 35 SETON HALL L. REV. 359, 400 (2004).
continue to shape attitudes and inform the views of many marriage
defenders, and cause concern for those who are committed to
secular legal institutions. 45

While the forefathers of the American Constitution sought a strict separation between church and
state, 46 marriage has always been, and will likely always be, an issue that cannot so easily be
categorized. It would logically follow, therefore, that the religious rights embodied in the
American Constitution must be a part of the conversation about same-sex marriage. However,
parties and courts have been reluctant to approach the equal marriage issue from a religious
perspective, deciding instead to resolve the issue through other constitutional arguments.

D. Goodridge v. Department of Public Health

Following the filing of the first same-sex marriage case in 1971, several other sets of
same-sex couples in various states from time to time filed lawsuits in attempts to obtain marriage
status, but on each occasion, they were denied relief. 47 It had taken seventeen years for gay


46 Steven D. Smith, Discourse in the Dusk: The Twilight of Religious Freedom?, 122 Harv. L.

47 See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (determining that same-sex
marriage, by definition, was impossible); Singer v. Hara, 522 P.2d 1187 (Wash. App. Div. 1974)
denying marriage equality as not required by equal protection principles); Adams v. Howerton,
673 F.2d 1036 (9th Cir. 1982) (holding that the denial of a same-sex marriage license to a gay
couple met rational basis review); Baehr v. Lewin, 852 P.2d 44 (1993) (denying same-sex
marriage despite right to privacy, due process and equal protection arguments); Dean v. District
of Columbia, 653 A.2d 307 (D.C. App. 1995) (denying same-sex couples the right to marry
despite an additional Human Rights Act claim).
rights advocates to turn a *Bowers*\(^{48}\) defeat into a *Lawrence*\(^{49}\) victory in the fight for the right to privacy.\(^{50}\) It would take only five months to achieve its biggest victory yet.\(^{51}\)

In *Goodridge v. Dep’t of Public Health*,\(^{52}\) the Supreme Judicial Court of Massachusetts addressed the right of same-sex couples to marry within the Commonwealth.\(^{53}\) The Court utilized equal protection and due process analyses in rendering its decision.\(^{54}\) Citing the many rights afforded only to married couples, the Court, in a controversial ruling that received national scrutiny, determined that Massachusetts could no longer “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry... . The Massachusetts Constitution . . . forbids the creation of second-class citizens.”\(^{55}\) In a few short months, the gay rights movement had advanced farther and faster than advocates could have anticipated, but the decision came at a heavy cost to the gay and lesbian community.

\(^{48}\) 478 U.S. 186 (1986).

\(^{49}\) 539 U.S. 558 (2003).


\(^{52}\) 798 N.E.2d 941 (Mass. 2003).

\(^{53}\) *Id.* at 948-50.

\(^{54}\) *Id.* at 953.

\(^{55}\) *Id.* at 948.
The backlash from *Goodridge* resonated throughout the country, as 11 states enacted legislation banning same-sex marriage within the next twelve months.\(^{56}\) In the five years following the *Goodridge* decision, the number of states officially rejecting same-sex marriage grew. At the close of the 2008 election, forty-four states barred same-sex marriage.\(^{57}\) Perhaps the most painful of those state bans was enacted in California in 2008. Proposition 8, a voter initiative that banned same-sex marriages in the state, passed a short five months after the California Supreme Court ruled that same-sex couples could marry there.\(^{58}\) The passage of Proposition 8 proved to be a major setback in the gay community.

Despite the disappointing Proposition 8 vote, in late 2008 and early 2009, the tide swung again, this time in favor of marriage equality. Between October 2008 and June 2009, five states joined Massachusetts and added their names to the same-sex marriage registry: Connecticut\(^{59}\) and Iowa\(^{60}\) by judicial decree; and Maine,\(^{61}\) Vermont,\(^{62}\) and New Hampshire\(^{63}\) through legislative...
action. While the decision of the Supreme Court of Connecticut generally mirrored the Goodridge decision, the Supreme Court of Iowa went one step further and entered unchartered territory.

