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Amelia A. Miller

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LETTING GO OF A NATIONAL RELIGION: WHY THE STATE SHOULD RELINQUISH ALL CONTROL OVER MARRIAGE

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹

—Virginia Trial Court Judge

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home.²

—Antonin Scalia, Supreme Court Justice

I believe in the sanctity of marriage, I totally do. [But] I was in Vegas and it took over me.³

—Britney Spears, American Pop Star

I. INTRODUCTION

In the 1960s, the overwhelming prejudice against blacks, fueled by religious sentiments, formed the legal and social barriers that empowered state governments to enforce anti-miscegenation laws, denying blacks and whites the right to marry each other. Today, similar obstacles are in place, but they are targeted at a different group. Homosexual couples endure prejudice, largely based on religious animosity, which has prompted the federal government and most states to deny them the right to marry. Just as the courts

1. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting opinion of trial court judge).

2. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

3. Dwight G. Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL'Y 543, 543 (2004) (quoting Britney Spears' telephone interview with MTV's Total Request Live) (alteration in original).

stepped in to correct the injustice of anti-miscegenation laws despite public resistance and religious extremism woven into the law, so too must the courts step in, over the protests of traditional thinkers, to correct the injustice of religious laws that restrict marriage to a man and a woman.

In 1967, the Supreme Court decided *Loving v. Virginia*, which held Virginia's anti-miscegenation statutes to be unconstitutional.⁴ Not only did the Court find the statutes violated the Fourteenth Amendment's guarantee of equal protection, it also declared marriage to be a fundamental right.⁵ As such, the government has no authority to restrict an individual's ability to exercise his or her right to marry.⁶ In 2003, the Supreme Court decided *Lawrence v. Texas*, which held that gay couples have a right to be in an intimate relationship without state interference.⁷ In his scathing dissent, Justice Scalia admonished that *Lawrence* paved the way for gay marriage and the destruction of a traditional, moral institution.⁸

Because marriage is in fact a moral, i.e., religious, institution (*holy* matrimony) and not a mere contractual agreement, the state should not regulate it. *Loving* set the course for disestablishing marriage from the public sphere by way of the Fourteenth Amendment. The arguments set forth in *Loving* similarly apply to same-sex marriage issues. Additionally, an examination of the First Amendment's free exercise and establishment provisions, buttressed by *Loving*, will illustrate why the solution to the gay marriage debate lies in returning the institution of marriage to the religious entities from which it came.

Part II of this paper will provide background information on the movements to achieve state recognition of interracial marriage and same-sex marriage. Part III will analogize and distinguish the legal arguments set forth in *Loving* with the controversy surrounding the legality of gay marriage according to settled Fourteenth Amendment jurisprudence. Part IV will discuss the conflict between marriage and the religion clauses in the First Amendment, and why disestablishing marriage from all government control is an

4. *Loving*, 388 U.S. at 12.

5. *Id.*

6. *Id.*

7. *Lawrence*, 539 U.S. at 574.

8. *Id.* at 604-05 (Scalia, J., dissenting).

innovative, yet wholly logical solution to the ongoing debate.

II. THE BUILDING BLOCKS OF SOCIAL PROGRESS

A. *Loving and the Beginnings of Unregulated Marriage*

In June 1958, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in Washington, D.C.⁹ When they returned to their home in Virginia, they were arrested for violating Virginia's anti-miscegenation laws and received a sentence of one year in jail.¹⁰ They brought suit, and in 1967, the Supreme Court held Virginia's anti-miscegenation statutes unconstitutional on both equal protection and due process grounds.¹¹ In so finding, the Court identified marriage as a fundamental right, "essential to the orderly pursuit of happiness by free men."¹²

In *Simple Justice*,¹³ Richard Kluger presents a careful, detailed history of how Thurgood Marshall led the fight to desegregate public education, which resulted in the Supreme Court's 1954 decision in *Brown v. Board of Education*.¹⁴ Kluger illustrates how tempers flared and resistance ensued when the courts forced school districts to desegregate. Yet thirteen years later when the Court decided *Loving*, the case that legalized the "most detestable of all rites—the joining of a white and a Negro in holy matrimony,"¹⁵ there was "barely a murmur of objection in the land."¹⁶

This is not to suggest, however, that society welcomed inter-racial relationships. When school desegregation was in its prelim-

9. *Loving*, 388 U.S. at 2.

10. *See id.* at 3.

11. *Id.* at 12 (holding that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause"). The Court went on to say that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupported a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law." *Id.* (internal citations omitted).

12. *Id.*

13. RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

14. 347 U.S. 483 (1954).

15. KLUGER, *supra* note 13, at 751.

16. *Id.*

inary stages, intermarriage was an “unmentionable subject.”¹⁷ When the University of Maryland admitted its first black student, the Richmond *Times-Dispatch* emphatically warned that if a black student were admitted to the University of Virginia, it would be a giant step closer to miscegenation.¹⁸ In fact, Thurgood Marshall chose George McLaurin, a black, sixty-eight year old applicant to the University of Oklahoma doctoral program, as his test-case plaintiff “because he was sixty-eight years old and we didn’t think he was going to marry or intermarry.”¹⁹ Marshall believed that completely bypassing the issue of miscegenation was necessary to help overcome one of the many hurdles built by the segregationist Dixicrats.²⁰ At trial, attorneys for the state of Virginia argued against desegregating schools, fearful of a slippery slope leading to the repeal of anti-miscegenation statutes.²¹ Clearly, throughout the civil rights movement, the public sentiment regarding interracial relationships was contemptuous.

Nevertheless, since the decision in *Loving*, the number of interracial couples has increased significantly. “[T]he number of black-white couples jumped 150 percent in the 1970s.”²² According to the U.S. Census, in 1970, there were 181,000 black-white marriages and 310,000 interracial marriages of other racial groups.²³ Between 1970 and 1991, the number of black-white marriages more than tripled.²⁴ Between 1960 and 1998, the number of interracial

17. *Id.* at 98.

18. *See id.* at 195.

19. *Id.* at 266 (quoting Thurgood Marshall). *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), along with *Sweatt v. Painter*, 339 U.S. 629 (1950), were two preliminary “test” cases before *Brown* that were designed to lay the foundation for desegregating all public schools. *See* George Paul, *John Frank and the “Law Professors’ Brief”*, 35 ARIZ. ST. L.J. 241, 252–53 (2003).

20. *See* KLUGER, *supra* note 13, at 266.

21. *See id.* at 491.

22. Jeff Kunerth, *U.S. Laws, Social Taboos Unkind to Mixed Couples*, ORLANDO SENTINEL, Jan. 14, 1990, at A10.

23. Itabari Njeri, *Faith, Hope and Racial Disparity: As Multicultural Marriages Increase, Churches Confront a Call for Greater Sensitivity, Support*, L.A. TIMES, Aug. 20, 1989, pt. VI (View), at 1, available at 1989 WL 2259741.

24. *See* Isabel Wilkerson, *Black-White Marriages Rise, but Couples Still Face Scorn*, N.Y. TIMES, Dec. 2, 1991, at A1, available at 1991 WLNR 3051516.

couples increased tenfold, exceeding 1.6 million.²⁵

Sociologists suggest two reasons for the increase: first, interracial marriages became more accepted during the 1970s, and second, blacks advanced both socially and economically through the '70s and '80s.²⁶ In 2000, the racial composition of the country had evolved so much that the U.S. Census adopted a new system of racial classification to reflect the reality that a substantial portion of the population has a multi-racial background.²⁷

Despite the growing numbers, broad public acceptance of interracial marriages, especially black-white relationships, is still lacking. "It has not passed the 'no blink' test," according to Dr. Tom W. Smith, a researcher at the University of Chicago's National Opinion Research Center.²⁸ In fact, in a public opinion poll conducted in 1991, one in five whites believed interracial marriage should still be illegal, as compared to two in five whites asked in 1972.²⁹ In 1991, sixty-six percent of white Americans said they would oppose a close relative marrying a black person.³⁰ Some black-white couples have never told their parents they were married with children, even after decades of marriage.³¹ Blacks seem to be less concerned, however. Almost two-thirds surveyed neither favor nor oppose a relative marrying someone non-black.³²

A 1990 article in the *Orlando Sentinel* quotes a Georgia resident

25. Michael A. Fletcher, *Interracial Marriages Eroding Barriers*, WASH. POST, Dec. 28, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/national/daily/dec98/melt29.htm>.

