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Marriage as Unconstitutional:
How Not Allowing Homosexual Marriage Violates the First Amendment

by

Brian M. Payne

Under the Direction of Andrew Altman

ABSTRACT

For the past several years the issue of homosexual marriage has been at the forefront of an often intense debate in American political culture. Those who oppose the policy have, by and large, been in the majority. But in America, majority decisions are not automatically legal; such status is obtained only when policies are not in conflict with the Constitution. With that in mind, this paper aims to show how not allowing homosexual marriage can amount to an unconstitutional endorsement of religion. To accomplish this I will first examine the main arguments presented against the policy by the defenders of "traditional" marriage and show how they fail. With the main arguments undercut, opponents of gay marriage must have either no real basis for their position, or make their arguments from within specific comprehensive (generally religious) doctrines- a phenomenon widespread enough to possibly constitute a violation of the first amendment.

INDEX WORDS: gay marriage, unconstitutional, first amendment

MARRIAGE AS UNCONSTITUTIONAL:
HOW NOT ALLOWING HOMOSEXUAL MARRIAGE VIOLATES THE FIRST AMENDMENT

by

Brian M. Payne

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I. Introduction

For the past several years the issue of homosexual marriage has been at the forefront of an often intense debate in American political culture. What was only a few generations ago considered completely unthinkable- men and women openly engaging in homosexual relationships- has become, if not accepted, at least tolerable. Since the 2003 decision of the Supreme Court in *Lawrence v. Texas*, it has even been *legal* for them to do so. With their private relationships finally considered to be something the government cannot legitimately prohibit, it would seem that the next logical step would be to gain legal recognition as well, in the form of marriage.

But what might seem like a relatively small step to some (after all, it is legal for homosexuals to participate in 'promise ceremonies' all but identical to marriage in its non-legal aspects, only lacking many of the legal property rights and responsibilities official state recognition entails) is a huge and utterly misguided, wrong, and dangerous policy change for others. These people, who by most accounts constitute a majority of the American public[1], vigorously and fiercely fight any attempt to revise the legal category of marriage to include homosexual relationships.

Unfortunately for the opponents of gay marriage, majority decisions are not automatically legal in the United States. Although legislation is not enacted without majority approval (of elected representatives, anyway), it is equally important that such

[1] 61% of the population, plus or minus 3%, according to a 2003 CBS News/New York Times poll: http://www.cbsnews.com/stories/2003/12/19/opinion/polls/main589551.shtml

decisions do not conflict with the principles of the Constitution. Activists, with numerous arguments, have claimed that the prohibition on homosexual marriage does precisely that. In response, rather than merely pointing at the ballot box to prove their case, opponents of gay marriage have had to articulate a range of arguments to support the continuation of the current status quo. The success of the arguments (on both sides) is debatable; what is undeniable is that constitutional principles will almost certainly be at or near the heart of any serious attempt to change the institution of marriage.

In this paper, I too aim to show that not allowing homosexual marriage can be shown to be unconstitutional. However, I intend to take a distinctive approach. While most arguments to date have relied on equal protection considerations, I believe that prohibition on gay unions can be shown to be an unconstitutional government endorsement of religion, in violation of the first amendment. I will admit up front that I do not believe I can show that this is *necessarily* the case in modern America. But I do think that I can show a high probability, or a reasonable certainty, that such a violation is in fact what is going on in contemporary political culture. To reach this conclusion I must engage in something of a roundabout argument; with this in mind, I must first spend a few moments to explain the structure of the argument as it will follow in this paper.

II. Structure of the Argument

Proving that not allowing homosexual marriage amounts to an unconstitutional endorsement of religion is no simple task. Opponents of homosexual marriage can point to a wide range of arguments, none obviously religious in nature, as proof that their

position is perfectly within the domain of legitimate American law and, if anything, that it is the supporters of gay marriage who hold the more uncertain ground in the debate. It would make no difference then if some defenders of traditional marriage might be against homosexuality and homosexual marriage for religious reasons, because they can still point to valid non-religious motivations to justify their position.

It is these additional arguments that complicate the task and force me to attack the problem in something of a roundabout way. Rather than directly showing that prohibiting homosexual marriage is an unconstitutional endorsement of religion, I must take a lead from the Lemon test and first show that all the other arguments against it fail. The Lemon test, a three-pronged test to determine whether legislation violates the Establishment Clause, has as one of its prongs that the government's action must have a valid secular purpose. Once I have shown that the secular arguments do not work and the opponents of gay marriage have had their legs cut out from under them (so to speak), the possibility of showing that a constitutional violation has occurred opens up. I will argue for this possibility more fully in the final section of the thesis.

In this paper, I will first examine and give reasons for rejecting four distinct arguments against gay marriage: the marital good argument, the moral tradition argument, an argument from definition, and the slippery slope argument. I treat the marital good argument, described primarily in John Finnis' and other new natural lawyers' work, before the rest because I believe it to be the most serious argument being put forth in current scholarly literature, and because I think the other three arguments (perhaps unknowingly) rely on it in some way. Second is the argument from moral tradition, epitomized in Justice Scalia's dissent in Lawrence v. Texas, which, although

not quite as important in scholarly literature, encapsulates well many opponents' view on the subject. The argument from definition, although the weakest and most easily treated of the four, needs to be treated because of the frequency with which it arises in debates on gay marriage; I will take the opportunity in this section to also talk about domestic partnerships and why they are not the optimal solution. I will treat the slippery slope argument- perhaps the most common reason given in opposition to gay marriage- last because a rejection of this argument, similar to my argument for unconstitutionality, requires that all other reasons be rejected first. I take these lines of thought to be representative of the best reasons offered by those opposed to the policy. Although other reasons could be given, most are either blatantly and purely religious or slight deviations from one of the four lines of thought listed above.

Once the four arguments against homosexual marriage have been shown to fail, it is possible to show that preventing the policy can amount to an unconstitutional government endorsement of religion. But this is by no means a foregone conclusion. Although I do not think it is possible to show that rejecting gay marriage is *necessarily* unduly religious in nature, I do think an excellent case can be made to suggest that that is exactly what is happening in contemporary American society. The last section will attempt to do exactly that, by taking the Lemon test, applying it to the situation after the four primary arguments are rejected and exploring what conclusions we can draw from it.

That, then, is the structure of the argument of the paper in a nutshell: a kind of *via negativa* in which we learn what is by first exploring what is not. With that in mind, it is now time to turn to the first line of debate: the new natural lawyers and their marital good.

III. The Marital Good Defense

The marital good defense is a formulation of John Finnis and several other new natural lawyers such as Patrick Lee, Robert George, Gerard Bradley, and so on. Finnis is the most well known of the group, and since his claims and formulations are more or less identical with the others', I will be dealing specifically with his work in this section. The section itself will proceed in two parts. The first and shorter section will attempt to lay out the argument in a concise and clear manner. In the second, I will go into the numerous problems with and arguments against the marital good argument.