E. Varnum v. Brien

In Varnum v. Brien, for the first time ever, a state high court considered religion as it affects same-sex marriage. Although the issue was not brought before the court at oral argument, the Iowa court, sua sponte, addressed the issue directly. After considering that various religions and sects of religious belief treat the concept of same-sex marriage differently, it stated that “in pursuing our task . . ., we proceed as civil judges, far removed from the theological debate . . ., and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.” The Court dismissed religious rights as a justification for upholding a gay marriage ban, acknowledging that as religious opinions of same-sex marriage differ, religious opposition to same-sex marriage cannot be used to justify a same-sex marriage ban. With its decision, the Supreme Court of Iowa changed the landscape of the same-sex marriage debate and

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64 798 N.E.2d 941 (Mass. 2003).
65 763 N.W.2d 862 (Iowa 2009).
66 Id. at 904-06.
67 Id. at 904.
68 Id. at 905.
69 Id. at 906.
opened the door for “reverse” religious rights attacks on same-sex marriage bans through the court system.

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

While the Varnum case reinforced the idea that equal protection challenges to same-sex marriage bans can be successful, the court also specifically addressed religion for the first time.\(^70\) The constitutional protections of religion are found in the First Amendment, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”\(^71\) In considering religion and its interaction with same-sex marriage, the Supreme Court of Iowa laid a path for plaintiffs to follow in future challenges to same-sex marriage. As was inversely suggested by the Iowa decision, religious arguments can be a basis for relief in same-sex marriage cases, a fact which raises the question of whether the same success could be achieved under the establishment clause.

A. Modern Establishment Clause Jurisprudence

This country’s modern-day establishment clause concepts began with Everson v. Board of Education of Ewing,\(^72\) where the United States Supreme Court iterated the “wall of separation between church and state” principle.\(^73\) In Everson,\(^74\) the Court was tasked with determining

\(^70\) Id. at 904.
\(^71\) U.S. Const. amend I.
\(^72\) 330 U.S. 1 (1947).
whether it is “an impermissible establishment of religion for a state to subsidize transportation for students attending certain private religious schools, but not all private schools, whether secular or religious.”75 The Court determined that, under the establishment clause, the government must remain neutral.76

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State. . . . [The purpose of the Amendment is] to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public . . . support for religion.77

For the next twenty-five years, establishment clause decisions were fairly consistent,78 as the Court tailored its rulings to fit within the wall of separation created in Everson.79

In 1968, the U.S. Supreme Court took the establishment clause a bit further in Board of Education v. Allen.80 In Allen,81 the Court reviewed a New York statute that required “local public school authorities to lend textbooks free of charge to all students in grades seven through

74 330 U.S. 1 (1947).
75 Wilson, supra note 73, at 604.
76 330 U.S. at 15-16.
77 Wilson, supra note 73, at 604.
78 Note, Church, Choice, and Charters: A New Wrinkle for Public Education?, 122 Harv. L. Rev. 1750, 1758 (2009) [hereafter “Church, Choice, and Charters”].
80 392 U.S. 236 (1968).
81 Id.
[twelve]” including private school students.\textsuperscript{82} The Court was called on to consider, in part, whether the statute was “a law respecting the establishment of religion . . . .”\textsuperscript{83} In ruling that the statute was constitutional under the First Amendment, the Court reiterated a test developed through prior case law called the “purpose and primary effect” test.\textsuperscript{84} Under that test, “if either [the purpose or primary effect of the statute] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.”\textsuperscript{85} The purpose and primary effect test made the establishment clause analysis a bit clearer, having designed a guide for constitutional analysis. However, beginning in 1971, when the Court issued its opinion in \textit{Lemon v. Kurtzman},\textsuperscript{86} the establishment clause analysis became a bit murky.\textsuperscript{87}

\textsuperscript{82} \textit{Id.} at 238.

\textsuperscript{83} \textit{Id.}


\textsuperscript{85} \textit{Schempp}, 374 U.S. at 222.

\textsuperscript{86} 403 U.S. 602 (1971).

\textsuperscript{87} David Felsen, Comment, \textit{Developments in Approaches to Establishment Clause Analysis: Consistency for the Future}, 38 AM. U. L. REV. 395, 413 (1989) (arguing that the multiple tests that have developed, beginning with the \textit{Lemon} decision create a difficult analysis for courts today).
B. Lemon v. Kurtzman

In Lemon, Pennsylvania and Rhode Island had adopted statutes that provided government funding to church-related private schools. Under its statute, the Pennsylvania government created subsidies to religious schools to reimburse them for teachers’ salaries, textbooks and educational materials. Rhode Island’s statute provided for payments to be made directly to private school teachers to supplement their salaries. The taxpayers of the two states filed suit seeking to declare the statutes unconstitutional under the establishment and free exercise clauses of the First Amendment. In ruling both statutes unconstitutional, the U.S. Supreme Court combined its prior decisions to create what became known as the Lemon test, a three-pronged test for establishment clause analysis. The Lemon test, which essentially added a third prong to the purpose and primary effect test developed through history and reiterated in