26. Kunerth, *supra* note 22.

27. See U.S. Census Bureau, Glossary, http://factfinder.census.gov/home/en/epss/glossary_r.html (defining "race" for Census 2000) (last visited Apr. 16, 2005); Fletcher, *supra* note 25.

28. Wilkerson, *supra* note 24 (quoting Dr. Smith).

29. *Id.*

30. Frank Rich, *To Have and to Hold? Like It or Not, Culture Is More Accepting of Gays*, MILWAUKEE J. SENTINEL, Aug. 10, 2003, at 1J, available at 2003 WL 58648836.

31. See, e.g., Wilkerson, *supra* note 24. Wilkerson tells the story of Teresa Johnson, a white woman, married to a black man for seventeen years. The couple has two children, although Teresa never told her parents she was pregnant with her second child after their reaction to news of the first child. Teresa goes by her maiden name; her friends and family believe she is single. Teresa will not go to a family wedding or funeral, for fear of someone asking her about her personal life. *Id.*

32. See *id.*

who distributes flyers to spread his message that interracial couples are the “ultimate abomination.”³³ He believes that “[r]ace mixing is a form of lunacy. Folks who believe in race mixing are suffering from insanity.”³⁴ In 1992, the volunteer coordinator for Patrick Buchanan’s presidential campaign likened “mixed marriages to the cross-breeding of animals.”³⁵ Thus, “[a]lthough the civil rights movement and integration erased many of the physical and legal boundaries dividing the races in this country, race relations in America remain strained at best. An undercurrent of bigotry pervades the nation”³⁶

All of these facts suggest that the Supreme Court’s decision was necessary to protect an individual’s right to marry, since most of the segregationists despised and feared miscegenation around the time of *Loving*, and especially since interracial couples have yet to become the accepted social norm. The decision was essential to enable hundreds of thousands of relationships to be legally acknowledged.

B. *Lawrence Awakens the Gay Political Agenda*

In *Lawrence*, Harris County police officers reported to a private residence to investigate a weapons disturbance complaint.³⁷ Upon entering, the officers observed John Lawrence, a resident of the property, engaged in a sexual act with another man, Tyron Garner.³⁸ The two were arrested, charged, and convicted of “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).”³⁹ Writing for the six-member majority, Justice Kennedy invalidated the Texas statute, finding it violated the defendants’ substantive due process rights.⁴⁰

In reaching its decision, the Court made it clear that its

33. Kuerth, *supra* note 22 (quoting J.B. Stoner of Marietta, Georgia).

34. *Id.* (quoting J.B. Stoner of Marietta, Georgia).

35. Fletcher, *supra* note 25. The coordinator was fired soon after. *Id.*

36. Karen M. Thomas, *Mixed Metaphor: An Increase in Interracial Couples Is Symbolic of the Nation’s Growing Diversity; People of All Races, Meeting, Socializing and Forming Relationships*, DALLAS MORNING NEWS, Mar. 23, 1993, at 1C, available at 1993 WL 8792093.

37. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

38. *Id.* at 562–63.

39. *Id.* at 563.

40. *Id.* at 572 (holding “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

“obligation is to define the liberty of all, not to mandate [its] own moral code.”⁴¹ Additionally, the Court adopted Justice Stevens’ dissent in *Bowers v. Hardwick*,⁴² which stressed “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”⁴³ This reference is particularly telling. The *Lawrence* Court adopted an analogy to *Loving* as a means of supporting its holding: irrespective of the context of the social attitudes of that era, anti-miscegenation statutes deprived individuals of liberty to marry in the same way that the Texas statutes unlawfully deprived individuals of their right to sexual intimacy. Many view *Lawrence* to be as important and revolutionary as *Brown* since it arguably lays the foundation for gay marriage.⁴⁴

Harvard law professor Laurence Tribe writes that “*Lawrence* is a story . . . of shifting societal attitudes toward homosexuality, sex, and gender.”⁴⁵ Does this mean that the public is ready to accept gays into the mainstream? Looking at the eleven states that, in the 2004

41. *Id.* at 571 (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

42. 478 U.S. 186, 216 (1986) (upholding on similar facts the Georgia anti-sodomy statute as a rational exercise of state police power, and narrowly defining the right at issue as the right to engage in homosexual sodomy), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

43. *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

44. For opinions on how *Lawrence* is the modern-day *Brown*, see Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004); Nancy Gibbs, *A Yea for Gays: The Supreme Court Scraps Sodomy Laws, Setting Off a Hot Debate*, TIME, July 7, 2003, at 38; Evan Thomas, *The War over Gay Marriage*, NEWSWEEK, July 7, 2003, at 40. For discussions on how gay marriage is the logical consequence of *Lawrence*, see *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (observing that after the majority opinion in *Lawrence*, “what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’ . . . This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”) (internal citations omitted); Duncan, *supra* note 3, at 559.

45. Tribe, *supra* note 44, at 1896.

election, amended their state constitutions to ban gay marriage,⁴⁶ it does not seem as though acceptance is universal. A Hawaii newspaper reports that “[t]he battle for acceptance and equal rights for gays isn’t over by a long shot.”⁴⁷ The article goes on to say that “[m]any Americans still consider homosexuality to be immoral and a form of mental illness.”⁴⁸ Nevertheless, gays have become increasingly visible in American culture since the Supreme Court’s decision in *Bowers*. Tribe suggests that homosexuals have “gained greater social acceptance”⁴⁹ as they have become involved in politics and public life in reaction to *Bowers*.⁵⁰

Public opinion polls suggest that acceptance of homosexual rights are slowly on the rise, though most Americans still do not favor *gay marriage*. In a CBS News/New York Times Poll conducted on July 11–15, 2004, 28% of Americans surveyed felt that gay couples should be allowed to legally marry and 31% of Americans supported civil unions, while 38% of Americans thought there should be no legal recognition of a gay couple’s relationship.⁵¹ The same poll conducted in March 2004 revealed that only 22% of those surveyed felt that gay couples should have the right to marry,

46. Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. See *Same-sex Marriage Bans Winning on State Ballots* (Nov. 3, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage>. The Human Rights Campaign website reports that forty-three states have laws or state constitutional amendments that ban same-sex marriage. The states that do not are Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, New York, Rhode Island, and the District of Columbia. See Human Rights Campaign, *Marriage/Relationship Laws: State by State*, <http://www.hrc.org/Template.cfm?Section=Center&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=63&ContentID=17353> (last updated Jan. 6, 2005).

47. David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201, 211 (1998) (quoting *Gay Marriage Decision Is a Civil Rights Victory*, HONOLULU STAR-BULL., May 31, 1993 at A8).

48. *Id.* (quoting *Gay Marriage Decision Is a Civil Rights Victory*, *supra* note 47).

49. Tribe, *supra* note 44, at 1901 n.28 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000)).

50. *Id.* (citing Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMINISM* 97, 108 (2002)).

51. CBS News/New York Times Poll, July 11–15, 2004 (N=955 adults nationwide) (MoE +/- 3 (total sample)), <http://pollingreport.com/civil.htm> (last visited Sept. 8, 2004).

33% favored civil unions, and 40% opposed any form of legal legitimacy for gays.⁵² In a CNN/USA Today/Gallup Poll conducted in March of 1996, 68% of Americans were against conferring rights of traditional marriage to homosexuals.⁵³

Still, seventeen states have already amended their state constitutions to prohibit same-sex marriage,⁵⁴ and more states are contemplating the idea.⁵⁵ President Bush favors an amendment to the federal Constitution that would ban gay marriage but provide for civil unions for same-sex couples.⁵⁶

Nevertheless, gay rights advocates hope that more courts soon come to the same conclusion that the Massachusetts Supreme Court reached in *Goodridge v. Department of Public Health*.⁵⁷

C. *Goodridge: An Addition to Loving's Progeny and a Civil Rights Victory*

In *Goodridge*, the Massachusetts Supreme Court held that the Commonwealth's policy of denying marriage licenses to homosexuals violated the due process and equal protection provisions in the Massachusetts Constitution.⁵⁸ The court redefined civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others."⁵⁹ In reaching its decision, the court relied

52. *Id.*

53. CNN/USA Today/Gallup Poll, Mar. 5–7, 2004 (N=1005 adults nationwide) (MoE +/- 3), <http://pollingreport.com/civil.htm> (last visited Sept. 8, 2004).