The Argument

One of the central assertions of Finnis and the new natural lawyers is that there are certain natural basic goods, and that these basic goods are worth pursuing for intrinsic reasons. One of these basic goods they call the marital good, and from this basic marital good they derive an argument against not just homosexual marriage, but homosexuality in general. I believe the basic structure of their argument from the marital good to the conclusion that homosexuality is immoral can be laid out in six steps as follows:

1. There exists a marital good that is discernible in heterosexual marriage.
2. This marital good is a good because it is the simultaneous realization of the twofold goods of procreation (and the long term responsibility and mutual support that proper child rearing entails) and friendship.

3. The marital good is realized principally in the marital act, genital sexual intercourse between spouses, that "enables them to actualize and experience… *their marriage itself*, as a single reality with two blessings."[2]
4. Sex acts that do not realize the marital good can achieve no more than individual gratification, which is unhealthy for the individual, damaging to society, and therefore immoral.
5. Because homosexual sex cannot realize the twin goals of friendship and procreation, it cannot be marital.
6. Because it cannot be marital, homosexual sex (actually, anything other than noncontracepted vaginal intercourse between spouses) must be immoral.

I think that list encapsulates the argument as concisely as possible. The idea seems to be that the purpose of marriage is twofold: both friendship and responsibility and mutual support through childrearing. This purpose is realized principally in marital sexual acts, in which spouses come together in the spirit of love, friendship, and companionship, and are also open to the possibility of children and the responsibilities that would entail. This marital act is the ideal sexual act; any non-marital intercourse can realize at best only one of the two goals. Non-marital intercourse could be merely for procreation, in which case the mutual love and friendship are lacking and sex becomes a merely mechanical thing; it could be for emotional togetherness and friendship, in which case the willingness for long-term commitment (shown through an openness to procreation) seems to be lacking; or it could be merely for personal gratification, in

[2] Finnis, John. "Law, Morality, and 'Sexual Orientation.'" In *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality*, John Corvino, ed. p. 34.

which case the humans involved are acting as little more than animals. This argument seems to draw some of its' plausibility from most people's intuitive sense that sex can or should be something important and uplifting between two people, and that not every sex act is a good one. But what would strike many people as an initial plausibility does not mean that the argument ultimately holds up, which brings us neatly to the second section and some criticisms of this theory.

The Response

There are many points where a critic might immediately criticize the martial good argument. You could reject the idea that procreation is an intrinsic good; you could point out that the marital good doesn't seem to have anything to do with *legal* marriage; you could suggest that the marital good might be realized in other ways than intercourse, such as, perhaps, taking care of a sick partner, which would seem to realize both friendship/companionship (talking with the spouse while ill) and mutual support and responsibility (caregiving for an ill partner, with the knowledge that he or she would do the same were the positions reversed); and you could reject the idea that any sex act that is not marital *must* be merely for personal gratification. But it is always best to show that an argument fails on its own grounds, and I will try to show that first, in the sterile partners objection. I will then proceed briefly to what I think are two other weighty objections, the false dilemma objection and the public/private objection.

The sterile partners problem is the first, and most obvious, objection to the marital good argument, and most critics do not fail to mention it.[3] The problem, in a nutshell, is this. In order to exclude homosexuals from marriage, Finnis needs to find something in that relationship that heterosexual unions intrinsically lack. The most obvious and immediate difference to come to mind is that homosexuals cannot, unaided, have children. If marriage is, at least in part, about procreation (and not merely children, because homosexuals could adopt), then homosexuals shouldn't be allowed to be married.[4] But here's the rub: not all heterosexual couples can have children. It would seem that, if procreation is really intrinsic to true marriage, then sterile heterosexual partners shouldn't be allowed to get married either. Postmenopausal women are unacceptable as marriage partners, as well as impotent men; and there are questions as to whether a husband and wife would be morally allowed to have sex while the woman is pregnant (she can't, after all, get *more* pregnant). It would seem that, in their haste to exclude homosexual marriage, they cast the net too wide and threw out more than they intended.

Finnis has a reply, of course. He claims the importance is not whether or not an individual heterosexual couple *can* procreate, it is whether or not they are open to the possibility and whether or not their act is "of the reproductive kind," that is, they have the right genitals to do the deed (if the genitals worked correctly, at any rate). Homosexual unions, by contrast, have "nothing to do with their having children by each other… so

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[3] See, for example, John Corvino's "Homosexuality and the PIB Argument." *Ethics* 115 (April 2005), pp. 501-534 and "Why Shouldn't Tommy and Jim Have Sex?" *Same Sex*, pp. 3-16; Andrew Koppelman, "Homosexual Conduct," *Same Sex*, pp. 44-57; and Jonathan Rauch, "Who Needs Marriage?" *Same Sex*, pp. 304-316.

[4] Finnis, of course, thinks homosexuals shouldn't have sexual relationships at all. But I will keep referring to gay marriage, as it is the biggest point of contact of private relationships with social control.

their sexual acts together cannot do what they may hope and imagine." Unlike heterosexual sex, even where the partners are sterile, homosexual sex acts "can *do* no more than provide each partner with an individual gratification."[5] First of all, I doubt that two gay men having sex 'hope and imagine' their union will result in children. But I can believe that they 'hope and imagine' that it will achieve something else, something different than mere individual gratification- among other things, greater intimacy and a deeper bond with their partner. This point will be addressed shortly, when talking about false dichotomy.

Back to the argument around reproduction: I think, with the reasoning described above, Finnis can claim to extend his marital good to sterile couples who don't *know* that they're sterile. But for couples who are aware of their inability to procreate, unless they are actively praying for a miracle, I cannot imagine that they 'hope and imagine' their union will result in children. Those acts don't seem to be of the reproductive kind any more than two lesbians or two gay men, or a heterosexual couple using contraceptives. True, homosexuals don't have the right equipment for procreation (although, they could adopt or, for lesbians, use artificial insemination), and heterosexuals using contraceptives actively work against it. But the outcome and mindset would seem to be no different than heterosexual couples who know they are incapable of having children: they know they won't have children, don't expect children, and still have sex anyway. On the other hand, it is not entirely clear why the ability to procreate is something to be morally concerned about. If the morally relevant component is the mutual responsibility and support the spouses would have to exhibit to best raise the children they had, then it might be possible to realize that in other ways as well (such as the caregiving I mentioned

[5] Finnis, p. 34. Emphasis in original.

earlier). It would seem that, absent a different explanation, if we allow knowingly-sterile heterosexuals to marry, we still don't have a good reason to disallow homosexuals from marrying.

