

# Caught in the Clause: An Analysis of Same-Sex Marriage Through the Lens of the Establishment Clause

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## I. INTRODUCTION

Two men, in love and committed to each other, stand before a preacher in their church and are pronounced husbands in the eyes of God and all witnesses. A man and woman kneel before an altar and repeat sacred vows of eternal commitment in front of an ordained minister and witnesses. Two women hold hands on a beach in front of a sunset and are declared “forever wed” by their pastor. A man and a woman hold hands on a mountaintop and speak personally written vows declaring their love and commitment to each other and then are sealed in marriage by a reverend of their church.

Each of these couples considers themselves married in the eyes of their god. Each considers the commitment he or she made to be binding in terms of their religious beliefs. Yet only two of the couples are married

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in the eyes of the federal government. All four marriages may be recognized by some, but not all, of the states. The question stands—who is married? Much of the dissent and confusion related to same-sex marriage is a result of the fact that there are two types of marriage: civil marriage and religious marriage. The debate that is crossing America is the debate on the scope of *civil* marriages.

As of January 2013, 18% of the states in the United States issue marriage licenses to same-sex couples.<sup>1</sup> Thirty states have constitutions that ban same-sex marriages.<sup>2</sup> Nineteen states and Washington D.C. recognize same-sex relationships in some way—either as domestic partnerships or through granting state benefits to same-sex partners.<sup>3</sup> At the federal level, the Defense of Marriage Act was passed into law in 1996, giving states the ability to refuse to recognize same-sex marriages performed in other states and defining marriage as a union between a man and a woman for all federal purposes.<sup>4</sup> As of March 13, 2012, legislation entitled the Respect for Marriage Act of 2011 was introduced in both houses of Congress.<sup>5</sup> The bills are intended to repeal the Defense of Marriage Act.<sup>6</sup> At the time of this writing, both bills are in committee.<sup>7</sup> On the opposite end of the argument, Representative Dan Burton introduced legislation to limit federal court jurisdiction to determine the constitutionality of the Defense of Marriage Act.<sup>8</sup> Clearly, the issue of same-sex marriage is unsettled in the law.

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1. Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington issue marriage licenses to same-sex couples. In addition, Washington D.C. issues same-sex marriage licenses, and Rhode Island legally recognizes same-sex marriages performed in other states. *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/Relationship\\_Recognition\\_Laws\\_Map\\_Nov2012.pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map_Nov2012.pdf) (last updated Nov. 8, 2012).

2. *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/US\\_Marriage\\_Prohibition.pdf](http://www.hrc.org/files/assets/resources/US_Marriage_Prohibition.pdf) (last updated May 10, 2012).

3. *Marriage Equality & Other Relationship Recognition Laws*, *supra* note 1.

4. Defense of Marriage Act (DOMA), Pub. L. No. 104-199 (1996).

5. H.R. 1116, 112th Cong. (2012); S.598, 112th Cong. (2012). Representative Jerrold Nadler of New York introduced the House Resolution and as of November 26, 2012, the resolution had 158 cosponsors. *Bill Summary and Status, 112th Congress (2011-2012), H.R. 1116*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01116>: (last visited Nov. 27, 2012). Senator Feinstein of California introduced a similar bill, S.598, which had 32 cosponsors as of November 26, 2012. *Bill Summary and Status, 112th Congress (2011-2012), S.598*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00598>: (last visited Nov. 27, 2012).

6. H.R. 1116; S. 598.

7. H.R. 1116; S. 598.

8. H.R. 875, 112th Cong. (2012). H.R. 875 had 27 cosponsors as of June 26, 2012, and had been referred to committee. *Bill Summary and Status, 112th Congress (2011-2012), H.R. 875*, LIBRARY OF CONGRESS, <http://Thomas.loc.gov/cgi-bin/bdquery/D?d112:1/temp-bdiuoi>:

Religious persons argue on both sides of the debate. Some religious leaders fear that expanding the civil definition to include same-sex couples will have negative impacts on their churches.<sup>9</sup> They argue that the civil government may find these churches in violation of civil rights principles and laws and remove their tax-exempt status or take other negative civil actions.<sup>10</sup> The alternative arguments come from religious leaders who believe that same-sex marriages are approved and ordained of God.<sup>11</sup> These church leaders argue that the government should allow these couples the same civil benefits as any other married couple.<sup>12</sup> Some churches seek a middle ground; the Episcopal Church of the United States, for example, defers to the civil definition of marriage and has a policy of blessing same-sex marriages where they are civilly legal<sup>13</sup> and of blessing same-sex relationships in places where marriage is not legal.<sup>14</sup> The public affairs representative for the church stated specifically that the blessing is “a theological response to a monogamous, committed relationship.”<sup>15</sup>

This Article looks at marriage through the lens of the Establishment Clause of the First Amendment and whether the government’s opposition to recognizing same-sex marriage is a possible violation of that clause. In order to thoroughly evaluate this topic, this Article looks at the following questions: (1) What is the definition of a religion for the purposes of constitutional analysis? (2) Is marriage primarily a religious concept or a civil concept? (3) If marriage is primarily a religious concept, does the governmental definition of marriage “establish” religion under our current understanding of that concept?