54. Alaska, Arkansas, Georgia, Hawaii, Kentucky, Louisiana (pending legal challenge), Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah. See, Human Rights Campaign, Proposed State Constitutional Amendments Limiting Marriage in 2004, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=21264&TEMPLATE=ContentManagement/ContentDisplay.cfm> (Nov. 3, 2004) [hereinafter Proposed Amendments]; *Massachusetts May Allow Same-sex Marriages, but Most States Will Not Recognize Them*, THE ADVOCATE, Mar. 16, 2004, at 43.

55. In Massachusetts, Tennessee, and Wisconsin, the state legislatures have passed proposals, but they must be re-approved. See Proposed Amendments, *supra* note 54.

56. See *Bush Calls for Ban on Same-Sex Marriages* (Feb. 25, 2004), <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/index.html>.

57. 798 N.E.2d 941 (Mass. 2003). See discussion *infra* Part II.C.

58. *Goodridge*, 798 N.E.2d at 959–62.

59. *Id.* at 969.

on the truism asserted in *Perez v. Sharp*,⁶⁰ a California anti-miscegenation case, and *Loving*: “the right to marry means little if it does not include the right to marry the person of one’s choice.”⁶¹

The Department of Health criticized the analogy between *Loving* and gay marriage, arguing that *Loving* came out the way it did because states had already begun to realize that anti-miscegenation laws were unconstitutional.⁶² The court responded to these challenges by pointing out that when the California Supreme Court decided *Perez*, racial discrimination was still widespread.⁶³ The *Brown* mandate to desegregate public schools was still on the distant horizon, and *Plessy v. Ferguson*’s doctrine of “separate but equal” was still good law.⁶⁴ Nevertheless,

[t]he lack of popular consensus favoring integration (including interracial marriage) did not deter the Supreme Court of California from holding that that State’s anti-miscegenation statute violated the plaintiffs’ constitutional rights. Neither the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus.⁶⁵

Similarly, the Massachusetts court could not allow “broad social consensus” to permit the denial of fundamental rights to homosexuals.

The main question coming out of *Goodridge* is whether the U.S. Supreme Court, when ultimately faced with the issue, will adopt this rationale. Due to the similarities between interracial marriage and

60. 198 P.2d 17 (Cal. 1948) (holding California’s anti-miscegenation statute to be unconstitutional). The California Supreme Court’s decision in *Perez* was the first time any state had recognized the legality of interracial marriages and set the course for the Supreme Court to decide *Loving* in 1967. See Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 601 (2000).

61. *Goodridge*, 798 N.E.2d at 958.

62. See *id.* at 958 n.16. In *Loving*, the Court noted that Virginia was one of only sixteen states that still prohibited marriages on the basis of race. It also pointed out that in the fifteen years prior to *Loving*, fourteen states had repealed laws prohibiting interracial marriages. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

63. *Goodridge*, 798 N.E.2d at 958 n.16.

64. See *id.*

65. *Id.*

same-sex marriage in the context of the Fourteenth Amendment, it is a possibility. However, there is another connection between the two marriage movements that courts have shied away from in reaching their decisions—one that holds promise for gay couples seeking to marry: religion.⁶⁶ Before discussing the religious implications in the context of gay marriages, the Fourteenth Amendment issues that the Court discussed in *Loving* must first be addressed.

III. THE CONNECTION BETWEEN *LOVING* AND SAME-SEX MARRIAGE

A straightforward statement of the analogy between *Loving* and same-sex marriage is as follows: “Just as you should be able to marry the person you love regardless of race . . . you should be able to marry the person you love regardless of sex or sexual orientation.”⁶⁷ This analogy can be expanded even further by looking at how the law has developed. When the Supreme Court decided in *Brown* that segregated schools were unequal, it rejected the idea that there was an inherent difference between blacks and whites.⁶⁸ While *Brown* specifically addressed segregation in five school districts, the decision served as precedent for subsequent opinions that invalidated discrimination in school districts across the United States.⁶⁹ *Brown* also opened the door for attacks on Jim Crow laws and provided the basis for invalidating an entire system of institutionalized racism.⁷⁰ After *Brown*, it was only a matter of time (thirteen years, to be exact) until racial discrimination would become sufficiently taboo (legally as well as socially) that the state would be forced to eliminate its discriminatory practices in the area of marriage.⁷¹ Thus, in 1967, the Court decided *Loving* and held that

66. See discussion *infra* Part IV.

67. Duncan, *supra* note 3, at 546 (citing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 284 (1994) (“Just as interracial couples cannot be made to suffer any legal disadvantage that same-race couples are spared, gay couples cannot be made to suffer any legal disadvantages that heterosexual couples are spared. Lesbians and gay men must be permitted to marry.”)).

68. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (overruling the separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

69. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

70. For a historical study from before *Brown* until the present, see JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

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

the government could not use race to regulate who marries whom.⁷²

In the context of same-sex marriage, *Lawrence* can be said to serve the same purpose as *Brown*. *Lawrence* sweeps away the idea that same-sex intimacy is less deserving of constitutional protection than heterosexual intimacy. *Lawrence* can be used as a basis for extending rights to gay people in the same way that *Brown* shifted the paradigm away from racial discrimination and towards a more egalitarian society. Just as *Loving* was the natural consequence of *Brown*, so too could same-sex marriage be the natural consequence of *Lawrence*.⁷³

A. Applying the Fourteenth Amendment to the Analogy

In applying the Court's rationale in *Loving* to gay marriage, there are three possible approaches to arguments in favor of gay marriage: substantive due process, equal protection based on a classification, and equal protection based on a fundamental right.

1. Substantive Due Process

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."⁷⁴ In *Loving*, the Court determined that marriage is a fundamental right and thus warrants protection by the Fourteenth Amendment.⁷⁵ Because Virginia infringed on that right by forbidding people of different races from marrying, the Court struck down the law as unconstitutional.⁷⁶

Similarly, in the case of gay marriage, the right at issue is marriage. The right is fundamental.⁷⁷ Thus, any law impinging on

72. *Id.* at 12.

73. See *Lawrence v. Texas*, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

74. U.S. CONST. amend. XIV, § 1.

75. *Loving*, 388 U.S. at 12.

76. *Id.*

77. Substantive due process cases following *Loving* have consistently affirmed marriage to be a fundamental right. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”); *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992) (“Marriage is . . . an aspect of liberty protected against state

that right would be subject to strict scrutiny.⁷⁸ In other words, the state must justify its actions with a compelling interest.

In *People v. Greenleaf*⁷⁹ and *Goodridge*, the respective states attempted to justify their acts by asserting an interest in procreation.⁸⁰ This argument, however, fails.⁸¹ The state does not otherwise require heterosexual couples to prove they will procreate before issuing marriage licenses.⁸² Moreover, the right to prevent pregnancy by using contraception is fundamental.⁸³ So too is the right to choose to have an abortion.⁸⁴ If a state cannot interfere with a person's right to procreate, then it cannot rely on procreation as justification for banning same-sex marriage.

Additionally, a government's interest in inculcating society with its own moral code is not compelling.⁸⁵ In *Romer v. Evans*⁸⁶ and *Lawrence*, the Court held that the state did not even have a *legitimate* interest in infringing on rights of gay individuals.⁸⁷ It is doubtful that a state would be able to satisfy the more stringent compelling interest requirement here. Thus, it is unlikely that a state will be able to

interference by the substantive component of the Due Process Clause"); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (observing that the fundamental right to privacy extends to “activities relating to marriage, procreation, contraception, family relationships, and child rearing and education” (internal citations omitted)).