Moving on to the false dilemma objection: Finnis claims that either a sex act is marital, or it's immoral. He thinks that the only way to coherently call many sex acts immoral is to call *all* non-marital acts immoral. He thinks that non-marital sex acts can "do no more than provide each partner with an individual gratification,"[6] and that without embracing the marital good there can be no coherent argument against adultery, promiscuity, bestiality, and so on.[7]

John Corvino thinks, and I have a tendency to agree, that this seems to result from "a bad phenomenology of sexual desire."[8] It just seems incorrect that someone must 'realize the twin goods of friendship and procreation' to avoid acting from motivations of mere gratification. It seems empirically verifiable that there are people who engage in deep, loving relationships, whose sex acts are not just about personal pleasure, but also bonding and sharing something deep and meaningful with a particular other individual. If Finnis is correct in his dichotomy, he must make a case why there are so many people who don't realize the marital good, or even aim for it (homosexuals, heterosexuals using contraception) who bother to try finding a stable partner, rather than who- or whatever happens to be willing and walking by.[9]

In the absence of that response it would seem we have to conclude that sexual relationships *can* achieve bonds of friendship, companionship, and support deeper and

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[6] Finnis, p. 35.
[7] This is actually a form of the PIB defense, which I examine later. I will treat the matter briefly in this section, however.
[8] Corvino, John. "Homosexuality and the PIB Argument." *Ethics* 115 (April 2005), p. 521.
[9] Corvino, "Homosexuality and the PIB Argument," p. 521.

more fulfilling than any platonic friendship, even if the individuals involved are not actively looking to have children. I suppose this could be wrong, but it does not seem terribly likely that so many people (the majority of the sexually active public) would be having illusory experiences or, in other terms, afflicted with a sexual false consciousness.

Similarly, the claim that homosexuals do not have a case against adultery is unsound. Marriage is a commitment of mutual trust and support, and generally that promise is between two people and also includes an agreement to sexual exclusivity. Engaging in adultery breaks that trust and harms the well-being of the non-adulterer; that's why it's immoral.[10] Other sexual 'immoralities' can be treated as well; for example, arguments against polygamy, incest, and bestiality will be treated below, in section VI.

So it seems there is a false dichotomy in Finnis' marital good. There's no reason to suspect that sexual morality is an 'either marital or immoral' thing. There are a wide range of sexual options (including homosexuality, for some people) that seem compatible with the full human flourishing of the individuals involved, options that do not involve mere egoistic hedonism. It is because of these additional options that nontraditionalists have access to arguments against practices such as adultery. And if there are a wide range of morally-acceptable sexual options available to most human beings (including, it would seem, homosexuality), then it would seem that government (and society) have little reason to legislate against them. But there is another thing I want to mention here.

Personally, I think it is unreasonable to insist, in an age when individuals *can* choose whether or not to have children, that they must be willing to answer that question in the affirmative or forego sex to be moral human beings. I see nothing wrong with a

[10] I talk about the more difficult case of 'open marriages,' or polyamory more generally, in section VI.

middle-aged man, married with children, getting a vasectomy because he and his wife do not have the time, money, or energy to raise new children properly. I don't think that someone who chooses not to have children because he (or she) thinks he (or she) might be a bad parent should be required to live life as a monk to avoid being sexually immoral. And I think it is implausible to claim that merely being *willing* to masturbate once damages any children one *might* have in the future. Of course, it could be argued that Finnis does not need to say masturbation harms children, he could just say that masturbation is wrong because it cannot produce children. But then we are left with the 'sterile partners' objection presented earlier, which seems to be a strong strike against his position.

Certainly, forcing a child to watch an adult masturbate would be harmful. But this is not (or not just) what he is talking about: sexual immorality (which includes masturbation and contracepted heterosexual sex) "runs contrary to…the good of procreation and of the children whose education etc. so depends on the context of a *good* marriage… Indeed, all sexual immorality…is contrary to love-of-neighbor, i.e., of children."[11]

This conclusion is, in a sense, heartening: it relieves critics of the need to construct a *reductio* argument against it. By excluding masturbation and contraception (is natural family planning acceptable?) from the range of acts that might *ever* be considered morally acceptable, Finnis has successfully ensured that the overwhelming majority of human beings will *never* be able to realize his good in any non-illusory way. Rather than raise up sex as something beautiful and wonderful that should be valued, views like Finnis' have had a tendency to arise from social contexts where sex is seen as

[11] Finnis, p. 39. Emphasis in original.

a fundamentally dirty, sinful thing, and any kind of expression of human sexuality is immoral.[12] That is something that I do not think most Americans would want to return to, regardless of how disdainfully they might look on the current state of 'sexual immorality' in this country. In any case, it does not seem to be a sound basis for formulating public policy.

This brings me to the third and final objection to Finnis' work. In his paper "Law, Morality, and 'Sexual Orientation,'" he begins by drawing a sharp line between the public and private realms: "Supervision of truly private adult consensual conduct is now (and rightly) considered to be outside the state's normally proper role…. But supervision of the moral-cultural-educational environment is maintained as a very important part of the state's justification for claiming legitimately the loyalty of its decent citizens."[13] He goes on to note that from society's point of view, it isn't private homosexual acts that matter, but rather "*public* activities intended specifically to promote, procure and facilitate homosexual *conduct*."[14] So it is socially permissible to be gay, as long as the public doesn't actually know about it. The problem, socially, is when you start letting other people know you're gay, to try and find someone to have those private and permissible (though still immoral) sex acts. Finnis seems to have in mind here something more substantial than merely going to a bar to pick someone up, but rather things like national organizations of homosexuals designed to spread awareness and tolerance. To allow those "would work significant discrimination and injustice against (and would

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[12] I'm thinking of fundamentalist or puritanical Christanity and fundamentalist Islam as two good examples.
[13] Finnis, p. 32. As an aside, one wonders whether non-decent citizens legitimately owe loyalty to the state. Of course, as an anarchist, I doubt *anyone* does, but that is neither here nor there.
[14] Finnis, p. 32. Emphasis in original.

indeed damage) families, associations and institutions"[15] dedicated to the true marital good.

This is to say that gay marriage (in fact, any and all public homosexual activity) can and should be prohibited by government because it harms families. It's not immediately clear how he thinks it accomplishes that, though. Certainly, there is a chance that public acceptance of homosexual relationships- essentially redefining the marital good to merely involve the sole good of friendship- would encourage other, innocent heterosexuals to revise their understanding of the marital good as well. The idea that sexual mores might widen across society is a not unreasonable claim. The problem is that there is good reason to suspect that not all non-marital sex acts are actually harmful to either the individual *or* the public.

But Finnis' claim is stronger: "Any willingness to…engage in non-marital sex radically undermines my marriage itself."[16] This could be meant in two ways (the text is unclear): either it is a willingness on his part to engage in non-marital sex, which would undermine *his* marriage. But it is possible that not everyone who is willing to perform non-marital acts has their marriage undermined. Or it could mean that someone else's willingness undermines Finnis' marriage by cheapening the value and intelligibility of marriage as an institution, which seems unlikely at best. Either way, the conclusions do not show what he intends. Society might not regard the marital good as highly as it 'should,' but the marital good is not about society's input. It's not the three-in-one flesh. It is about the commitment and friendship of two people, between them. Does the support of society help them fulfill that bond? Yes, it does. But widening the idea of

[15] Finnis, p. 33.
[16] Finnis, p. 39.

what is sexually acceptable does not entail hostility to views that retain a narrow view. In the world of homosexual marriage, Finnis' good human beings can still attain the marital good. They're just not the only ones who can call themselves 'married.'