This Article argues that marriage is, and should be, a religious concept, that the government is establishing a religion by defining

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@@@L&Summ2=m&l/home/LegislativeData.p;hp?n=BSS;c=112. No related Senate bill is on record.

9. Ronald J. Rychlak, *The Unintended Consequences of Gay Marriage*, CATHOLIC NEWS AGENCY, <http://www.catholicnewsagency.com/resources/life-and-family/homosexuality/the-unintended-consequences-of-gay-marriage> (last visited Nov. 27, 2012).

10. *Id.*

11. *See In Support of Equal Marriage Rights for All*, UNITED CHURCH OF CHRIST (July 4, 2005), <http://www.ucc.org/assets/pdfs/in-support-of-equal-marriage-rights-for-all-with-background.pdf>.

12. *Id.*

13. *See* Becky Bratu, *Episcopal Church Becomes Biggest US Church To Bless Gay Unions*, NBC NEWS (July 10, 2012, 7:10 PM), [http://usnews.nbcnews.com/\\_news/2012/07/10/12666645-episcopal-church-becomes-biggest-us-church-to-bless-gay-unions?lite](http://usnews.nbcnews.com/_news/2012/07/10/12666645-episcopal-church-becomes-biggest-us-church-to-bless-gay-unions?lite).

14. *See* Michael Pearson, *Episcopal Church Approves Same-Sex Blessing Service*, CNN (July 10, 2012, 9:30 PM), <http://www.cnn.com/2012/07/10/us/episcopal-same-sex-unions/index.html>.

15. *Id.* (internal quotation marks omitted).

marriage in a particular way, and that the government should divorce itself from involvement in marriage entirely. This Article proposes that the government (both federal and state) should eliminate marriage as a definitional concept in any regulations and statutes, including those determining government benefits.

## II. WHAT IS RELIGION FOR FIRST AMENDMENT PURPOSES?

While the First Amendment to the Constitution of the United States includes the guarantee that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”<sup>16</sup> nowhere in the Constitution did the Framers specify a definition for the term “religion.” Perhaps the Framers felt that religions were so clear to everyone that there was no need.<sup>17</sup> Perhaps the Framers suffered from a lack of diversity and did not realize that there were religions other than Judaism and Christian sects. Perhaps they considered defining religion and decided against it after realizing what an incredibly complex task it could be with as many potential definitions as there are people in America. Whatever their reasons for leaving the guiding language out of the Constitution, the Framers left us with a lack of evidence to determine their intentions in using the term “religion.”<sup>18</sup> Thus, the courts must fill in the gaps and define the term.

The definition of the term “religion” has undergone many changes in the history of Supreme Court jurisprudence. In early years, the Supreme Court in *Reynolds v. United States* defined religion as the relationship between a person and that person’s “God,” and the duties that the believer has as a result of this relationship.<sup>19</sup> The Supreme Court reaffirmed this view in 1890, stating that the “term ‘religion’ has reference to one’s views of his relations to his Creator.”<sup>20</sup> The Court stated that this relationship will necessarily influence the behavior of the believer, but that any behaviors that are contrary to the peace and well-being of our culture do not deserve the protection of the First

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16. U.S. CONST. amend. I.

17. A nondefinition leads to great confusion because it opens the door of protection to everything—the term religion could be taken to mean *any* belief—any belief that is not contrary to current law, any belief with roots in a deity, any belief that influences behavior, and so on.

18. James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of “Religion,”* 6 SETON HALL CONST. L.J. 23, 35-36 n.43 (1995) (citing U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL POLICY, RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 9 (1986)).

19. *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878) (stating, ironically, that a criminal statute prohibiting polygamy was constitutional given the long history of prohibition of polygamy in western religions).

20. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

Amendment.<sup>21</sup> The tone of the opinion indicates that, so long as there is a relationship to a supreme being that created humankind and so long as the relationship does not require any actions that are contrary to the laws of the United States and the states individually, there is complete freedom of religion. This theistic approach to the term religion is seen in Supreme Court decisions until 1944. Then, in *United States v. Ballard*, the Court upheld a decision to disallow any consideration of the truth of a man's beliefs in determining a mail fraud charge.<sup>22</sup> The jury was told to concentrate on the sincerity of the beliefs.<sup>23</sup> Justice Douglas, writing for the majority, stated that the relationship between an individual and the individual's God "was made no concern of the state."<sup>24</sup>

In 1961, the Supreme Court seemed to move away from a God-centered definition of religion.<sup>25</sup> In *Torcaso v. Watkins*, the Court invalidated a Maryland Declaration of Rights provision stating that in order to hold office in Maryland, one must not be required to perform any religious test other than declare a belief in God.<sup>26</sup> The Court cited many examples of religions that do not profess a belief in God but that are bona fide religions worthy of protection under the First Amendment.<sup>27</sup> According to Professor Steven Jamar of Howard University, this decision moved the Court away from theistic definitions to defining "freedom of religion [as] freedom of conscience."<sup>28</sup> The Court was reluctant, however, to abandon all notions of theistic religion. In 1965, the Court decided *United States v. Seeger*, requiring that a nonreligious belief "occupy" a place in the life of the believer that is paramount to the place that God holds in the lives of orthodox believers in order to qualify as a religious belief.<sup>29</sup> The Court again upheld this "equivalent of God" requirement in

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21. *Id.* The court specifically pointed to polygamy, human sacrifice, and promiscuity (disbelief in marriage) as crimes that are tenets of various religious sects that would not be protected in the United States. *Id.* at 341, 344, 347. The Court indicated that belief in polygamy would not be questioned as a religious belief but that acting upon that belief would not be protected as freedom of religion. *See id.* at 348.

22. 322 U.S. 78, 86 (1944).

23. *Id.* at 81.

24. *Id.* at 87.

25. *See Torcaso v. Watkins*, 367 U.S. 488 (1961).

26. *Id.* at 489, 496.

27. *See id.* at 495 & n.11.

28. Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 750 (1996).

29. *United States v. Seeger*, 380 U.S. 163, 184 (1965). The *Seeger* case dealt with religious exemption from active war duty by providing conscientious objector status. *Id.* at 164-65. While that case dealt with a statute, for the purposes of defining religion, this Article assumes that the Court would use the same definition for statutory construction as for constitutional jurisprudence.

1970 in *Welsh v. United States*.<sup>30</sup> In that case, the petitioner was granted conscientious objector status based on a sincerely held moral belief unrelated to religion.<sup>31</sup> The Court held that even a blatant denial that the beliefs were religious did not preclude the “religiously held belief” excuse for demanding conscientious objector status.<sup>32</sup>

In 1972, with *Wisconsin v. Yoder*, the Court stated that the Amish desire to keep their children out of public school was a religious belief worthy of First Amendment protection but that the belief would not satisfy First Amendment criteria if it was founded on “subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time.”<sup>33</sup> Thus, if there was no traditional religious component, there would be no protection. In this decision the Court seems to be returning to a God-centered approach. But less than a decade later, in *Thomas v. Review Board of the Indiana Employment Security Division*, the Supreme Court denied the requirement of a historical component and reversed<sup>34</sup> a decision by the Indiana Supreme Court that held that “[a] personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim.”<sup>35</sup>

In addition to legal interpretations of the term religion, social science definitions may be helpful. Anthropological definitions of religion may be separated into four categories.<sup>36</sup> Each category makes sense from an anthropological point of view, but is problematic for the purposes of legal analysis. For example, “mental definitions” of religion compose one category of anthropological definitions.<sup>37</sup> These definitions are highly subjective,<sup>38</sup> focusing on emotions, feelings, and human interactions to define whether or not a religion exists.<sup>39</sup> This poses obvious concerns for the purposes of legal analysis. These definitions would allow for any sincerely held belief to be protected as a religion. There are a number of areas of study that rely heavily on assumptions and faith and yet are not considered religions. For example, physics relies on the propositions of gravity and inertia and yet there is no

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30. See 398 U.S. 333, 341 (1970).

31. *Id.* at 343.

32. See *id.* at 341, 343.

33. 406 U.S. 205, 216 (1972).

34. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 720 (1981).

35. *Id.* at 713 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 391 N.E.2d 1127, 1131 (Ind. 1979)).

36. Donovan, *supra* note 18, at 71-72.

37. *Id.* at 79.