78. Strict scrutiny requires that a state's restriction on the right must further a compelling state interest using the least restrictive means. See ALLAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 76 (3d ed. 2004).

79. 780 N.Y.S.2d 899 (2004).

80. *Id.* at 901; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

81. See *Greenleaf*, 780 N.Y.S.2d at 903; *Goodridge*, 798 N.E.2d at 961–62.

82. See *Goodridge*, 798 N.E.2d at 961 (“Our laws of civil marriage . . . contain[] no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage”); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1079 (2002) (“[N]o one in the United States is required to procreate, or even to be capable of procreation, to marry.”).

83. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

84. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

85. See *Casey*, 505 U.S. at 850.

86. 517 U.S. 620 (1996).

87. *Id.* at 634; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

justify its infringement on the exercise of a fundamental right.

The argument could be made that the right at issue is not marriage, but rather gay marriage. By defining the right at issue narrowly, the right may not be classified as fundamental since gay marriage is not "deeply rooted in this Nation's history and tradition."⁸⁸ Although the Court could technically take this route to justify a state's actions, doing so would put restrictions on a fundamental right—something a state cannot do.

Nevertheless, if the Court were to adopt this narrow definition, the law would only be subject to a rational basis review. This means that the state must have a legitimate interest in passing laws banning gay marriage, and the means must be rationally related to achieving that interest. Even under a rational basis test, however, the Court might not be as deferential to the state legislature in situations where politically unpopular groups are targeted, as compared to other situations that fall within the state's police power.⁸⁹ As was the case in *Loving*, it is likely that laws banning gay marriage could be invalidated on substantive due process grounds under either strict scrutiny or rational basis review.

2. Equal Protection Based on a Classification

In *Loving*, the Court also invalidated Virginia's anti-miscegenation statute on equal protection grounds. The Court held, "There is patently no legitimate overriding purpose independent of individious racial discrimination which justifies this classification."⁹⁰ The Court went on to say that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."⁹¹

88. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

89. *Compare Romer*, 517 U.S. 620 (using rational basis review to invalidate a state amendment that burdened rights of gays only), *Lawrence*, 539 U.S. 558 (using rational basis review to invalidate a Texas statute banning sexual intimacy for homosexuals), and *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (using rational basis review to invalidate a statute discriminating against the mentally ill), with *City of New Orleans v. Duke*s, 427 U.S. 297 (1976) (upholding an ordinance that prohibited any vendors from selling products in New Orleans' French Quarter unless the vendors had been in business for more than eight years).

90. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

91. *Id.* at 12.

In the case of gay marriage, sexuality is the classifying trait. The law permits heterosexual couples to marry but not homosexual couples. Although classifications on the basis of race trigger strict scrutiny,⁹² classifications based on sexuality do not.⁹³ Moreover, the Court has not named gays a quasi-suspect class, worthy of mid-level scrutiny.⁹⁴

Theoretically, gays could fall into either of these categories because they share characteristics consistent with other groups receiving heightened scrutiny. These characteristics are as follows: (1) members of the class share an immutable trait;⁹⁵ (2) there is a history of discrimination against members of the class;⁹⁶ (3) the group is politically powerless;⁹⁷ and (4) the characteristic has no bearing on one's ability to perform.⁹⁸ Nevertheless, the Court has been unwilling to expand the categories of protected classes.⁹⁹ Thus, the Court would afford the discrimination against same-sex couples only a rational basis review. Again, the Court might apply rational basis more stringently, as it did in *Romer*, *Lawrence*, and *Cleburne*,¹⁰⁰ but the Court could also choose to apply the traditionally deferential strand of the test as well.

Rather than identifying sexuality as the classifying trait, gender could be the identifiable criteria. In *Loving*, antimiscegenation statutes were unconstitutional because the state had used race as the criterion for determining who could marry whom. Similarly, with

92. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”).

93. Race, national origin, and alienage (when states discriminate) are the only classifications that receive heightened scrutiny. See *City of Cleburne*, 473 U.S. at 440–41.

94. The Court has found that gender and legitimacy are quasi-suspect classes and receive mid-level scrutiny once a prima facie case has been established. See *IDES & MAY*, *supra* note 78, at 241, 251–52.

95. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360–61 (1978).

96. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

97. See *supra* notes 46, 54–55 and accompanying text.

98. See *City of Cleburne*, 473 U.S. at 471–73 (laying out characteristics for heightened scrutiny).

99. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (using rational basis to attack discrimination against gays); *City of Cleburne*, 473 U.S. at 471–73 (using rational basis test to attack discrimination against the mentally ill).

100. See *supra* note 89 and accompanying text.

respect to gay marriage, the state is using gender as the criterion for determining who may marry whom.

The Court has consistently held gender to be a quasi-suspect class,¹⁰¹ which receives heightened scrutiny under a substantial relationship test. This means that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”¹⁰² Further, a “State must show ‘at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” The justification must be genuine, not hypothesized or invented *post hoc*.¹⁰³ Lastly, the classification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁰⁴

This test is much closer to strict scrutiny than to rational basis. Thus, if Courts view laws banning gay marriage as discriminatory on the basis of gender, the laws will have a difficult time withstanding the Court’s rigid scrutiny.

3. Equal Protection Based on the Provision of a Fundamental Right

The Fourteenth Amendment provides a third approach for attacking laws that ban gay marriage. This third means is a combination of the first two: an equal protection argument based on the state’s discrimination in its provision of a fundamental right, rather than discrimination based on a character trait.¹⁰⁵ Under this theory, a state cannot deny one group a fundamental right when it does not infringe on other groups’ opportunities to exercise that same right.

101. See *United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

102. *Virginia*, 518 U.S. at 531 (quoting *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 136–37 (1994) and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

103. *Id.* at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)) (internal citation omitted) (alteration in original).

104. *Id.*

105. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 649 (1982) (finding an equal protection violation in the government’s provision of the fundamental right to vote).

As in the substantive due process analysis, the fundamental right at issue is marriage. By banning marriage for same-sex couples only, the state denies an identifiable group—homosexuals—the right to exercise a fundamental right, while properly remaining uninvolved when heterosexuals seek to enter into marriage. Such an unequal deprivation of a fundamental liberty interest would trigger strict scrutiny and likely thwart state efforts to ban gay marriage.

Each of these approaches is theoretical and counter-arguments exist. Some might argue that the Fourteenth Amendment's purpose is to remedy racial discrimination and nothing more. Thus, the argument goes, discrimination based on a person's sexuality falls completely outside the protection of the Fourteenth Amendment. This argument, however, is a bit outdated. Reaching beyond mere racial discrimination, the Fourteenth Amendment has been used to incorporate most of the Bill of Rights to be enforceable as against the states.¹⁰⁶ The Fourteenth Amendment also provides remedies for discrimination on the basis of alienage,¹⁰⁷ national origin,¹⁰⁸ gender,¹⁰⁹ legitimacy,¹¹⁰ voting discrimination,¹¹¹ and discrimination involving the right to travel.¹¹² Thus, limiting the Fourteenth Amendment to racial discrimination would illogically contradict the evolution of equal protection jurisprudence.

While comparisons to *Loving*, guided by the Fourteenth Amendment, provide valuable tools to the same-sex marriage advocate, there is another, more nuanced solution to the debate: the First Amendment.

IV. SEVERING MARRIAGE FROM STATE CONTROL: FROM *LOVING* TO GAY MARRIAGE

Religious views shaped public opinion in 1967 when the Court

106. See *Palko v. Connecticut*, 302 U.S. 319, 324–26 (1937). Through the Fourteenth Amendment, the First, Fourth, Fifth (except for the requirement of a grand jury indictment in criminal prosecutions), Sixth, and Eighth (only the prohibition of cruel and unusual punishment) Amendments now apply to the states. *Id.* at 323–24.

107. See *Graham v. Richardson*, 403 U.S. 365 (1971).

108. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

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

110. See *Clark v. Jeter*, 486 U.S. 456 (1988).

111. See *Hill v. Stone*, 421 U.S. 289 (1975).

112. See *Saenz v. Roe*, 526 U.S. 489 (1999).

decided *Loving*, and they are relevant today in the controversy surrounding gay marriage. An examination of this social force will further illustrate why the *Loving*/gay marriage analogy holds true and why the Supreme Court should continue what *Loving* started by altogether removing government from marriage.