88 403 U.S. 602 (1971).
89 Id. at 606-07.
90 Id.
91 Id. at 607.
92 Id. at 608.
93 The Court pulled three concepts from two prior establishment clause cases to create the Lemon test. See Board of Education v. Allen, 392 U.S. 236, 243 (1968) (requiring statutes that impact religion to have a secular purpose and to not have the effect of advancing or inhibiting religion); Walz v. Tax Commission of City of New York, 397 U.S. 664, 674 (1970) (ruling unconstitutional those statutes that foster an “excessive government entanglement with religion”).
Allen,95 dictates that a statute will be ruled unconstitutional under the establishment clause unless: (a) the statute has a secular legislative purpose; (b) the statute does not have the primary effect of either advancing or inhibiting religion; and (c) the statute does not result in an “excessive government entanglement” with religion.96

In the years following the announcement of the Lemon test, the Justices of the U.S. Supreme Court followed the test closely, but as establishment clause cases got more complicated, so too did the test used to evaluate them.97 At various times throughout recent history, the Justices of the Supreme Court have shown a general dissatisfaction with the Lemon test as a whole, at least “as a comprehensive test for all establishment [clause] cases.”98 The Lemon test, however, has never been expressly discarded, and “a majority of [J]ustices [continue] to suppose that either a purpose to promote religion or a direct effect of advancing

95 392 U.S. 236 (1968).
96 Id.
97 In Roemer v. Maryland Public Works, 426 U.S. 736 (1976), for example, Justice Blackmun discussed a potential fourth prong to the Lemon test: divisiveness. Id. at 751. The Court also mentioned a three-part expansion to the entanglement prong. Id. at 755-56. The interweaving of the various tests apparently began to confuse Supreme Court Justices from time to time. For instance, Justice White, acknowledged his confusion in his dissent in Roemer, and he called on the Court to return the test to the simple two-factor test discussed in Abington Tp. School District v. Schenpp, 374 U.S. 203 (1963) which originally fashioned the purpose and primary effect test. Id. at 767-69.
98 Church, Choice, and Charters, supra note 78, at 1759.
religion may render a program unconstitutional.” 99 The test is now sporadically used, and other tests have been developed and utilized by the Court in more recent establishment clause cases. 100

C. Other Establishment Clause Tests

Unwilling to utilize the Lemon test to decide Marsh v. Chambers, 101 the Court instead created “the Historical Acknowledgment Test,” which is rarely, but effectively used to quash controversial issues that seek to invalidate long-held religious practices. 102 Announced by Justice Warren Burger, the Historical Test states that “if the practice is one that has been common throughout United States history, it is not a violation of the establishment clause.” 103

The Historical test offers greater protections to the religious majority – those individuals who have conducted themselves in a certain way for so long that the Court occasionally offers their conduct protection under the law. 104

As the U.S. Supreme Court continued to wrestle with its establishment clause decisions, Justice Sandra Day O’Connor suggested what has become known as the “endorsement test” in a concurring opinion in Lynch v. Donnelly. 105 The endorsement test states that “if a reasonable observer would find a particular practice to be an endorsement of religion, that practice violates


100 Church, Choice, and Charters, supra note 78, at 1759 n.67.


102 Wilson, supra note 73, at 611-12.

103 Schuman, supra note 5, at 2131.

104 Id. at 2131-32.

the [e]stablishment [c]lause.”\(^{106}\) The test generally offers greater protections to religious minorities and non-believers than the other tests, as it removes the concept of practical history from the equation.\(^{107}\) The endorsement test is rarely used today. It was criticized shortly after it was announced and described as “unworkable[,]”\(^{108}\) and it is unlikely that the endorsement test will see increased use in the future now that its author has retired from the U.S. Supreme Court.\(^{109}\)

The coercion test is the most recent of the four establishment clause tests developed by the U.S. Supreme Court.\(^{110}\) The coercion test, announced by Justice Anthony Kennedy in *County of Alleghany v. ACLU*,\(^{111}\) states that the “government may not coerce anyone to support or participate in any religion or its exercise.”\(^{112}\) The coercion test offers what Justice Kennedy believes to be a basic rule that helps clarify establishment clause jurisprudence.\(^{113}\) Rather than


\(^{107}\) *Id.* at 2133-34.