38. See *id.*

39. *Id.* at 79-84.

absolute proof of these theories as true.<sup>40</sup> Few people, however, would consider physics a religion. As discussed above, the courts are weary of protecting beliefs that are not based in some traditionally religious belief.

A second type of anthropological definition is behavior-based.<sup>41</sup> Behavioral definitions look for rituals that are mandated by the belief system.<sup>42</sup> Those definitions are problematic in that they are both over-inclusive and under-inclusive. To avoid some under-inclusion, anthropologists redefine the definition to include mandatory rituals and optional rituals “directed toward sacred objects.”<sup>43</sup> While this does alleviate some of the under-inclusion, the definition begins to look more content based<sup>44</sup> as the focus moves toward the sacred objects of the ritual.<sup>45</sup> Under-inclusion still exists because not all aspects of religion are manifested in a ritual; thus some religions will be excluded.<sup>46</sup> Over-inclusion exists because all that a belief system must do to be a religion is mandate a ritual. Perhaps one “system of beliefs” mandates that all followers must smoke a cigarette every thirty minutes. If this is considered a religion for legal purposes, then an employer who enforces a policy of no smoking within the building will have to make reasonable accommodations of the religion and either eliminate no-smoking policies, institute smoking sections within the building, or allow for a ten-minute cigarette break every thirty minutes.

Content definitions look at the presence of sacred symbols in the religion.<sup>47</sup> Beliefs in supernatural ideas such as a Creator, Heaven, Hell, Celestial Kingdoms, and the like are indicators of religion. The concept “sacred” itself creates problems with these definitions in that it is culture-dependent.<sup>48</sup> This creates a risk that otherwise valid “new” religions would be unprotected because their belief structure is not historically culturally sacred. Alternatively, if symbols are the sole characteristic of religion, then high school lockers in the sixties indicate a religion based on the Beatles, and many teenagers in the eighties belonged to the Church of Def Leppard. While this test opens the door for enormous judicial discretion, it can be argued that the charge of the judiciary is to

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40. The fact that gravity has existed for as long as there has been communication does not necessarily mean that it always has and will forever be a part of this world.

41. *Id.* at 76.

42. *Id.* at 76-77.

43. *Id.* at 77-78.

44. *Id.* at 79.

45. *Id.* at 78-79.

46. *See id.* at 78.

47. *Id.* at 72.

48. *Id.* at 74.

exercise discretion to serve justice. Many anthropologists have gravitated toward content definitions because of the ease in application and the lack of alternatives.

The final category of definitions is that of functional definitions.<sup>49</sup> These definitions focus on the function or the need the religion fulfills in an individual's life.<sup>50</sup> James Donovan concludes that the best definition for religion may be "any belief system which serves the psychological function of alleviating death anxiety."<sup>51</sup> He proposes the use of "psychologists of religion" to determine whether or not a person's beliefs are religious.<sup>52</sup> Psychological standards apparently exist that measure death anxiety.<sup>53</sup> Donovan does note several problems with the application and "operationalization" of this standard. The test would be quite intrusive and that factor alone causes concern about skewed results.<sup>54</sup> This test would also entail evaluating one's death anxiety before and after exposure to the belief system.<sup>55</sup> As religion is something that is a part of many people's lives from their very early days, questions arise as to the ability to measure any changes other than those in the lives of converts to the belief system.

Even if one is able to measure with some degree of accuracy the effect of removing one's belief system on that individual's level of death anxiety, there are numerous other factors that affect this anxiety. The increasing ability of the medical profession to prolong life and cure disease, as well as the availability of drugs to allow for death without pain, should lower the level of death anxiety.

Similar to Donovan's "death anxiety" test is Jesse H. Choper's "extratemporal consequences" test.<sup>56</sup> This test looks to the negative consequences of disobeying a religious belief.<sup>57</sup> Professor Choper uses the example of two hypothetical draftees into the armed services.<sup>58</sup> One sincerely believes that a human being should not kill another human being, but there is no religious reason.<sup>59</sup> The other believes that if he kills another human he will be damned for all eternity.<sup>60</sup> Under the

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49. *Id.* at 86.

50. *Id.*

51. *Id.* at 95.

52. *Id.* at 98.

53. *Id.* at 95.

54. *Id.* at 96.

55. *Id.* at 95.

56. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 77 (1995).

57. *Id.*

58. *Id.* at 74-75.

59. *Id.* at 75.