I simply fail to see how two men filing joint tax returns have any effect on *Finnis'* marriage. And I certainly don't see how it would have a *greater* effect than those same two men living in the same relationship (privately), but without the legal title of 'marriage' and the basket of rights that comes with it. It is true that legal recognition matters for the couple involved in the marriage; lack of legal recognition can stress long-term relationships and lead to their dissolution. But Finnis draws a clear distinction between private homosexual relationships, which he thinks should not be criminalized by the state, and homosexual marriage, which he believes should not be recognized. I would think that more 'harm' to the marital good would be done by the permissibility of homosexual relationships in general, not by the ability to obtain certain legal rights and responsibilities. If anything, it is *more* prudent to *encourage* homosexual marriage: not allowing it in any form, while permitting homosexual sex, could be said to send the message to society that fleeting sexual encounters are better than long-term committed relationships.

Perhaps I am misinterpreting Finnis' argument; the bulk of his paper is actually about why homosexual activity is immoral for the individuals involved, not harmful to actual, existing marriages and the state. The fact is, though, that knowledge of some homosexual activity, no matter how closeted the individuals involved might be, will always trickle out to the public. The private lives of homosexuals (or heterosexuals, for that matter) cannot be completely locked away from public sight. I think Finnis'

argument would be more consistent if he argued for what he seems to think, although doesn't state: private homosexual activity should be the concern of government also. But if he goes that far, he would have to admit government regulation into private heterosexual relationships as well- making sure people aren't swingers, using condoms, or masturbating. Without that, his argument seems to call for a kind of schizophrenic public policy.

I've looked at what I think are three main objections to the idea of the marital good. I think that the argument fails on its own grounds, but perhaps more importantly, involves assumptions about human life and sexuality that most people outside of some very specific, limited comprehensive doctrines are not willing to accept.[17] Time now to move on to the moral tradition defense.

IV. The Moral Tradition Defense

The moral tradition defense is less elaborate, but still easily addressed. There are two forms that it can take: the first says that there are moral traditions in this country, that those traditions exist for a reason, and that it can be socially disastrous to tinker with those traditions without an overwhelmingly good reason. When voiced in the public sphere, it is almost always accompanied by some form of the PIB (pedophilia/incest/bestiality, or slippery slope, defense) defense. The second form is more legalistic and says that, constitutionally, the desire to maintain traditions just because they are traditions is a valid secular purpose. But with regards to the second

[17] I'm thinking extremely conservative Christians here, but it is by no means limited to them (many Muslims and some Jews would also fit, for example).

form, it does not seem that specifically *religious* traditions could be legitimately enforced by the government upon the public at large. We must determine if the tradition in question is problematically religious, and to do this we have to look at the reasons justifying the tradition and possibly even the likely effects of changing it (a process that is largely identical to the elaboration and treatment of the first form described above). Elements of both forms of the argument can be seen in Scalia's dissent in *Lawrence v. Texas*:

> "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation….State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of [*Bowers v. Hardwick's*] validation of laws based on moral choices. Every single one of these laws is called into question today….What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails."[18]

I am not personally aware of any laws in any state that prohibit masturbating in private, but Scalia's point is clear enough: as in the first form of the argument described above, when you tamper with tradition, society (the current social order) gets hurt. I think the argument is separable into two distinct parts: first, that tradition is something that we can and should respect. Second, not respecting it in a certain limited way (allowing homosexual marriage) will lead to disastrous consequences (total sexual anarchy). The

[18] Scalia's dissent, *Lawrence v. Texas*, 539 U.S. 558 (2003).

second part I treat in section VI, the PIB Defense, below. What I am concerned with in this section is the claim that tradition, specifically, the tradition in the United States that homosexuality is a bad thing, should be respected.

It is tempting to brush the argument off as a fallacious appeal to tradition. If traditions are worthwhile, we should be able to point to some external reason justifying them. The moral tradition defense doesn't attempt to justify its judgments of sexual immorality, it just says that they are immoral because tradition says so. To say, as the PIB defense does, that the moral tradition is justified because it prevents the sexual anarchy that would reign in its absence, is question-begging; sexual anarchy has to be justified as immoral on other external grounds as well, even if all sides in the debate agree that adult incest, bestiality, and adultery (at least) are morally problematic. The real question is why such acts should be considered immoral, something that is not addressed by merely assuming that they are.

The moral tradition defense is not as easily dismissed as one might think at first glance, however. As Jonathan Rauch notes, there is a kind of Burkean line of reasoning one can credit to it:

> "[H]uman societies evolve rich and complicated webs of nonlegal rules in the forms of customs, traditions and institutions. Like prices, the customs generated by societies may often seem irrational or arbitrary. But the very fact that they are the customs that have evolved implies that there is a kind of practical logic embedded in them that may not be apparent from even a sophisticated analysis."[19]

[19] Rauch, Jonathan. "Who Needs Marriage?" in *Same Sex*, p. 306.

The argument is excellent for traditionalists because it seems to remove the necessity of justifying traditions. No matter how rigorous a critical analysis one might put traditions through, you might not find the practical reasons it rests on. So in fact, traditional moral prohibitions don't need to justify themselves on external grounds. For traditionalists, the fact that the traditional prohibitions exist *is* justification (this is the essence of the second form of the moral tradition defense).

Although the point increases the strength of the moral tradition defense, it isn't by much. The question that ultimately must be addressed is that is whether or not supporting tradition because it is tradition is a valid secular purpose, and whether or not the tradition against homosexuality is a secular tradition. Extreme forms of the argument from tradition make tampering with the moral framework of society undesirable in *any* case for fear of the social disruption that might result. And as Rauch points out, slavery was widely accepted as moral in the United States for hundreds of years before the end of the Civil War.[20] It is extremely difficult to say that ending slavery in that case would have been the morally (or legally) incorrect thing to do. But in admitting that, you must also admit that contemporary social decisions must be made with respect to some kind of externally existing moral framework, and thus, traditions must be justified by more than the mere fact that they are a tradition. In that way, supporting traditions through government action can only be seen to be a valid secular purpose if the tradition is justifiable on external secular grounds.

In the more mild form, this argument merely says that you need strong reasons before attempting to monkey with moral traditions. But that is not a problem for the supporter of gay marriage: "if there is any social policy today that has a fair claim to

[20] Rauch, p. 307.

being scaldingly inhumane, it is the ban on gay marriage."[21] While traditionalists would vehemently object to that statement, it is only on the grounds of social traditions that haven't yet been shown to be externally justified, weighed against the activists' claims of equal protection, justice, nondiscrimination, and liberty.

It is true that the last claim needs to be substantiated more fully, something that is beyond the scope of this paper. But it does seem to have an air of *prima facie* plausibility to it. Regarding the second form of the argument mentioned earlier- that supporting tradition is a constitutionally valid secular concern of the government- it seems that it does not work absent some kind of external secular justification, something that seems to be lacking entirely in the case of homosexual relationships. Enforcing traditions with religious justifications, what is left after removing secular arguments as flawed, can hardly be a valid *secular* concern. In any case, resorting to tradition for its own sake simply does not work as a substantial argument against homosexual marriage.