\(^{108}\) *Id.* at 2133.

\(^{109}\) *Id.*

\(^{110}\) *Id.*


\(^{113}\) Schuman, *supra* note 5, at 2133-34.
make establishment clause analyses easier, the existence of four tests muddies the already cloudy waters even more.\textsuperscript{114}

D. The Law of the Land

Today, the \textit{Lemon} test remains the most consistently applied test for establishment clause cases,\textsuperscript{115} having been utilized by the U.S. Supreme Court recently in \textit{McCreary County v. ACLU},\textsuperscript{116} a 2005 case that determined that religiously-themed displays on government-owned land violated the establishment clause. The Court however has shown a willingness to abandon one or more prongs of the test or to step outside the borders of the \textit{Lemon} test when it deems appropriate, as it did in \textit{Vanorden v. Perry}\textsuperscript{117} and \textit{Zelman v. Simmons-Harris}.\textsuperscript{118} Despite the Court’s wavering use of the \textit{Lemon} test, foundationally, all establishment clause cases will receive \textit{Lemon} review; it remains to this day the law of the land.\textsuperscript{119}

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

The \textit{Lemon} test was also used by the Superior Court of the District of Columbia when it decided its first same-sex marriage case, \textit{Dean v. District of Columbia},\textsuperscript{120} in 1992. The D.C. court dismissed an establishment clause argument quickly by stating that “[w]hatever may be the

\footnotesize
\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 2134.
  \item \textsuperscript{116} 545 U.S. 844 (2005).
  \item \textsuperscript{117} 545 U.S. 677 (2005).
  \item \textsuperscript{118} 536 U.S. 639 (2002).
  \item \textsuperscript{119} \textit{See generally} \textit{McCreary County v. ACLU}, 545 U.S. 844 (2005).
  \item \textsuperscript{120} 1992 WL 685364.
\end{itemize}
exact contours of the separation [of Church and State], it is inconceivable that the ‘wall’ is so impregnable as to preclude judicial or legislative resort to the Bible merely as a historical reference. None of the Lemon proscriptions is implicated in the least by so doing."\textsuperscript{121} With that, and by citing religious dogma and tradition as a basis for its decision,\textsuperscript{122} the court ruled that the establishment clause did not render the statute unconstitutional.\textsuperscript{123} It is, to date, the only time an establishment clause claim has been argued in a same-sex marriage case.\textsuperscript{124} The new emerging landscape of the same-sex marriage debate beckons for that issue to be raised once more. It is time for religion to be revisited by the courts.

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

While the Supreme Court has recently shown a willingness to depart from the traditions of the Lemon test for establishment clause decisions,\textsuperscript{125} the three-pronged test remains the jumping-off-point for all establishment clause analyses.\textsuperscript{126} With that in mind, this article will

\footnotesize{\textsuperscript{121} Id. at *5.}
\footnotesize{\textsuperscript{122} Id. at *7.}
\footnotesize{\textsuperscript{123} Id. at *5.}
\footnotesize{\textsuperscript{124} Wilson, supra note 73, at 577.}
\footnotesize{\textsuperscript{125} See, e.g., Van Orden v. Perry, 545 U.S. 677 (2005) (holding that the Lemon test “is not useful in dealing with the sort of passive monument that Texas has erected on its capitol grounds. Instead, the analysis should be driven by both the monument's nature and the Nation's history.”); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (utilizing the purpose and primary effect test without a total abandonment of the test iterated in Lemon).}
\footnotesize{\textsuperscript{126} 403 U.S. 602, 612-13 (1971).}
analyze the same-sex marriage question by following this path. In order to determine whether
same-sex marriage bans meet constitutional muster, a reviewing court would first consider
whether: (a) the ban on same-sex marriages has a secular legislative purpose; (b) these bans have
the primary effect of enhancing or inhibiting religion; and (c) the bans result in an excessive
government entanglement with religion.\textsuperscript{127} While the Supreme Court of Iowa considered
religion in its landmark same-sex marriage decision,\textsuperscript{128} the analysis was confined to whether
religious opposition to same-sex marriage justifies a ban on same-sex marriages.\textsuperscript{129} This article
considers the reverse: Do same-sex marriage bans have the effect of establishing religion in
violation of the First Amendment of the United States Constitution?