60. *Id.*



extratemporal consequences test, the religious objector has better reason to object than the conscience-driven objector. Rather than look at the belief in question, the test looks to the effect of denying that belief or acting contrary to that belief.<sup>61</sup> Because the religion clauses do focus on the term “religion” rather than “moral belief” or simply “belief,” Professor Choper uses the after-life consequences as the sole factor to separate religious beliefs from other beliefs.

Noted Religion Clauses scholars disagree with the appropriateness of Professor Choper’s definition. Gary J. Simson uses Judaism to illustrate one failure in the definition.<sup>62</sup> Simson notes that the emphasis in Judaism is obeying God’s commands today, not out of fear of repercussions, but out of love and devotion.<sup>63</sup> Under the extratemporal consequences test, a devout Jewish citizen may be forced to go against the precepts of his religion because violating those precepts does not primarily create a fear of consequences in the afterlife. Similarly, a church that preaches absolution or repentance and forgiveness may eliminate any religious protection for its members.<sup>64</sup> Any fear of negative consequences arising could be counterbalanced by repentance or absolution. Only the most heinous and inabsolvable sins could be avoided by claiming religious freedom.

Most humans tend to assimilate new ideas into their lives by drawing analogies to things they already know. For example, a child that has touched a red-hot stove burner will be wary of the red-hot elements of a toaster, not because the child necessarily knows what the elements do, but because the elements are red-hot just as the stovetop was red-hot. The child remembers the pain that resulted from touching the stove and will properly give the toaster the properties that were embodied in the stove top. A similar approach to defining religion is espoused by Kent Greenawalt of Columbia University.<sup>65</sup> He states that “religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion.”<sup>66</sup> Rather than make a list of stated qualifications that determine a religion, Professor Greenawalt says that courts should find examples where there is clearly a

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61. *Id.* at 78.

62. Gary J. Simson, *Endangering Religious Liberty*, 84 CALIF. L. REV. 441, 450 (1996) (book review).

63. *Id.*

64. *See id.* at 447.

65. *See* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

66. *Id.* at 762.

religion present and draw analogies between the clear religion and the disputed beliefs at issue in each case.<sup>67</sup>

A. *The Brimmer Test*

In *Meyers v. United States*, David Meyers was indicted by a grand jury for conspiracy to possess marijuana with the intent to distribute it, for conspiracy to distribute marijuana, and for aiding and abetting possession of marijuana with the intent to distribute it.<sup>68</sup> Meyers attempted to claim that he was a member of a religion that required smoking marijuana as one of its principle religious tenets.<sup>69</sup> Meyers founded the “Church of Marijuana.”<sup>70</sup> Meyers served as the Reverend of the Church, which had approximately twenty teachers and allegedly had eight hundred members.<sup>71</sup> The book *Hemp & the Marijuana Conspiracy: The Emperor Wears No Clothes—The Authoritative Historical Record of the Cannabis Plant, Marijuana Prohibition, & How Hemp Can Still Save the World* served as the scriptures for this Church.<sup>72</sup> Members of the Church prayed to the marijuana plant and urged legislatures to legalize the drug.<sup>73</sup> The Church’s sole ceremony was smoking marijuana and discussion.<sup>74</sup> What the members discussed was a mystery,<sup>75</sup> but one thing is clear about the ceremony—it requires the procurement of marijuana.

In *Meyers*, U.S. District Court Judge Clarence Brimmer held that the Church of Marijuana was not a *bona fide* religion.<sup>76</sup> In doing so, he acknowledged that the First Amendment and the Religious Freedom Restoration Act “could easily become the first refuge of scoundrels if defendants could justify illegal conduct simply by crying ‘religion.’”<sup>77</sup> The threshold question in any religion clause case is to prove that a *bona fide* religion exists.<sup>78</sup> In determining a way in which to answer this question, Judge Brimmer proceeded with two main propositions. “The first is that one man’s religion will always be another man’s heresy.”<sup>79</sup>

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67. *Id.*

68. *United States v. Meyers (Meyers II)*, 95 F.3d 1475, 1479 (10th Cir. 1996).

69. *United States v. Meyers (Meyers I)*, 906 F. Supp. 1494, 1504 (D. Wyo. 1995).

70. *Id.*

71. *Id.* at 1495, 1504, 1506.

72. *Id.* at 1504.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1505.

77. *Id.* at 1498.