V. The Defense From Definition

The defense from definition is probably the most simplistic and most easily countered of the four. The position runs as follows: marriage is defined as being between a man and a woman. Therefore, homosexuals can't get married. To argue otherwise is ridiculous, because it is simply not linguistically possible. If you expand the definition of marriage, it distorts the meaning of the term so that it's not really pointing at marriage anymore.

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[21] Rauch, p. 307.

To be fair, I think that this argument has some merit in judicial considerations. If a term is defined in a certain way, that's what the law is. If the role of a judge is to interpret and not legislate, they are typically bound by these definitions. Courts have used that reasoning before to deny marital status to same sex relationships: "It appears to us that appellants are prevented from marrying… by their own incapability of entering into a marriage as that term is defined."[22] This would seem to be a strike against my argument; I am, after all, arguing precisely that judges *do* need to change the term. But something similar happened when the antimiscegenation laws were overturned- marriage prior to that could have been defined as "between a man and woman of the same race," and afterwards the definition had shed the unnecessary "of the same race." The short of it is that, with regard to constitutional interpretation, if judges have a compelling reason to modify the legal definition of marriage, and no reason to refrain from doing so, the mere fact that the definition is a certain way should not prevent them from ruling in favor of change (at the very least, recognition of domestic partnerships).

However weighty the argument may be from the view of judicial interpretation, it stacks up rather poorly as an argument to legislators and the public against policy change. I will explore this point further and go briefly into the world of policy to show more precisely why it is not a good secular reason under the Lemon test. Take the word pregnancy for a moment. The definition of that word cannot be widened to include men and still retain a semblance of its original meaning, because men are physically incapable of being pregnant, period. I think this example points at what traditionalists mean by using this argument, but it doesn't really work- mainly because it is not physically

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[22] *Jones v. Hallahan*, ruling of the Court of Appeals of Kentucky, Nov. 1973. Excerpt found in: Andrew Sullivan, ed. *Same-Sex Marriage: Pro and Con* (Vintage Books: New York, 1997), p.95.

impossible for homosexual relationships to realize the goods of heterosexual marriage, the important qualities that make marriage *marriage*. The marital good aside, important aspects of a marriage such as companionship, loving support and care, and even child rearing (through adoption or the artificial insemination of lesbians) can all be achieved. So widening the legal definition of the word 'marriage' would not seem to destroy the word, but rather, loosen it from unnecessary restrictions ('between a man and a woman') that don't have any apparent empirical bearing on the *essence* of marriage as a social and interpersonal institution.

Even if loosening the definition of marriage to include homosexual unions did destroy the meaning of the term, I fail to see why that is a bad thing. Legal definitions are not biological imperatives; if changing the legal definition of a term (by a legislator or, in some cases, a judge) would yield substantial benefits for negligible cost, I see no reason to refrain from doing so. That is, absent evidence that doing so would be harmful to people in some real way (and we don't appear to have gotten that evidence from the previous sections, nor will we from the PIB argument described in the next), there isn't a compelling reason to refrain from slightly modifying the definition of marriage to include homosexual unions.

Permit me a brief aside to mention that if this definitional stance is the last argument of traditionalists, marriage activists might be tempted to concede and accept domestic partnership laws that provide the same basket of rights as traditional marriage. But this compromise is a halfway house that only serves to make everyone equally unhappy. For homosexuals, it is a 'separate but equal' state that, however benignly, gives them a constant reminder that the society does not really respect or accept them.

Paradoxically, opponents would see the exact opposite- it is granting *too much* equality to a practice that, from their point of view, is intrinsically immoral and not worthy of public encouragement in any form. Add to that the fact that domestic partnerships would probably be seen as (and in fact actually be) a stepping stone to the title of full marriage, and it seems the only reason to adopt domestic partnerships at all is unnecessary linguistic stubbornness on the part of opponents.

There are arguments revolving around domestic partnerships vs. full marriage titles, but going into them more fully is beyond the scope of this thesis. The point of this section, to show the weakness in the definitional argument both in the judicial and public arenas, I think has been sufficiently shown and it is time to move on.

VI. The PIB Defense[23]

If we allow homosexual marriage, it follows that we must allow polygamy, incest, and bestiality (PIB) to run rampant through our streets. That is what opponents of gay marriage want us to think, anyway. Some traditionalists go farther and say that allowing gay marriage, by changing the family as the 'basic unit of society,' society itself will come to a chaotic, debauchery-filled halt. But this is just a step down the slope; usually, the collapse is because we can't prevent things like polygamy, incest, and bestiality anymore. The response to the more limited PIB argument is substantially identical to the wider, so I will only be talking about the former here. Despite my treating this argument last, I would venture to say that it is the most common of the four. It is rare to find an

[23] This section of the essay draws heavily from arguments set forth in John Corvino's "Homosexuality and the PIB Argument."

argument against gay unions that does not include to this line of thinking in some way. After all, even if something is intrinsically bad, it does not hurt to point at negative consequences when making your case to the public.

This defense is often quickly brushed off as an example of the slippery slope fallacy. It certainly seems as though it might be, especially when you consider that each major change in marriage over the years (allowing women to own property, permitting interracial marriage, etc.) has been accompanied by virtually the same doomsday predictions on the part of opponents. But as John Corvino notes, slippery slope arguments are not necessarily fallacious.[24] It is possible that there might be a logical connection between homosexuality and PIB. The supporter of gay marriage should show why that is not the case before moving on. The sheer prevalence of the argument in the public sphere suggests that it would be strategically wise to confront it anyway.

Corvino notes that nontraditionalists can tackle the problem in the following way: First, show that existing arguments against homosexuality not only do not work to prove the 'immorality' of homosexual relations, but that they are also insufficient to show the immorality of all PIB relations. Once that is done, give arguments that nontraditionalists could use against (at least some) PIB relations. The understanding is that any new arguments traditionalists could give would be usable by nontraditionalists as well. It is a response to Finnis' challenge that "those who propound a homosexual ideology have no principled moral case to offer against (prudent and moderate) promiscuity, indeed the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice

[24] Corvino, "Homosexuality and the PIB Argument," p. 503. A fuller development of the idea can be found in Eugene Volokh's "The Mechanisms of the Slippery Slope," *Harvard Law Review* 116 (2003), pp. 1077-1114.

(human or otherwise) one may opportunely find it."[25] Giving examples of possible nontraditionalist arguments is just proof that it is not necessary to choose between (for example) only uncontracepted vaginal intercourse between a husband and wife and complete sexual and legal anarchy.

Step one of the process has already been completed in the earlier sections, when treating the three previous arguments. None of them seem to work very well, and are certainly not slam dunks against homosexual marriage. I will now proceed to step two and give a few brief suggestions of arguments against PIB relationships might proceed.