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

If a statute has a secular legislative purpose, the establishment clause will “not ban
federal or state regulation of conduct whose reason or effect merely happens to coincide or
harmonize with the tenets of some or all religions . . . .”\textsuperscript{130} Such a bright line presents a major
hurdle for gay rights claimants.\textsuperscript{131} Although inherently, gay rights advocates can argue that a
law restricting marriage to same-sex couples has a decidedly religious basis, the court is unlikely
to be receptive to such an argument unless the claimants can distinguish themselves from the

\begin{footnotes}
\footnote{127} Id.
\footnote{128} Varnum v. Brien, 763 N.W.2d 862, 905 (2009).
\footnote{129} Id. at 906.
\footnote{131} Marc L. Rubinstein, Note, Gay Rights and Religion: A Doctrinal Approach to the Argument
\end{footnotes}
rule. In essence, claimants must prove affirmatively that no secular purpose exists for the statute. That process can be a complicated one, wrought with historical and sympathetic arguments from the opposition. Nevertheless, the overwhelming evidence applicable to the same-sex marriage debate shows that a valid secular purpose does not exist for banning same-sex marriages. Accordingly, same-sex marriage bans must be struck down as violative of the establishment clause.

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

Same-sex marriage scholars have divided the secular arguments against same-sex marriage into three categories: the definitional argument; the stamp-of-approval argument; and the defense-of-marriage argument. Under the definitional argument, “marriage is a union between a man and a woman because that’s the way it’s always been.” The stamp-of-approval argument states that “any rights of marriage afforded to same-sex couples will be perceived as an endorsement of homosexuality.” Finally, the defense-of-marriage argument proposes that “if

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See, e.g., id. at 1609-13 (presenting anti-gay rights arguments such as traditional morality and disfavor of “special rights”).
\item See infra Parts IV.A.
\item Schuman, supra note 5, at 2113.
\item Id. (citing WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE 21-22 (2006)).
\item Id. (citing ESKRIDGE, supra note 136, at 25-26).
\end{enumerate}
\end{footnotesize}
sanctioned, [same-sex marriage] will undermine the sanctity of ‘traditional marriage’ and lead to a moral collapse.”  

a. The Definitional Argument

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

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138 Id. (citing ESKRIDGE, supra note 136, at 28-29).

139 Id. at 2114.

140 BLACK’S LAW DICTIONARY (8th ed. 2004), marriage.

141 501 S.W.2d 588 (Ky. 1973).

142 Jones, 501 S.W.2d at 589.

143 Schuman, supra note 5, at 2114.

144 798 N.E.2d 941 (Mass. 2003).
While, prior to 2003, the “it is what it is” argument would have made perfect sense to those unfamiliar with historical international treatment of same-sex marriage, or those who based their support solely on the historical treatment of same-sex marriage in the United States up to that point, neither Black’s definition, nor the definitional argument are current or accurate. In the United States alone, six states recognize same-sex couples’ rights to marry, and two others intend to recognize extrajurisdictional same-sex unions. Outside the United States, there is even more support for same-sex marriage, as several Western European countries, Canada and South Africa all permit same-sex marriages under their laws. \(^{147}\) “[G]iven the fact that marriage is [now] defined more broadly across this nation and throughout this word, ‘that’s just the way it is’ carries less weight than it used to[,]”\(^{148}\) and can no longer be considered a valid secular purpose for banning same-sex marriage.

\(^{145}\) See Kathleen A. Lahey & Kevin Alderson, Same-Sex Marriage: The Personal and the Political 16 (2004).


\(^{147}\) Schuman, supra note 5, at 2114.

\(^{148}\) Id.
b. The Stamp-of-Approval Argument

The stamp-of-approval argument has become increasingly popular with opponents of same-sex marriage.\(^{149}\) Such an argument allows opponents of same-sex marriage to accept homosexuality for the role it plays in society – in essence, abiding by an “I won’t bother you if you don’t bother me” theory of human interaction\(^{150}\) – but prevent same-sex marriage from, one argues, “transform[ing] the [historical] institution of marriage by questioning traditional roles, rights and duties based on gender.”\(^{151}\) A shining example of this phenomenon is that opponents of same-sex marriage “routinely contend that the legal recognition of gay and lesbian unions would be the first step down a slippery slope that would ultimately foreclose legal prohibitions on minors entering into marriage, polygamy, incest, and even bestiality.”\(^{152}\) For opponents of same-sex marriage, this argument is generally based on individual and collective senses of morality,\(^{153}\) because historically, homosexuality has been seen as immoral in the eyes of a vocal majority,\(^{154}\) a large segment of the American population is unwilling to embrace a law that could

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\(^{149}\) *Id.* at 2115.