78. *Id.*

79. *Id.* at 1499. This proposition is based on the opinions of the District Court for the District of Columbia in *United States v. Kuch*, 288 F. Supp. 439, 443 (D.D.C. 1968), and the

The second proposition set forth by Judge Brimmer is that the court will err on the side of religious liberty if there is any borderline question.<sup>80</sup> Having set forth his guidelines for deciding the case, Judge Brimmer then determined that a definition for religion, while having been avoided for many years, is probably necessary to avoid political pressure:<sup>81</sup> “[T]he trees of religious freedom would bend with the political breeze” if a definition were not established.<sup>82</sup> To avoid this stormy future, Judge Brimmer established a test based on case law and commentary. The test, adopted by the United States Court of Appeals for the Tenth Circuit on appeal, consists of five factors to be evaluated when a potential religion comes before a court.<sup>83</sup>

Judge Brimmer analyzed the history of the definition of religion in the courts and academia under this five-factor test that can aid courts in determining whether a religion qualifies for protection under the Freedom of Restoration Act or the First Amendment.<sup>84</sup> In applying this test, Judge Brimmer concluded that the Church of Marijuana did not meet enough of the criteria to be defined as a religion.<sup>85</sup>

The first of the factors is the “Ultimate Ideas” factor.<sup>86</sup> This factor recognizes the tendency of religions to address the purpose and meaning of life and death.<sup>87</sup> Judge Brimmer included questions such as man’s place in the universe and man’s sense of being in this test.<sup>88</sup> For example, many religions believe that people are put on the planet to do good works

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United States Court of Appeals for the Third Circuit in *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981).

80. *Id.*

81. *See id.* at 1501.

82. *Id.* As an aside, the tree and wind analogy is especially appropriate coming from the District of Wyoming.

83. *Meyers II*, 95 F.3d 1475, 1483-84 (10th Cir. 1996).

84. *Meyers I*, 906 F. Supp. at 1495. Judge Brimmer concluded that the definition of religion for the Religious Freedom Restoration Act is the same as the definition of religion for the First Amendment. His conclusion is based on the fact that Congress intended that the RFRA would “restore the compelling interest test as set forth in *Sherbet v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).” *Meyers I*, 906 F. Supp. at 1499 (quoting 42 U.S.C. § 2000bb(b) (1993)) (internal quotation marks omitted); Religious Freedom Restoration Act, 42 U.S.C. §§ 2000(bb) to 2000(bb)-4 (1993). That test was designed to decide First Amendment cases. In light of the many challenges to the constitutionality of the RFRA, this Article will discuss the definition in light of the First Amendment. Also, because the Religion Clause applies to the states through the Fourteenth Amendment, this Article will use the term “First Amendment” to mean the Religion Clauses of the First Amendment applied to the federal government and to the states individually by incorporation through the Fourteenth Amendment.

85. *Meyers I*, 906 F. Supp. at 1505.

86. *Id.* at 1502.

87. *Id.*

88. *Id.*

for fellow humans so that they may be reincarnated as higher beings and eventually reach greater destinations.

Metaphysical beliefs make up the second factor of the test.<sup>89</sup> This factor addresses the “where” questions that might be asked<sup>90</sup>: Where do we go after we die? Where does the Creator exist? A belief in Heaven, Hell, Paradise, Nirvana, a Celestial Kingdom, Purgatory, or the like would satisfy this factor. For example, an indicator of religion may be that angels dwell on the earth and spiritual warfare is occurring around us at all times, pushing us forward and backward along the good-evil continuum.

Factor three answers the question, “How should we behave?”<sup>91</sup> This is the presence of a moral or ethical system.<sup>92</sup> This factor does not require that an organization take a stand on every divisive ethical issue. It merely looks to whether or not the organization set out some guidelines for right and wrong.<sup>93</sup> A church that states that it is wrong to harm any living creature, for any reason, would have a moral code. This code would generate some traditionally “religious” beliefs as well as some unique beliefs. For example, this church would be against abortion, child abuse, and war. It would also prohibit wearing fur or leather, eating meat, and wearing cosmetics that were tested on animals. Although it may seem that this category would make vegetarians, animal rights activists, and other traditionally nonreligious groups religious, Judge Brimmer points out that these systems fail the other factors of the test.<sup>94</sup>

Factor four looks to the comprehensive nature of the belief structure.<sup>95</sup> Judge Brimmer notes that one of the “hallmarks” of religion is that it often creates a lifestyle rather than simply dictating one small aspect of life.<sup>96</sup> The Amish, for example, forego the benefits of modern technological society and live in the same manner as their parents and grandparents. They do not simply say that one cannot use a stereo while other modern media equipment is fine under religious doctrine. They make their own clothes, drive horse-drawn carriages, and live off the land.

Judge Brimmer’s final factor is entitled the “Accoutrements of Religion.”<sup>97</sup> There are ten subcategories in this factor.<sup>98</sup> These

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89. *Id.*

90. *See id.*

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1504.