A. Religious Sentiments

Religion has been used to support both sides of the interracial marriage and same-sex marriage controversies. On the one hand, traditional values render the “daring” relationships immoral and “against God.”¹¹³ Therefore, morality dictates that the illicit liaisons cannot be condoned by God or by the state.¹¹⁴ On the other hand, when the government restricts a religious leader’s ability to sanctify a marriage—a sacred *religious* event—the state effectively infringes on a person’s First Amendment right to free exercise of religion and, at the same time, violates the Establishment Clause. These arguments were set forth when *Loving* was litigated, and they are likewise present in the gay rights debate.

1. Religion and Interracial Marriage

When the Supreme Court was deciding *Loving*, a number of bishops joined together with the National Catholic Conference for Interracial Justice and the National Catholic Social Action Conference to submit an amicus brief, urging the Court to declare Virginia’s anti-miscegenation statutes unconstitutional.¹¹⁵ The brief argued that the Virginia laws restricted the free exercise of religion guaranteed by the First Amendment.¹¹⁶ The bishops contended that “[r]eligion does not encompass belief alone; it involves action. And in wise recognition of this fact, the Constitution . . . ‘safeguards the free exercise of the chosen form of religion.’”¹¹⁷

Because “[m]arriage is a fundamental act of religion,” it should fall within the protection of the First Amendment.¹¹⁸ In Catholicism,

113. See Cruz, *supra* note 82, at 1012.

114. See *id.* at 1013.

115. Brief of Amicus Curiae John J. Russell, Bishop of Richmond et al., *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 93613.

116. *Id.* at *6–*7.

117. *Id.* (quoting *Cantwell v. Connecticut*, 301 U.S. 296, 303 (1940)).

118. *Id.* at *7.

marriage is a sacrament—a “divine bestowal of salvation in an outwardly perceptible form which makes the bestowal manifest.”¹¹⁹ In Judaism, marriage is “a sanctification encompassing an entire philosophy and way of life.”¹²⁰ According to Episcopalian tradition, “no member of the Church shall be excluded from the sacraments of the Church because of race, color, or ethnic origin.”¹²¹ Similarly, the Evanston Assembly preached that segregation is “contrary to the Gospel, and is incompatible with the Christian doctrine”¹²² Thus, according to the bishops, the state has no business infringing on their right to practice their religion as they see fit.

The Virginia trial court judge took an opposing view to those advocating free religious exercise. The trial judge upheld Virginia’s anti-miscegenation statutes based on the belief that God put different races on different continents for a reason—so that they would not mix.¹²³ “And but for the interference with his arrangement there would be no cause for such marriages.”¹²⁴

Although *Loving* did not specifically address the bishops’ free exercise arguments, the Court did quote the trial judge’s statement of God’s “intentions,” thus creating a powerful juxtaposition that nicely illustrates just how baseless the Virginia laws really were. Perhaps in the context of gay marriage, the Supreme Court could similarly ferret out the bigotry and discrimination that are being shielded by religious beliefs.

2. Religion and Same-Sex Marriage

Building on the same arguments propounded in the *Loving* amicus brief, proponents of gay marriage assert that free religious exercise supports their cause. In New York, police arrested two Unitarian Universalist Church ministers for performing marriage

119. *Id.* at *9 (quoting EDWARD SCHILLEBEECKX, *CHRIST THE SACRAMENT OF THE ENCOUNTER WITH GOD* 15 (1963)).

120. *Id.* at *10 (quoting PHILIP GOODMAN & HANNA GOODMAN, *THE JEWISH MARRIAGE ANTHOLOGY* viii (1965)).

121. *Id.* at *11.

122. *Id.* (quoting EDWARD DUFF, *THE SOCIAL THOUGHT OF THE WORLD COUNCIL OF CHURCHES* 243 (1956)).

123. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967).

124. *Id.* (quoting opinion of the trial judge); *see also* *Scott v. State*, 39 Ga. 321, 326 (1869) (condoning anti-miscegenation statutes because “[t]he God of nature made it otherwise”), *quoted in* *People v. Greenleaf*, 780 N.Y.S. 2d 899, 902 (2004).

ceremonies for thirteen gay couples without a marriage license.¹²⁵ The ministers defended their acts on the grounds that New York's ban on gay marriage infringed on their free exercise of religion.¹²⁶ In a debate over a federal constitutional amendment that would ban gay marriages, Senator Ted Kennedy argued that "[f]ar from upholding religious freedom, the proposed amendment would undermine it by telling churches they can't consecrate same-sex marriages."¹²⁷ The Episcopal Church has already sanctioned same-sex marriages.¹²⁸ The Reform Jewish Movement has done the same. In a press conference concerning the Federal Marriage Amendment, Rabbi Michael Namath of the Religious Action Center of Reform Judaism said the following:

The Reform Jewish Movement . . . is a longtime supporter of equal rights for gay men and lesbians, including full civil marriage equality. . . . We do not believe that homosexuality is a sin. Judaism teaches that the family serves as the fundamental institution of society—families rooted in love between two committed, caring adults—and families devoted to raising children in a loving, supportive environment.

....

Civil marriage must be differentiated from religious marriage—because religious marriage is an institution and a religious concept that must remain the domain of religion, but civil marriage is a set of legal protections and benefits that the government grants based on the possession of a civil marriage license. We do not believe that all religions should have to recognize same-sex religious marriage, but we do believe that the government must give equal protection to all its citizens and equal respect to all its religions.¹²⁹

125. See *Greenleaf*, 780 N.Y.S.2d at 900.

126. See *id.* at 902–03.

127. Michael J. McManus, *Save Marriage in Court . . . or Constitution?*, WASH. TIMES, Sept. 26, 2003, at A21 (quoting Sen. Ted Kennedy), available at 2003 WL 7719809.

128. *Id.*

129. Rabbi Michael Namath, Statement at a Press Conference Concerning the Federal Marriage Amendment on Capitol Hill, Washington, D.C. (Mar. 3, 2004), <http://rac.org/news/030304.html>.

Opponents of gay marriage also rely on religion to make their case. After the Massachusetts Supreme Court decided *Goodridge*, President Bush made the following statement: "Marriage is a *sacred* institution between a man and a woman. Today's decision of the Massachusetts Supreme Judicial Court violates this important principle. I will work with congressional leaders and others to do what is legally necessary to defend the *sanctity* of marriage."¹³⁰ "Sacred" is defined in the Merriam-Webster OnLine Dictionary as "1a: dedicated or set apart for the service or worship of a deity . . . 2a: worthy of religious veneration . . . 3: of or relating to religion: not secular or profane."¹³¹ Because President Bush frequently refers to marriage as "sacred," it appears as though he is using his religious beliefs to justify homosexuals' exclusion from rights to a civil marriage.

With twenty-nine religious and political organizations as sponsors, President Bush declared the week of October 12–18, 2003 as "Marriage Protection Week."¹³² One of the sponsors, the American Family Association, said this about homosexuals' place in society:

What Would Jesus Do? Jesus never "tolerated" or "accepted" sin. While His response to sin was swift and sometimes harsh, His motive was always one of unconditional love. Jesus didn't "pussy foot" around, fearful He may "offend" someone or worried He may appear "hate-filled," "intolerant" or "bigoted." No, Jesus called it like it was: sin is sin is sin. . . . It's high time Christians . . . did the same.¹³³

130. JASON CIANCOTTO & RODDRICK COLVIN, *THE BUSH ADMINISTRATION ON MARRIAGE EQUALITY FOR SAME-SEX COUPLES* (2004) (emphasis added) (quoting George W. Bush, Statement Concerning the Massachusetts Court's Decision in *Goodridge*, at <http://www.whitehouse.gov/news/releases/2003/11/20031118-4.html> (Nov. 18, 2003)), at <http://www.thetaskforce.org/downloads/Election2004Archive/BushCheneyMarriage.pdf>.