Take incest, for example. Corvino takes an interesting position and claims that the marital good proponents actually would have to allow at least some incestuous relationships under their scheme. Namely, they would have to permit consensual, sterile, adult heterosexual incest (a consistent marital good proponent could argue that it is impermissible because sterile partners can't have children- but this just leads back to the familiar 'sterile partners' objection, which has results that most would be loathe to accept). Such incestuous acts, according to Corvino, "seem prima facie capable of achieving the biological complementarity and friendship constitutive of the martial good."[26] As distasteful as it might be, nothing in the formulation of the marital good itself seems to exclude that case (unless proponents were to revise it to exclude all sex between sterile partners- but this, again, has other unwanted consequences). So any reason to object to that case must come from somewhere other than the marital good- and if it is a reason unconnected to the marital good (and positions like the moral tradition

[25] Finnis, p. 42.
[26] Corvino, "Homosexuality and the PIB Argument," p. 525.

defense described earlier), then those who advocate homosexual marriage can probably use them as well.

That is just one example of how the process might continue. The point is that traditionalists need new reasons to back up their rejection of PIB arguments- and that those arguments are ones that would probably be available to gay rights activists, since they really can't revolve around something like a marital good or teleology of the body (I give brief suggestions of what these arguments might look like further below).

On the other hand, conservatives might say that they don't need to resort to these philosophical arguments, but merely have to look at the real-world results of the increasing liberalization of sexuality: high rates of teen pregnancy and illegitimate children, epidemics of sexually transmitted diseases, unbelievably high divorce rates, and so on prove that we *are* on a slippery slope (they might say). But these claims do not necessarily speak against gay marriage. Take divorce: nothing about being aghast at the huge number of divorces in this country would seem to require one to be equally aghast at the prospect of gay marriages. Insofar as high divorce rates are a bad thing, it seems more appropriate to make divorces harder to get or educate people more effectively so that they have the knowledge of what they're getting into and have the responsibility and maturity to deal with any problems that might arise.[27]

Sexually transmitted disease is a problem, at least in the case of incurable, potentially life-threatening diseases. But again, being against STDs would not seem to require one to be against gay marriage as well. It is not incoherent to promote responsible sexual behaviors (such as abstinence or serial monogamy combined with always using protection and getting tested for STDs regularly) and accept homosexual

[27] Jonathan Rauch suggests something along these lines, for example. Rauch, pp. 315-16.

marriage. It would be a change in the current social fabric, but one does not have to accept *everything* to accept responsible homosexual relationships.

Teen pregnancy and promiscuity can be treated in a similar light. The problem does not seem to be the widening of what sexual behaviors are morally permissible, but rather the decrease in emphasis on personal responsibility for one's actions, both in deciding what to do and in dealing with the consequences. While traditional sexual ethics might remedy this to some degree, it does not need to maintain a fierce opposition to homosexual acts to do so.

I have to say that in the end, however, I think there is some truth in the PIB defense. Traditionalists are right in that if they can't use their traditional justifications to exclude polygamy, incest, and bestiality, then a widening of what is considered sexually permissible (and legally acceptable) will almost certainly happen. I can see the possibility of marital benefits being extended to polyamorous relationships, with the Gordian knot of property relations that would ensue. I don't think it's terribly likely, given how they have a history of being bad for women (or, the weaker party in the case of homosexual polyamorous relationships). And I highly doubt that even if it were to become legal, it would become anything near widespread. Free love was tried before, and it doesn't seem to work well for most people. But that does not mean the door will simply open wide to legal recognition of every possible relationship under the sun. Human-animal civil unions, for instance, seem fairly unlikely. I can't see anyone being able to marry one of their farm animals, since the basic ability to consent to the union would seem to be missing entirely. Incest, even the 'hard' case of nonfertile consensual adult incest, will almost certainly remain a cultural taboo and entirely illegal, if for no

other reason than to make it less likely that adults will be tempted to abuse their young relations. This is a brief listing of how the PIB slope might be halted by gay rights advocates, albeit a bit further down the slope than many might prefer. Since a detailed rejection of polygamy, incest, and bestiality is really beyond the scope of this thesis, I see no need to elaborate the arguments any farther.

The admission that there might be a kernel of truth in the PIB argument, however, should not be seen as a weakness in my argument. We should only be upset at the widening of social mores and legal recognition of sexual relations if there is something wrong or dangerous about them to begin with, something that the traditionalists haven't fully proven. Even if they were to do so, it probably would not be on the basis of reasons that also exclude all homosexual relationships. Insofar as it does not work as an argument against homosexuality, the PIB defense, the last and most common of the four standard arguments against gay marriage, fails.

VII. The Unconstitutionality Revealed

So, thus far it seems as though the standard arguments against homosexual marriage do not hold up (or, at the very least, have serious issues that must be addressed). As well-developed as they might be, they ultimately collapse under rigorous scrutiny. This alone is excellent for the gay rights activist. But for my purposes, to show that an unconstitutional endorsement of religion is occurring, I have to go farther. It is not enough for me to show that the arguments are uniformly poor in character; I have to show that they, in actuality, also have a distinct and unavoidably religious element to them.

I have shown how the major arguments against gay marriage can be successfully rebutted. Thus, it is not philosophically justifiable to oppose gay marriage because of them; anyone who does so is drawing unsupported conclusions from flawed arguments. But this is not to say that opposition to gay marriage is *always* based upon a variation of one or more of the arguments listed previously. In fact, in the absence of those four reasons, it is still possible to field a logically consistent opposition to the policy in one of three ways: on religious grounds ("Homosexuality and gay marriage are wrong because [God/Allah/Confucius/etc.] tells us it is wrong"), on personal distaste ("I oppose gay marriage because the very idea makes me sick"), or on *nothing at all* (that is, *a priori* assumptions such as "Homosexuality and gay marriage are simply wrong, period").[28] The latter two are not distinctly religious in tone, although I suspect any who would give voice to them would have unspoken religious convictions lurking somewhere in the background.

This rejection of most secular arguments would seem to be enough to field a strong equal protection argument for allowing gay marriage.[29] This argument has been made well and often in the scholarly literature and in actual court cases, and it is beyond

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[28] Of course, there is no requirement in America that voters form their opinions and vote only on the basis of the soundest philosophical arguments available. It is perfectly legal to vote on policies for completely illogical, inconsistent reasons. But this would seem to present no substantial difference to the traditionalists' founding their beliefs on personal distaste or nothing at all- opponents of gay marriage, if forced to admit that their arguments were flawed, would probably say that homosexuality is 'just wrong' rather than modify their beliefs to fit the best arguments. Regardless, whether traditionalists make a priori determinations, base conclusions on flawed premises, or just feel ill at the thought of same-sex relationships, it does not seem to give their side much ammunition when deciding which of the two positions has greater constitutional merit.

Moreover, it is possible that there exists, somewhere out there in the ether, some phenomenal argument that proves, beyond a shadow of a doubt, that homosexuality is wrong. But if no one has yet given voice to it, it seems unlikely that anyone is actually using it in their reasoning; I see no need to treat the possibility any further.