\(^{150}\) *Id.* at 2116.


promote its acceptance. The stamp-of-approval argument is even supported by at least one Justice on the U.S. Supreme Court. Justice Antonin Scalia, in a dissenting opinion in *Lawrence v. Texas*,\(^\text{155}\) argued that the majority, which, in that case, acknowledged a right to privacy and fostered a certain tolerance for homosexuality that was absent from the Court’s previous decisions, had “signed on” to a “homosexual agenda . . . directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”\(^\text{156}\) While the stamp-of-approval argument has become increasingly popular with opponents of same-sex marriage, it has also become perhaps the most vulnerable to attack by same-sex marriage advocates.

At the outset, the so-called valid secular justification for banning same-sex marriage that is the stamp-of-approval argument is not-so-secular after all. One’s concept of morality is often shaped by one’s own religious beliefs,\(^\text{157}\) and it is often the case that an individual’s condemnation for homosexuality stems directly from biblical text.\(^\text{158}\) An overwhelming percentage of individuals who consider themselves religious oppose same-sex marriage, whereas

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\(^{155}\) 539 U.S. 558 (2003).

\(^{156}\) 539 U.S. at 602 (Scalia, J., dissenting).


there exists a split of opinion among those who do not consider themselves religious.\textsuperscript{159} Such evidence suggests that the stamp-of-approval argument, with its feet firmly rooted in concepts of morality, is based more in religion than the constitution might allow.

The validity of the stamp-of-approval argument is also easily called into question. “[W]hen a state recognizes same-sex marriages, it purports to be[,] and actually is[,] supporting interpersonal commitment (marriage), not homosexuality.”\textsuperscript{160} Considering that the stereotype that members of the gay community are promiscuous and lack interpersonal commitment is one of the main reasons given when opponents of same-sex marriage question the morality of homosexuality,\textsuperscript{161} the logical assumption is that same-sex marriage would take a step towards promoting the morality of the gay community. By way of analogy, “the governmental action of granting a marriage license to a same-gender couple signals no more approval of the act of gay sex or the group of gay couples, than the governmental action of granting a marriage license to a


\textsuperscript{160} William N. Eskridge, Jr., \textit{The Same-Sex Marriage Debate and Three Conceptions of Equality}, \textit{in Marriage and Same-Sex Unions: A Debate} 167, 179 (Lynn D. Wardle et al., eds., 2003).

convicted rapist signals approval of the act of rape or the group of rapists.\textsuperscript{162} The palpable difference is that the rapist can obtain a marriage license in any state of this nation, so long as he or she is not attempting to marry a person of the same sex.\textsuperscript{163}

c. The Defense of Marriage Argument

The ‘defense of marriage’ argument is based on the underlying premise that ‘the great virtue of marriage is the creation of an altruistic space, where adults sacrifice their own self-interest in the service of mutual commitment to one another and to children they raise together.’ The proponents of this argument maintain that traditional marriage has declined because this ideal has been sacrificed by liberalizations that treat marriage as just another avenue for seeking self-fulfillment and pleasure. The legal recognition of same-sex marriage would allegedly render the liberal conception of marriage victorious and constitute the proverbial straw that broke traditional marriage's back.\textsuperscript{164}

\textsuperscript{162} Chai R. Feldblum, \textit{The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage}, \textit{in Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law} 55, 60 (Robert Wintemute & Mads Andenas eds., 2001).

\textsuperscript{163} Barbara J. Cox, \textit{The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy}, 33 \textit{Cal. W. L. Rev.} 155, 161 (1997) (“Convicted felons, divorced parents who refuse to pay child support, delinquent taxpayers, fascists, and communists—all receive marriage licenses from the state. The Supreme Court stands ready to discipline any state that denies their citizens their right to marry, yet no one believes that the license constitutes state approval of felony, default on support obligations, tax delinquency, communism, or fascism. . . . Gay people constitute virtually the only group in America whose members are not permitted to marry the partner they love.”)

\textsuperscript{164} Staszewski, \textit{supra} note 152, at 1317-18.
This argument presupposes that same-sex couples are unable or unwilling to create relationships based on mutual commitment. Rather, it is suggested, same-sex relationships are based on selfishness, self-centeredness and solidarity.\(^{165}\) This concept allegedly weakens or cheapens the traditional marriage model such that opponents of same-sex marriage must prevent marriage equality.