95. *Id.* at 1502.

96. *Id.*

97. *Id.*

subcategories, or indicia of religion, include a founder, prophet, or teacher; important writings or scriptures; gathering places; keepers of knowledge; ceremonies and rituals; structure or organization; holidays; dietary or fasting requirements; appearance or clothing restrictions; and propagation or missionary work.<sup>99</sup>

The five factors of the Meyers test are not revelations by any definition. The test merely organizes and condenses the many tests that have been offered by the Supreme Court and the academic community and presents them as a single package. This combination, if adopted by other courts, will lead to a more uniform and comprehensive analysis of religion.

#### 1. History of Marriage—Is Marriage a Religious Concept or a Civil Concept?

Once we define religion, we must address whether marriage is primarily a religious concept or a civil concept. Currently, marriage is both a civil institution and a religious institution. States require couples to obtain a marriage license before entering into the contract of marriage.<sup>100</sup> Some states will recognize common-law marriages if couples meet certain criteria.<sup>101</sup> Marriage is generally defined in some states by statute and in some states by the state constitution.<sup>102</sup> The federal government also has a statute defining marriage for all federal purposes as between one man and one woman.<sup>103</sup> These different civil definitions of marriage create confusion and chaos in the state of the family. It is important to come to an agreement on the definition of marriage, and that agreement can lie in the separation of civil marriage from the religious concept of marriage.

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98. *See id.* at 1502-03.

99. *See id.*

100. *See, e.g.,* CAL. FAM. CODE § 350 (West 2012), ARIZ. REV. STAT. ANN. § 25-111 (2012); N.Y. DOM. REL. § 13 (Consol. 2012); NEB. REV. STAT. § 42-104 (2012).

101. Criteria typically are based in the intent to be a married couple, the capacity to marry and some cohabitation or consummation of the relationship. Dorian Solot & Marshall Miller, *Common Law Marriage Fact Sheet*, ALTERNATIVES TO MARRIAGE PROJECT, <http://www.unmarried.org/common-law-marriage-fact-sheet.html> (last updated Feb. 2012).

102. *See, e.g.,* *Statewide Marriage Prohibitions*, *supra* note 2; AL CONST. amend. 774; AZ CONST. art. XXX; LA CONST. art. XII, § 15.

103. Defense of Marriage Act (DOMA), Pub. L. No. 104-199 (1996) (amending the U.S. Code Chapter 1 of Title 1, Section 7). The added text stated, “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” *Id.*

If marriage is primarily a civil concept, then, from a First Amendment perspective, the government can and should define marriage as it sees fit.<sup>104</sup> If, however, marriage is primarily a religious concept, the government needs to be careful about the Religion Clauses of the First Amendment. History provides us with arguments for marriage as a civil concept, but religious orders also provide us with arguments that marriage is primarily religious.

In 1922, Edward Westermarck, a sociology professor from the University of London, explored the history of marriage and defined marriage as “a social institution . . . recognised by custom or law.”<sup>105</sup> In reviewing human cultures from around the world, as well as a number of different species, Westermarck determined that marriage was invented by the needs of human beings—men served to protect women and the young, and women served to nurture the young.<sup>106</sup> Westermarck argued that marriage exists because of the primitive urge to preserve the human race.<sup>107</sup> Willystine Goodsell of Columbia University, another marriage historian, paraphrased Westermarck to state, “[I]t appears that marriage has its source in the family, rather than the family in marriage.”<sup>108</sup> Professor Goodsell also noted, “[M]arriage is commonly regarded as a private contract.”<sup>109</sup> These definitions do not assist in the debate on whether marriage is a religious institution or a legal institution—either could evolve from the history as described by these historic professors.

In describing marriage, Professor Goodsell articulated four methods men used to obtain a wife in primitive culture: purchase, service, consent, and capture.<sup>110</sup> Of these, all but consent seem rooted in theories of property.<sup>111</sup> Consent appears to be a “far less common” form than purchase/service, though a more common form than capture in primitive societies.<sup>112</sup> Regardless of the type of marriage, the family was viewed as a patriarchal unit, governed by the husband.

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104. This Article ignores any other arguments for or against same-sex marriage based in equal protection or substantive due process.

105. EDWARD WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* 26 (5th ed. 1922).

106. *Id.* at 28.

107. *Id.* at 53.

108. WILLYSTINE GOODSSELL, *A HISTORY OF MARRIAGE AND THE FAMILY* 4 (rev. ed. 1934).

109. *Id.* at 30.