131. MERRIAM-WEBSTER ONLINE, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=sacred> (last visited Mar. 27, 2005).

132. See Sean Cahill et al., "Marriage Protection Week" Sponsors: Are They Really Interested in "Building Strong and Healthy Marriages?", Policy Brief, Nat'l Gay and Lesbian Task Force Policy Inst. (Oct. 15, 2003), available at <http://www.nglftf.org/downloads/MarriageProtectionWeek.pdf>.

133. CIANCOTTO & COLVIN, *supra* note 130 (quoting S. Bennett, *Homosexual Agenda: The Deception and Desensitization of America's Youth*,

As was the case when interracial marriage was on the public agenda, religious arguments drive both sides of the same-sex marriage debate. This is where the problem lies. Although the government has protected civil marriages, marriage, at its core, is a religious institution.¹³⁴ As a result, religious organizations—not states—should govern religious practices. In fact, government regulation potentially runs afoul of both the Free Exercise Clause and the Establishment Clause of the First Amendment. Although the Court did not rely on the First Amendment in reaching its decision, *Loving* first articulated the idea that the government cannot regulate whom one chooses to marry. The First Amendment can carry this idea to completion by providing a means of completely removing government from marriage, thus providing a solution to the ongoing debate.

B. Free Exercise and the Same-Sex Marriage Ban

The First Amendment contains two separate provisions regarding religion: the Establishment Clause and the Free Exercise Clause.¹³⁵ In *Employment Division v. Smith*,¹³⁶ the Supreme Court clarified the meaning of the Free Exercise Clause. At issue in *Smith* was whether an Oregon law criminalizing the ingestion of peyote violated the free exercise rights of the defendants, who were members of the Native American Church and ingested peyote as part of a religious ceremony.¹³⁷ The Court found the law constitutional because “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”¹³⁸ Thus, the general rule emerging from *Smith* is that a law violates the Free Exercise Clause only when a state intentionally targets and forbids religiously motivated conduct.¹³⁹

Am. Family Ass’n (2005), http://www.afa.net/homosexual_agenda/get_article.asp?id=81.

134. See *supra* Part IV.A.1.

135. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

136. 494 U.S. 872 (1990).

137. *Id.* at 874.

138. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

139. See *id.* at 886 n.3.

1. Implementing *Smith* in the Case of Gay Marriage

Applying the *Smith* rule to a ban on same-sex marriage raises a free exercise problem. Although it is true that there is a distinction between religious and civil marriage, the distinction is illusory. The *Greenleaf* case involved ministers who had been arrested for performing marriage ceremonies for gay couples without a license.¹⁴⁰ Even though the court overturned the convictions on other grounds, it maintained the position that the state—not God—had bestowed the ministers with the power to officiate over the ceremonies.¹⁴¹ Additionally, President Bush has said that “[m]arriage cannot be severed from its cultural, *religious* and natural roots without weakening the good influence of society.”¹⁴² If courts are asserting that ministers cannot be free to perform marriage ceremonies that are acceptable to their religion, and the President of the United States contends that marriage is inseparable from religion, then how is it possible that there is any true distinction between civil marriage and religious marriage? Moreover, although Bush supports a constitutional amendment that would restrict marriage to a man and a woman, he would support civil unions for same-sex couples.¹⁴³ If the civil unions were to give gay couples rights equivalent to marriage in effect, though not in name, then how is “marriage” a civil institution rather than a religious one?

Lawmakers are intentionally targeting the religious conduct. The specific purpose of Defense of Marriage laws (“DOMAs”) and state constitutional amendments is to ban same-sex marriages.¹⁴⁴

140. *People v. Greenleaf*, 780 N.Y.S.2d 899, 900 (2004).

141. *Id.* at 902.

142. *Bush Calls for Ban on Same-Sex Marriages*, Feb. 25, 2004, <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/index.html> [hereinafter *CNN Article*] (emphasis added).

143. *See id.*

144. For example, Alabama’s Marriage Protection Act states that “[m]arriage is a *sacred covenant*, solemnized between a man and a woman, which . . . establishes their relationship as husband and wife, and which is recognized by the state as a *civil contract*. No marriage license shall be issued in the State of Alabama to parties of the same sex. The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred . . . as a result of the law of any jurisdiction . . .” ALA. CODE § 30-1-19 (2005) (emphasis added). *See also CNN Article, supra* note 142 (explaining that the Defense of Marriage Act “prevents federal recognition of same-sex marriage, and allows states to ignore same-sex licenses from outside their borders”).

President Bush stated that “[t]he union of a man and a woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith.”¹⁴⁵ President Bush, however, fails to account for the fact that some religions do support the union of two people of the same sex. The government’s targeting and proscribing such religious activity thus violates the rule set forth in *Smith*.

Smith discussed an exception to the general rule where a court could relax the “intent” element if the state law that hindered the religious practice also hindered the exercise of some other constitutionally protected right.¹⁴⁶ Justice Scalia termed such a situation a “hybrid,” since two fundamental rights—free exercise and some other right, such as freedom of speech or freedom of the press—¹⁴⁷ would be infringed.¹⁴⁸ However, this “hybrid” exception is theoretically suspect. When the government impinges on an individual’s ability to exercise a fundamental right, strict scrutiny is triggered, period. There is no need for a second fundamental right to be restricted in order to establish a need for heightened scrutiny. For example, if a law infringes on an individual’s free speech rights as well as her ability to carry on religiously motivated conduct, there would be no need to attack the law under a hybrid theory. Instead, the law could be successfully challenged on freedom of expression grounds alone. Nevertheless, the “hybrid” scenario remains good law and could apply to gay marriage since laws banning such marriages interfere with both the right to free exercise as well as the fundamental right to marry.¹⁴⁹

2. Free Exercise in the Courts

Although the free religious exercise argument is a plausible

145. *CNN Article*, *supra* note 142.

146. *See Employment Div. v. Smith*, 494 U.S. 872, 880–82 (1990).

147. *Id.*

148. In his opinion in *Smith*, Justice Scalia distinguished *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case that permitted Amish parents to remove their children from school before completion of the state-mandated minimum education. He reasoned that *Yoder* was a “hybrid situation” rather than a pure, free exercise case: the state-mandated minimum infringed both the parents’ right to free exercise, as well as their fundamental right to raise and educate their children as they saw fit. *See id.* at 881–82.

149. For a discussion of substantive due process, see *supra* Parts III.A.1, 3.

means to afford marital rights to homosexuals, courts thus far have appeared unwilling to adopt that rationale as a basis for invalidating statutes banning gay marriage.¹⁵⁰ In *Goodridge*, although the court held that laws banning same-sex marriage were unconstitutional, the court explained:

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us.¹⁵¹

In *Greenleaf*, the court overturned the ministers' convictions, holding that the state interest in defining marriage according to "political, cultural, religious, and legal" traditions was not a legitimate state interest.¹⁵² The court also rejected the state's argument that laws restricting marriage to a man and a woman further the interest in encouraging procreation and child rearing.¹⁵³ However, the court refused to overturn the convictions on religious exercise grounds.¹⁵⁴ The court makes clear the distinction between religious and civil marriage.¹⁵⁵ It writes, "[s]ince the state has made an accommodation by permitting clergy to act in the state capacity of

150. See, e.g., *People v. Greenleaf*, 780 N.Y.S.2d 899, 902 (2004) ("[S]tate sanctioned marriage is a civil event, not a religious one.").

151. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

152. *Greenleaf*, 780 N.Y.S.2d at 901 (finding that "[t]radition does not justify unconstitutional treatment. Slavery was also a traditional institution."). The court goes on to say that "[t]he traditional definition of marriage in some states excluded interracial marriages," and the Court in *Loving v. Virginia*, 388 U.S. 1 (1967), later found that definition to be unconstitutional. *Greenleaf*, 780 N.Y.S.2d at 901-02.