[29] Similar, though by no means identical, arguments were made in Baehr v. Lewin (1993 Hawaii), Baker v. Vermont (1999 Vermont), and Goodridge v. Department of Public Health (2004 Massachusetts), which all decided in favor of homosexuals.

the scope of this thesis to go into it here. The basic point is that, absent compelling reasons to the contrary, not allowing homosexuals to marry is a violation of the equal protection clause. Since there don't seem to be any compelling *secular* reasons, prohibiting gay marriage would be unconstitutional. But that does not get us much closer to the different claim that it is also an unconstitutional endorsement of religion.

I admitted in my introduction that I do not think that I can show that prohibiting gay marriage is *necessarily* an unconstitutional endorsement of religion. Now, I can explain why that is the case: although most of the substantial arguments against gay marriage do not work, there still exist non-religious bases that traditionalists can turn to. It is entirely possible that traditionalists, in the unlikely scenario where they are forced to admit the weaknesses in their arguments, would turn to precisely those reasons to continue their crusade. There is no *necessary* connection to religion here. There can't be a violation of the establishment clause if no religion is being established, after all.

But to say that I cannot make a case for necessary connection to religion is not to say that no case can be made to suggest that that is what is in all probability actually happening. That is not the end of the story, for once that is accomplished I still need to show that the connection to religion is of an unconstitutional nature. With that in mind, the rest of this section will proceed in two parts: first, describing the evidence suggesting religious tones to the traditionalist position, and second, explaining how this connection can be seen as constitutionally problematic.

The Connection to Religion

The assertion of a religious connection is a point both easy to believe and difficult to prove. The question of whether religious justifications actually lie behind most traditionalists' opposition to gay marriage is, of course, primarily an empirical one. Delving into the evidence fully and completely is beyond the scope of what I can accomplish here. Nevertheless, I think I can offer a brief list of evidence that supports my position; that, combined with what I believe to be common perception of the public debate, should be enough to grant it a high degree of plausibility.

There is no need to go outside of the scholarly literature to find a religious connection. John Finnis, in an endnote regarding his point that persons choosing to engage in non-marital acts "dis-integrates each of them precisely as acting persons," helpfully informs us that the full argument is developed in Germain Grisez's The Way of the Lord Jesus, vol. 2, Living a Christian Life.[30] I suppose it is possible that a fully secular argument could be successfully extracted from that, but I have my doubts. Other authors are not shy in invoking Scripture in their arguments, although to their credit they are usually trying to prove a theological point.

Although politicians have become more careful about invoking specifically religious reasoning in past years, religion is certainly not absent from the floor of Congress any more than it is from the academy. Speaking in the October 9, 1996 Senate debate on the Defense of Marriage Act, Senator Byrd had these pearls of wisdom to distribute: "Indeed, thousands of years of Judeo-Christian teachings leave absolutely no

[30] Finnis, John. "Law, Morality, and 'Sexual Orientation.'" In *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality*, John Corvino, ed. Pp. 31-43. The quote appears on page 35; the endnote is 7.

doubt as to the sanctity, purpose, and reason for the union of man and woman. One has only to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage…. Woe betide that society, Mr. President, that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning."[31]

Religious appeals need not be fire and brimstone, however, as seen in President Bush's 2004 State of the Union Address: "Our nation must defend the sanctity of marriage. The outcome of the debate is important- and so is the way in which we conduct it. The same moral tradition that defines marriage teaches that each individual has dignity and value in God's sight."[32]

Outside of elected officials we have groups such as Focus on the Family and the Family Research Council, whose members are seen frequently in the public debate speaking in defense of traditional marriage and are not shy about their religious convictions. Focus on the Family, for instance, believes "that the institution of marriage was intended by God to be a permanent, lifelong relationship between a man and a woman,"[33] and its head, Dr. James Dobson, has enough political clout that, shortly before President Bush announced his nomination of Harriet Miers to the Supreme Court, he received a private call from Karl Rove assuring him of her judicial philosophy.[34] Dr. Dobson also hosts a nationally syndicated radio show that airs on over 3,000 stations, reaching an estimated 26 million Americans per week.[35] The Family Research Council,

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[31] Senator Robert Byrd, Oct. 9, 1996, speaking in the Senate debate on the Defense of Marriage Act. Found in: Sullivan, *Same-Sex Marriage: Pro and Con*, pp. 234-5.
[32] President George W. Bush, Jan. 20, 2004 State of the Union Address. Transcript at: http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html
[33] http://www.family.org/welcome/aboutfof/a0000078.cfm
[34] http://www.cnn.com/2005/POLITICS/10/12/miers.religion/index.html
[35] Ibid.

part of a coalition of conservative groups that delivered on July 9, 2004 well over a million signatures on a petition in support of the Federal Marriage Amendment, lists among its core principles the belief that "God exists and is sovereign over all creation."[36]

These two groups, although not conclusive evidence on their own, are just examples of the trend of evangelical, conservative Christianity that has been growing and becoming increasingly politically active over the past few decades. It is undeniable that this movement has millions of Americans behind it; it is equally undeniable that the vast majority of these Americans oppose gay marriage, and do so for religious reasons. The question of importance is whether these people constitute a large enough group to give plausibility to my position.[37]

Let's look at a few back-of-the-matchbook calculations. Roughly 80% of Americans self-identify as Christians.[38] About 70% of them (56% of the population) can be safely categorized as evangelical[39]- a group that is always deeply committed to their religious beliefs, unafraid to admit it, and typically very socially conservative. The

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[36] http://www.frc.org/get.cfm?c=ABOUT_FRC

[37] Certainly, one does not need to be Christian to have religious grounds for opposition to homosexual unions. But other religious groups are, by comparison, so small a percentage of the overall population as to make no difference to my argument.

[38] Mayer, Egon, Barry A. Kosmin, and Ariela Keysar. *American Religious Identification Survey*, performed by the Graduate Center at CUNY (the US Census has not gathered information on religious trends since 1936). Full contents available at: http://www.gc.cuny.edu/faculty/research_briefs/aris/aris_index.htm

[39] Noll, Mark A. *American Evangelical Christianity: An Introduction* (Blackwell Publishers: Malden, Mass., 2001), pp. 30-33. The percentage is drawn from a 1996 survey; responders could be safely categorized as 'evangelical' if they agreed with at least three of the following four statements (p. 31 in the text):

1. Strongly agreed that "through the life, death and resurrection of Jesus, God provided a way for the forgiveness of my sins."
2. Strongly agreed that "the Bible is the inspired word of God," or agreed to whatever degree that "the Bible is God's word, and is to be taken literally, word for word."
3. Strongly agreed that "I have committed my life to Christ and consider myself to be a converted Christian."
4. Agreed or strongly agreed that "it is important to encourage non-Christians to become Christians."

lesson we can take is that there is a significantly large number of people who admit to being against homosexual marriage at least in part due to religious convictions.

I think it is clear that religious conviction plays a large part in the opposition to gay marriage. The question that has to be addressed now is whether or not that fact is constitutionally problematic. To answer that, I think it is best to go to the Lemon Test.