The validity of the defense of marriage argument is questionable. “[S]ame-sex couples can, and do[,] enter into relationships that comport with the traditional ideal of marriage.”\(^{166}\)

Since 2003, thousands of same-sex couples in the United States have been married,\(^{167}\) and thousands more have entered civil unions.\(^{168}\) Same-sex couples buy houses, pay taxes, raise

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\(^{166}\) Staszewski, *supra* note 152, at 1318.


children, attend church, volunteer in their communities, and do the various other “things” that heterosexual married couples do. Moreover, the establishment of same-sex unions in various states has led to an “increase the number of ‘married’ couples, as well as the number of children who are raised by two parents who are married to one another[,]” a fact that researchers say benefits the child, regardless of the gender of that child’s parents. “While [such] research is undoubtedly in a preliminary state, the defense of marriage argument . . . appears . . . to amount to nothing more than unwarranted speculation.” Based on this evidence, the question remains: “Defend marriage from what?”

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

It is an unconstitutional violation of the establishment clause for a statute’s primary effect to be that it advances or inhibits religion. The U.S. Supreme Court has decreed that “the establishment clause bars a State from passing ‘laws which aid one religion, aid all religions, or prefer one religion over another.’” Therefore, if a state enacts a same-sex marriage ban, it must do so without promoting the religious tenets of certain faiths or diminishing the tenets of certain others. In regard to same-sex marriage, the enhancement prong of the Lemon test has

169 Staszewski, supra note 152 at 1318-19.

170 Id. at 1319.

171 Id. at 1319-20.

172 Schuman, supra note 5, at 2119.


been considered before. In *Dean v. District of Columbia*,\(^{175}\) the Superior Court of the District of Columbia found that “[n]o ‘religion’ is advanced by a refusal [to recognize same-sex marriages], since said refusal applies equally to same-sex applicants who are atheists, agnostics, or believers, and no one is thereby coerced in the slightest to alter his or her convictions.”\(^{176}\) The present day treatment of same-sex marriage within the eyes of various religious faiths makes the institution of a same-sex marriage ban an almost impossible task to complete without directly violating this concept.

Notwithstanding the analysis expressed in *Dean*,\(^{177}\) under the second prong of the *Lemon* test – considering the state of same-sex marriage today and the landscape of religious sentiment towards same-sex marriage – a same-sex marriage ban, in effect, both enhances and inhibits various religions in violation of the establishment clause. “[A] law banning gay marriage achieves two ends. First, such a law favors, or ‘advances,’ those religions that do not condone same-sex unions by siding with that particular viewpoint. At the same time, religions that would gladly solemnize a same-sex marriage but-for the law are ‘inhibited.’”\(^{178}\) While a large number of religious denominations, such as some American Baptists, Roman Catholics, and Evangelical Christian Churches, only recognize traditional marriages between a man and a woman, a larger number of denominations, such as some Episcopalians, Presbyterians, Quakers, and Unitarian

\(^{175}\) 1992 WL 685364.


\(^{177}\) 1992 WL 685364.

Universalists, are supportive of same-sex unions. The fact of the matter is that “religious beliefs regarding same-sex marriage are neither static nor universally-held within a single faith system.” The analysis expressed in Dean fails to fully consider the issue; the question is not alone whether an individual is coerced to change their religious beliefs, but whether a certain set of religious beliefs is advanced by state action. By enacting a same-sex marriage ban to restrict the behavior of its citizens, a state essentially imposes the religious views of the majority “over what should be secular, contractual rights.” Such a practice is exactly the type of behavior the First Amendment aims to prevent.

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

Although Justice Sandra Day O’Connor no longer sits at the U.S. Supreme Court bench, and the endorsement test she created to evaluate establishment clause questions perhaps lies dormant in the annals of Supreme Court history, an analysis made thereunder is nevertheless telling on the issue of same-sex marriage. Under O’Connor’s endorsement test, if a reasonable

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179 Wilson, supra note 73, at 584 (compiling a thorough list of religious denominations with their corresponding views on same-sex marriage).

180 Id. at 583-84.


183 Miller, supra note 178, at 2211.
observer would find a particular practice to be an endorsement of religion, that practice violates the [*establishment clause* as an impermissible enhancement of religion.\textsuperscript{184}

From the eye of the unbiased observer, the issue of same-sex marriage is clearly affected by religious interference. On one hand, most Americans believe that the Bible condemns homosexuality,\textsuperscript{185} whether they follow scripture or not. When the issue comes to debate, the most vocal opponents of same-sex marriages are religious leaders and churchgoers who consider homosexuality a sin.\textsuperscript{186} Religious organizations and churches are strong financial supporters of traditional marriage initiatives.\textsuperscript{187} Protestors of same-sex marriage often hold signs that cite to Biblical passages.\textsuperscript{188} On the other hand, less-religious individuals support marriage equality.\textsuperscript{189}


\textsuperscript{185} Rubinstein, *supra* note 131, at 1616.