153. *Greenleaf*, 780 N.Y.S.2d at 903. In rejecting the state's rationale for the laws, the court writes, "Citing 'procreation' as a broad justification for denying marriage to same-sex couples displays an anti-gay bias." *Id.* Other married couples "are not required to have children, or even to engage in sexual relations." *Id.* Furthermore, gay people can adopt, give birth to, and raise children themselves. *Id.* "Prohibiting same-sex couples from marrying suggests that marriage is about nothing but sex. This is demeaning to all couples who seek to marry and to the institution of marriage." *Id.*

154. See *id.*

155. *Id.*

officiating at civil marriage ceremonies, the state does not violate free exercise of religion by imposing valid restrictions on the ability to do so.”¹⁵⁶

As discussed above, however, the court’s reasoning in *Greenleaf* is flawed because it fails to recognize that civil and religious marriages are inextricably intertwined. In fact, the statement by the court helps make the case that this is indeed the situation. According to the court, since the state bestowed upon clergy the power to officiate over *civil* marriages, the state—not religious institutions—retains the sole authority to determine who may take part in *religious* marital ceremonies. If the court were to recognize this flaw in its reasoning, free exercise would be a legitimate challenge to laws banning same-sex marriage.

C. Marriage and the Establishment Clause

Unlike the Free Exercise Clause, the Establishment Clause lacks a single definitive test for a law’s constitutionality. Instead, a number of different approaches have emerged.¹⁵⁷

1. The Separationists

A separationist view seeks to maintain Thomas Jefferson’s “wall of separation” between church and state.¹⁵⁸ To determine whether the wall has broken down, the separationists apply a three-prong test first articulated in *Lemon v. Kurtzman*:¹⁵⁹ “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster ‘an excessive government entanglement with religion.’”¹⁶⁰

Analyzing gay marriage under this test would result in a

156. *Id.*

157. *See Cruz, supra* note 82, at 1027 (“Because study of the constitutional law of religion in the United States is, to understate the case, not a jurisprudential field suffering from a surfeit of stifling unanimity, there are numerous scholarly and judicial approaches to disestablishment, each with its proponents and detractors.” (internal citation omitted)).

158. *See id.* at 1048 (“Strict separationist approaches to the disestablishment of religion hold that the wall of separation between church and state should be high and impenetrable.”).

159. 403 U.S. 602 (1971).

160. *Id.* at 612–13 (internal citations omitted).

violation of the Establishment Clause. The first issue is whether a statute banning gay marriage might have a secular purpose.¹⁶¹ Arguably, regulating civil marriage would qualify as a secular purpose. But, as discussed above, the idea that there is a true distinction between civil and religious marriage is erroneous. If this idea were accepted, such a secular rationale would fail. Opponents of gay marriage have tried to set forth secular justifications for laws that ban marriage for same-sex couples.¹⁶² University of Southern California law professor David Cruz argues that “[m]any of these explanations might reflect partial historical explanations for how or why marriage became enshrined as a legal status regulated by the state, but they so poorly fit the actual contours of marriage laws in the United States today that they cannot be regarded as justifying the mixed-sex requirement.”¹⁶³ Thus, the law would fail the first prong of the test, indicating that it falls outside of constitutional boundaries.

Additionally, under the second prong, the primary effect of such a statute would both advance and inhibit religion. This is because 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.” In essence, what the government is doing is superimposing its religious views about marriage over what should be secular, contractual rights. As a result, the law would fail the second prong, and violate the Establishment Clause.

The third prong of “excessive government entanglement”¹⁶⁴ could also lend itself to an Establishment Clause violation. Excessive entanglement occurs when the government must regularly oversee the activities of a religious institution.¹⁶⁵ In the case of gay marriage, if the government constantly monitored sectarian organizations to make sure that no same-sex couples professed their vows, then this would constitute excessive entanglement.¹⁶⁶ Thus, under

161. Any secular purpose will do; it need not be the primary purpose. See *IDES & MAY*, *supra* note 78, at 409.

162. See Cruz, *supra* note 82, at 1078.

163. *Id.* (internal citation omitted).

164. *Lemon*, 403 U.S. at 613.

165. See *id.* at 614–22.

166. *People v. Greenleaf*, 780 N.Y.S.2d 899 (2004), is an excellent illustration of this point.

the separationist view, laws banning gay marriage violate the Establishment Clause.

2. The Endorsement Approach

Justice O'Connor "pioneered" the endorsement approach, which suggests that "government should not appear to embrace religious beliefs or the proposition that a person's religion is relevant to his or her standing in the public realm."¹⁶⁷ Banning gay marriage violates this principle. Professor Cruz writes that "[c]ivil marriage is one of the last great bastions of resistance to the disestablishment of religion in the United States."¹⁶⁸ When government does not permit same-sex couples to marry, government endorses, or gives credence to, those religions that adhere to the belief that only heterosexual marriage is "sacred" and thus worthy of the state's protection. Professor Cruz goes on to argue that the American "hysteria" surrounding gay marriage "is grounded in people's religious beliefs that marriage means, simply must be, and was instituted by God as[] a union of one man with one woman."¹⁶⁹ As such, restricting marriage to heterosexual couples violates the endorsement approach to the Establishment Clause.

3. The Coercion Test

Justice Kennedy propounded the Establishment Clause's coercion test in *Lee v. Weisman*,¹⁷⁰ a case that addressed prayer in public schools. In his opinion, Justice Kennedy wrote that "prayer exercises in public schools carry a particular risk of indirect coercion."¹⁷¹ He went on to say that "[t]his pressure, though subtle and indirect, can be as real as any overt compulsion . . . [T]he State may not, consistent with the Establishment Clause, place primary

167. Cruz, *supra* note 82, at 1045. See *Wallace v. Jaffree*, 472 U.S. 38, 69–70 (1985) (O'Connor, J., concurring) ("*Lemon's* inquiry . . . requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement. . . . The endorsement test . . . preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.").

168. Cruz, *supra* note 82, at 1078.

169. *Id.*

170. 505 U.S. 577 (1992).

171. *Id.* at 592.

and secondary school children in this position.”¹⁷²

Coercion is not a readily applicable theory to same-sex marriage. Coercion, while an arguably viable theory when analyzing the effects on children forced to pray in a public learning environment, is not suited to the issues involved in an analysis of marriage. In fact, “the question of the degree of coercion effectuated by the offer of mixed-sex civil marriage but not of same-sex marriage is exceedingly complex and perhaps not well suited to judicial resolution.”¹⁷³ Thus, coercion may be left to school prayer and need not be examined further in this discussion.

4. The Non-Preferentialist Approach

Under a non-preferentialist view, the government may advance religion generally without violating the Establishment Clause, so long as it neither establishes a national or state religion, nor gives preferential treatment to one religion over another.¹⁷⁴ Laws prohibiting gay marriage violate this principle. By limiting marriage to heterosexual couples, the government advances one particular religious belief about what constitutes marriage. But, in doing so, the government embraces and enforces one particular strand of religious thought at the expense of others. Therefore, under a non-preferentialist approach, government is “singl[ing] out particular religions for special favor,”¹⁷⁵ which it cannot do.

5. The Trump Card: Tradition

Sometimes tradition can excuse state-sponsored religious activities. In his dissent in *Lee v. Weisman*, Justice Scalia argues that religious invocations at school graduation ceremonies are constitutional because the government has traditionally condoned prayer at

172. *Id.* at 593.

173. Cruz, *supra* note 82, at 1039.

174. See *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“The Framers intended the Establishment Clause to prohibit the designation of any church as a ‘national’ one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. . . . [N]othing in the Establishment Clause requires government to be strictly neutral between religion and irreligion . . .”).

175. Cruz, *supra* note 82, at 1044.

public ceremonies.¹⁷⁶ While tradition may serve a legitimate function in certain instances (perhaps maintaining the phrase “In God We Trust” on the dollar bill), it cannot overpower rights so fundamental to an individual as marriage. For, if tradition could trump the First and Fourteenth Amendments, what purpose would the Constitution serve?¹⁷⁷

D. A Solution to the First Amendment Problems

A plausible, though admittedly quasi-revolutionary, remedy for these First Amendment violations would be to completely disestablish the institution of marriage from the civil context. If marriage were an entirely religious event, religious entities would be free to marry, or not marry, couples as they saw fit. The government would be unable to interfere or regulate, for the choice would be left to the priests, ministers, rabbis, monks, and other clergy retaining the right to perform the “*sacred*” (to borrow from President Bush’s vocabulary) ritual.