The Lemon Test

It is possible that the sheer number of evangelicals would make prohibiting homosexual marriage unconstitutional regardless of the status of the secular arguments in the debate. Even if all the arguments against gay marriage I covered earlier *did* work, it would remain the fact that most opponents to gay marriage base their reasoning at least in part on religious grounds. Those religious grounds could be enough to violate the establishment clause, as it seems that what the government would be doing is not promoting secular interests, but specific religious ones (broadly, this could be taken to be 'religions opposed to gay marriage'; more narrowly, it would mean conservative Christian movements). I think that this argument as it stands is fairly weak, however. It has two main strikes against it: first, the secular arguments, if correct, might give the government a compelling interest overriding the seemingly minor establishment of religion that would be occurring with a ban on gay marriage (the government is not prohibiting religions from accepting gay marriage theologically, for instance; merely prohibiting gay marriage would not seem to place an undue burden on those religions). Secondly, it can be very difficult to prove that the religious reasons are the primary ones.

If there are good secular arguments against gay marriage then traditionalists can, in a Rawlsian public reason fashion, point to secular reasons and say that although they do hold private religious convictions against gay marriage, those reasons do not enter into their *public* decision-making process. Their decision to have government prohibit gay marriage would be made on the basis of secular reasons, not religious ones. That way, even if most opponents do hold private religious convictions opposed to gay marriage, it would not seem to be a violation of the establishment clause because no one is using those reasons in their public decision-making.

The key to both of those points are the secular reasons I spent so much time arguing against. With them out of the way, it becomes much more plausible to say that an unconstitutional endorsement of religion is occurring. Conveniently, it also makes the situation fit nicely into the Lemon Test. The Lemon Test is a three-pronged examination to determine whether legislation is constitutionally sound with regards to the Establishment Clause of the First Amendment. It was first fully formulated in the 1971 decision of the Supreme Court in *Lemon v. Kurtzman*[40] and consists of three distinct requirements (or prongs):

1. The government's action must have a legitimate secular purpose.
2. The government's action must not have the primary effect of either advancing or inhibiting religion.
3. The government's action must not result in an "excessive entanglement" of the government and religion.

[40] 403 U.S. 602.

Legislation must pass all three prongs to be considered constitutional. Failing one fails the test. It is true that Lemon's status as valid law is a little uncertain at this point because of inconsistent application of the test to Establishment Clause cases since the 1980s and Scalia and Thomas' sustained criticisms. But it remains about as accepted standard for evaluating these types of cases as we are likely to get, and I see no reason not to resort to it here to further examine the idea that an unconstitutional endorsement of religion is occurring.

As for the prongs themselves, number three is clearly unproblematic. The decision to not permit homosexual marriage does not entangle the government with religion in any noticeable way. Slightly more difficult to pass is the second criterion. One could argue that the government is advancing those religions opposed to homosexual marriage over those who support (or at least have no theological objections to) it. But this really is not tenable, since the government refuses to accept traditionalists' stance that homosexuality is intrinsically immoral (at least, insofar as it cannot make homosexual behavior illegal). In any case, it could hardly be called a primary effect.

For my purposes the critical point in the test is the first prong, and the bulk of this essay has been spent trying to show how it fails to be met. By showing that the main secular arguments against homosexual marriage do not work, I was simultaneously showing that no legitimate secular purpose exists to support the policy. You don't need to legislate against gay marriage to stop the possibility of legalized PIB relationship; the "marital good" (if it even exists) is not harmed by two men filing joint tax returns; moral tradition does not need to be supported simply for its own sake; and so on. By contrast,

allowing homosexual marriage does have valid secular purposes, such as equal protection considerations.

One objection to this evaluation might be that the religious connection is far too broad, that is, it does not reference any one religion specifically. Opposition to gay marriage is something that unites people across the spectrum of religious traditions. But that does not change the fact that the policy favors the conservative Christians that make up the majority of the opposition in this country. In a similar case, the fact that some ultra-Orthodox Jews might favor the teaching of intelligent design (as a backdoor to creationism, just like the conservative Christians) doesn't mean the federal courts were incorrect in ruling teaching the "theory" to be an unconstitutional endorsement of religion.[41]

A second objection might be that if not allowing homosexual marriage violates the Establishment Clause, so does permitting it. After all, it would seem to be the government granting greater recognition to some peoples' religious beliefs over others' (some people do, in fact, believe gay unions to be theologically sound). But this has no more merit than a religious white supremacist claiming that antidiscrimination laws negatively favor his own religious beliefs- because, like antidiscrimination laws, homosexual marriage can claim to serve a legitimate secular purpose such as equal protection or protecting fundamental rights. Furthermore, making homosexual marriage legally permissible does not entail forcing everyone to think it is morally acceptable; Catholic priests and Baptist ministers could still refuse to perform them, and their

[41] While it is true that these rulings (ranging from court-mandated removal of stickers criticizing evolution on textbooks to declaring a specific school's decision to teach intelligent design unconstitutional) are controversial, it is equally true that they form a body of precedent that counts *against* the possibility of their being overturned and *for* the possibility of their being considered valid law into the foreseeable future; I see no problem in using them as an example here.

congregation can continue to ostracize any members who might be outed a bit too soon.[42] Allowing gay marriage does not remove freedom from its opponents, but rather grants homosexuals the freedom to live in a way and with a person that they find most personally fulfilling, with the backing of a basket of property rights that helps their union to endure in the face of adversity and makes it easier to secure the goods (friendship, loving companionship, mutual support and, yes, even a stable household within which to raise any children the spouses might choose to have) that all marriages claim to aim at.

VIII. Conclusion

In this thesis I have summarized in brief what I take to be the main arguments against homosexual marriage and shown them to be, if not outright unsupportable, at least philosophically unsound. I believe I have made a good case for showing that many individuals oppose gay marriage at least in part for religious reasons, and I think I have also shown how the policy fails the Lemon Test and violates the Establishment Clause.

It is true that activists have already accumulated a wide range of constitutional arguments in support of their position. Equal protection and fundamental right considerations are highly important, and I think they are key to realizing change. But the religious aspect of the opposition has been relatively unexplored to this point, and I think the possibility of an unconstitutional endorsement of religion would only add further weight to already impressive legal briefs. In short, opponents to gay marriage are left with two choices: either they are accepting bad secular arguments, and gay marriage should be allowed on equal protection grounds, or they are *really* using religious reasons,

[42] At least, ostracize them to the extent already allowed by current antidiscrimination laws.

in which case prohibiting gay marriage would be an unconstitutional endorsement of religion.

After the 2004 presidential election, in which Georgia voters overwhelmingly supported a "defense of marriage" amendment to the state constitution, a friend told me he was leaving for Canada because it was clear that "Americans don't want us [he and his partner] here." After reviewing the arguments, I have found absolutely no valid reason to continue to support the often crushing social condemnation that hounds homosexuals in most places across the nation. I believe that allowing gay marriage would go a long way to allowing these men and women to live in the way that they think best promotes their own well-being and flourishing, without simultaneously harming the self-interests and flourishing of others, and I have written this essay with the intent of providing more philosophical ammunition to those who are actively fighting for change. It is my hopes that they are successful, and enable more people to live and fully engage in a form of life that has been found so essential and uplifting by so many throughout human history.