\textsuperscript{187} Jesse McKinley & Kirk Johnson, *11th-Hour Effort Saved Same-Sex Marriage Ban On California Ballot*, N.Y. TIMES, Nov. 15, 2008, at A1 (discussing the $40 Million contribution from congregants of the Mormon Church in support of Proposition 8, which banned same-sex marriages in California).


\textsuperscript{189} Schuman, *supra* note 5, at 2108.
Marriage equality is generally backed by the young and the liberal – demographics that are less likely to embrace a specific religious tradition.\textsuperscript{190} From the outside looking in, religion clearly controls the debate, therefore under O’Connor’s endorsement test, a same-sex marriage ban should be rendered invalid.

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

A statute will be ruled unconstitutional if it fosters an excessive entanglement with religion.\textsuperscript{191} For the purposes of a constitutional analysis[,] “excessive entanglement” means “that the institutions of church and state are more entangled than they need to be in order for government to accomplish its otherwise legitimate purposes in the program or policy at issue.”\textsuperscript{192} If the purposes of denying same-sex couples the right to marry are threefold – to preserve the history and custom of marriage in the United States; to maintain America’s moral compass as it pertains to marriage; and to defend the sanctity of the traditional marriage model\textsuperscript{193} – then each must be accomplished in a manner as least-restricted by religion as possible.

To determine whether same-sex marriage bans pass constitutional muster, one must first consider that “the current state of marriage is already an excessive entanglement with religion,


\textsuperscript{191} Lemon v. Kurtzman, 303 U.S. 602 (1971).


\textsuperscript{193} See supra notes126-173 and the accompanying text.
given the connection between the state and clergy in sanctioning a legal marriage relationship.”

That being said, when it is religion that shapes the moral scale against which same-sex marriages are compared, when it is religion that dictates the confines of the traditional marriage model, when it is religion that fills the bank accounts of anti-marriage equality organizations, when it is religion that creeps into legislative debate over same-sex marriage, one must believe that religion has impermissibly entangled itself farther than necessary into the law.

V. CONCLUSION

In 2006, the Maryland General Assembly debated the issue of marriage equality. At the time, only Massachusetts law permitted same-sex marriage, and like a majority of states, Maryland law provided that the only valid marriage was one between a man and a woman. American University law professor Jamie Raskin testified at a committee hearing in favor of marriage equality. During Raskin’s testimony, Senator Nancy Jacobs, a conservative Republican representing rural Cecil and Harford Counties, stated: “As I read Biblical principles, marriage was intended, ordained and started by God – that is my belief. . . . For me, this is an

194 Schuman, supra note 5, at 2119.

195 See supra notes 150-164 and the accompanying text.

196 See supra notes 140-149 and the accompanying text.

197 See supra notes 188 and the accompanying text.

198 See infra Part V.

199 Kelly Brewington, Emotions flare over same-sex marriage, BALTIMORE SUN, Mar. 2, 2006, at 5B.

200 Id.

201 Id.
Without pause, Raskin replied: “Senator, when you took your oath of office, you placed your hand on the Bible and swore to uphold the Constitution. You did not place your hand on the Constitution and swear to uphold the Bible.”

The Raskin-Jacobs exchange is a mere microcosm of the same-sex marriage issue. Despite arguments to the contrary, religion has always been, and will always be, a factor when considering marriage equality. Yet, when same-sex marriage cases reach the appellate courts, religious arguments and analysis are mysteriously absent.

The United States Constitution was created with a mind towards separating Church and State, but on some social issues, such as same-sex marriage, courts have turned a blind eye to the ideals of our forefathers, and allowed religious beliefs to color our books of law. The result is that, based on arguments of morality, defense of traditional marriage, and history – all laden more with religious undertones than secular reasoning – opponents of same-sex marriage have succeeded in enacting laws that violate the establishment clause of the First Amendment and the rights of same-sex couples in this country. The time has come to change that, but until courts show they are willing to take on the analysis of religion’s impact on same-sex marriage, the ban plays on.

202 *Id.*

203 *Id.*