This remedy actually is not so revolutionary. The idea first emerged in *Loving*. By classifying marriage as a fundamental right, the Court recognized that the government could not regulate something that is so fundamental to a free society. Since government is already unable to interfere with an individual’s decision to marry, it makes sense to go one step further and completely remove marriage from the public sphere.

Setting aside private bias against homosexuals for the moment, if the ban on gay marriage were challenged in court on substantive due process grounds, it is hard to see how such a challenge would fail.¹⁷⁸ As the Court in *Loving* decreed, the government may not interfere with any individual’s right to marry.¹⁷⁹

Building on *Loving*, the proper solution would simply be to

176. *Lee*, 505 U.S. at 635 (Scalia, J., dissenting) (“[C]ongressional sessions have opened with a chaplain’s prayer ever since the First Congress. And this Court’s own sessions have opened with the invocation ‘God save the United States and this Honorable Court’ since the days of Chief Justice Marshall.” (internal citation omitted)).

177. *See People v. Greenleaf*, 780 N.Y.S.2d 899, 901 (2004) (“Tradition does not justify unconstitutional treatment. Slavery was also a traditional institution.”).

178. *See supra* Parts III.A.1–3.

179. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

convert *all* “civil” marriages (which, as discussed above, are really religious marriages with civil contractual benefits) into civil unions. Such an act would leave the legal *contractual* agreements in place, unchanged. All that would change would be the name (“marriage” to “union”). Additionally, homosexual couples could obtain the legal and financial benefits that civil marriage has always provided—benefits which, according to well-established Fourteenth Amendment jurisprudence, should already have been made available.

Of course, the mere mention of the idea that there would be no more legally recognized marriage immediately raises questions as to property rights, parental rights, inheritance rights, evidentiary privileges, tax benefits, and so on. These questions have already been answered in the previous few sentences. A civil union would confer all the benefits and protections that marriage has traditionally provided, but would not be limited to heterosexual couples.¹⁸⁰ Of course, churches, synagogues, mosques, and other religious institutions could restrict *marriage* to heterosexual couples if they wish. Marriage, as a religious sacrament, would thus be preserved in whatever form a particular sect deems holy.

This remedy would be amenable to proponents as well as opponents of gay marriage. For the proponents: the government would have to treat heterosexual and homosexual couples equally, conferring the same benefits upon all “union members.” Also, both gay and straight couples would be free to seek out religious recognition of their union in the form of marriage. Religious clergy would be able to officiate over same-sex marriages and sanction the holy unions in the eyes of God (or whatever other spiritual entity a

180. In California beginning on January 1, 2005, registered domestic partnerships were afforded the same legal protections and privileges that civil marriages currently receive. Although California still does not allow same-sex couples to take part in civil marriage ceremonies, the domestic partnership, with the benefits of marriage, is available to gay couples. CAL. FAM. CODE § 297 (West 2005). Furthermore, to dissolve a domestic partnership, couples must conduct divorce proceedings. To fully implement the proposed remedy, all California must do now is convert existing civil marriages into civil unions, and relinquish the institution of “marriage” to the religious organizations. See Lee Romney, *Though They Can't Wed, Gays May Now Divorce*, L.A. TIMES, Jan. 1, 2005, at A1, (“The law’s supporters and opponents agree that it makes domestic partnership in California equivalent to marriage in almost all but name.”) available at <http://www.latimes.com/news/local/la-me-domestic1jan01,0,7970132.story?coll=la-home-headlines>.

particular religion might worship).

For the opponents: the status quo would remain—the government would not have to recognize gay marriage (of course, the government would not be recognizing any marriages, among those, marriages between same-sex couples). People who oppose homosexual relationships would never have to acknowledge gay marriage; they could simply join a different church that comports with their religious beliefs.

Public support for this solution as it pertains to same-sex couples may be easier to attain than one would think. Even though a majority of the public opposes gay *marriage*, a majority also supports legal recognition of same-sex relationships.¹⁸¹ Further, Bush's proposed constitutional amendment to ban gay marriage would not preclude civil unions. Thus, conferring contractual rights upon gay couples is not so radical.

What might be a bit harder for some to swallow is the idea that civil marriage, as we currently know it by name, would no longer exist. This idea, though, is not quite as extreme as it sounds. Again, the benefits that civil marriage provides would remain available to everyone, albeit listed under a new name in the tax code. Marriage, of course, would still be alive and well (or at least as "well" as it is now); it will merely have relocated. Instead of residing in city halls and capitol buildings, marriage will return to where it began and where it belongs—churches, synagogues, and mosques.

Questions might arise as to what would qualify as a civil union. For couples seeking to enter into a civil union, Section 297 of the California Family Code provides a useful guide. Section 297 lays out how to establish a domestic partnership, California's version of a civil union. Section 297 defines domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."¹⁸² It also sets forth the following requirements for establishing such a partnership in

181. According to a poll conducted in July 2004, 28% of Americans surveyed felt that gay couples should be allowed to legally marry, and 31% supported civil unions (for a total of 59% support for gay rights). Only 38% surveyed believed there should be no legal recognition of homosexual relationships. CBS News/New York Times Poll, July 11–15, 2004 (N=955 adults nationwide) (MoE +/- 3 (total sample)), <http://pollingreport.com/civil.htm> (last visited Apr. 3, 2005).

182. CAL. FAM. CODE § 297 (West 2005).

addition to filing a Declaration of Domestic Partnership with the Secretary of State:

- (1) Both persons have a common residence.
- (2) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
- (3) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
- (4) Both persons are at least 18 years of age.
- (5) Either of the following:
 - (A) Both persons are members of the same sex.
 - (B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act [i.e., over the age of sixty-two]
- (6) Both persons are capable of consenting to the domestic partnership.¹⁸³

Although in California this provision only applies to same-sex couples and heterosexual couples above the age of sixty-two, the state legislature could easily adapt the criteria to define civil unions for both heterosexual and homosexual couples alike. The reference to marriage would disappear from the second element, but a “domestic partnership” substitute is already in place. The third element could be amended to read “The two persons are not related by blood in the following degree: [the statute could list the degree of relativity forbidden by the marriage laws referenced in this element].” The fifth element above could be easily revised so that “(B)” reads “the persons are members of the opposite sex,” while “(A)” remains the same. Thus, redefining civil unions would hardly constitute an insurmountable task.

Dissolution of a civil union or domestic partnership would remain unchanged. California dissolves marriages as well as domestic partnerships through divorce.¹⁸⁴ Divorce proceedings would constitute a legal severance of the contractual relationship. Dissolution of a religious marriage would be handled through the religious institution that ordained the union.

183. *Id.*

184. *See Romney, supra* note 180.

V. CONCLUSION

Same-sex marriage is a volatile social issue that the Supreme Court inevitably must confront. One approach the Court could take would be to rely on *Loving* and subsequent Fourteenth Amendment jurisprudence to resolve the debate on due process or equal protection grounds. Although the outcome of this approach would likely be favorable to proponents of same-sex marriage, the potential public backlash from such a decision might dissuade the Justices from expanding even a little on current case precedent. A more fitting solution would require coming to terms with the fact that marriage is, indeed, a religious institution—not a civil contract. Nothing about this proposition is new. Why else would there be such strong opposition to allowing gay couples to take part in a “sacred,” but not civil, event? No one seems to object to a gay person entering into a contract to buy a car or to buy life insurance. Tempers flare only when homosexuals seek to marry.

Because state-sponsored religious marriage intentionally favors some religions while intentionally discriminating against others, it runs afoul of the First Amendment. Using *Loving* as precedent for eradicating government control over marriage, the First Amendment can complete the story by providing a legal means to wholly disestablish marriage from the public sphere.

*Amelia A. Miller**

* J.D. Candidate, May 2006, Loyola Law School, Los Angeles; B.A. Political Science, Brown University, 2001. Many thanks to Professors William Araiza and Allan Ides for their thoughtful comments and suggestions, and to my parents and Nick Collins for their patience and encouragement.