110. *Id.* at 23.

111. *See id.* at 23-25. While purchase and capture may seem self-evident, the theory of service is really a purchase theory where the purchase price is paid through service to the wife's family.

112. *Id.* at 24.

In evaluating this patriarchal unit, Goodsell evaluated Hebrew, Greek, and Roman traditions.<sup>113</sup> Marriage under Hebrew law and tradition was “held in high esteem.”<sup>114</sup> Marriage was governed by several rules, both demographic and contractual.<sup>115</sup> In Greek culture, the family was seen as a religious organization and marriage was viewed as a sacred ceremony.<sup>116</sup> It was through marriage and the family that ancestral worship continued from generation to generation.<sup>117</sup> Sacrifices were made to the gods of marriage and private ceremonies were held in which the bride was released from her obligation to worship her father’s ancestral gods and instead committed to worshipping her husband’s family.<sup>118</sup> Similarly, the Roman view of the family was that of a religious and legal entity, with the husband being the legally recognized person charged with representing the family.<sup>119</sup> The marriage itself could be formalized through one of three methods: (1) the religious ceremony with the eating of sacred cake; (2) a contract-like ceremony with similar fanfare to the first, but with a symbolic purchase of the wife with a coin of small value instead of the eating of the sacred cake; or (3) by common law where the woman lived as a wife to the man for one year without leaving his home for more than three days.<sup>120</sup>

Again, according to Dr. Goodsell, early Christian churches sanctioned and accepted existing nonchurch marriages.<sup>121</sup> Goodsell specifically stated that for “many centuries Christian marriage, like pagan, rested upon the free consent of the contracting parties and *was not essentially a religious ceremony*.”<sup>122</sup> Goodsell points out, however, that by the time of St. Augustine, it was probably customary for married couples to participate in religious activities as part of the wedding celebration.<sup>123</sup> Goodsell notes that the Christian church had an increasing impact on the legislation of marriage over time.<sup>124</sup>

In reviewing marriage through the Protestant Reformation, Goodsell notes that Martin Luther viewed marriage as a “civil contract necessary to society and blessed of God” rather than a mystical

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113. *Id.* at 51-154.

114. *Id.* at 61.

115. *See id.* at 63-65.

116. *Id.* at 88.

117. *See id.* at 88-89.

118. *Id.* at 91.

119. *Id.* at 115-16.

120. *Id.* at 123-24.

121. *Id.* at 171.

122. *Id.* at 171-72.

123. *Id.* at 173.

124. *Id.* at 184-85.

sacrament.<sup>125</sup> At the same time, Luther contradicts that direct statement by referring to marriage as a “most spiritual” status.<sup>126</sup>

In 1653, after Cromwell became Lord Protector of England, the Civil Marriage Act was passed, abolishing religious marriages and requiring civil ceremonies before judges.<sup>127</sup> Goodsell asserted that marriage in northern colonial America also was predominantly a civil contract, while in the southern colonies, it was viewed as a sacrament to be performed exclusively by clergy.<sup>128</sup> East and West New Jersey allowed marriages to be solemnized by clergy or a justice of the peace,<sup>129</sup> while Virginia had a law that stated no marriage was valid unless conducted by a minister.<sup>130</sup> Generally, laws related to marriage in the colonies provided for notice, parental consent, ceremony conducted by someone recognized by law, and record-keeping.<sup>131</sup>

Opponents of same-sex marriage point to the scriptures to define marriage as between a man and a woman and primarily as a religious concept. Christians can point to the early pages of Genesis, where the Lord created Adam and gave him the Garden of Eden to tend.<sup>132</sup> To ease any loneliness Adam might have felt, the Lord created Eve from one of Adam’s ribs.<sup>133</sup> Adam then stated, “Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.”<sup>134</sup> Later in Genesis, Hamar the Hivite approached Jacob and shared an understanding of marriage when he said, “The soul of my son Shéchem longeth for your daughter: I pray you give her him to wife. And make ye marriages with us, and give your daughters unto us, and take our daughters unto you.”<sup>135</sup> In Deuteronomy, the Lord links marriage to a male/female companionship when He told the Israelites, “Neither shalt thou make marriages with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son.”<sup>136</sup> In Romans, Paul talks of the law of Moses and the duties owed from wife to husband, indicating that the lawful relationship is between a man and a woman.<sup>137</sup>

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125. *Id.* at 266.

126. *Id.*

127. *Id.* at 269.

128. *Id.* at 366.

129. *Id.* at 387.

130. *Id.* at 384.

131. *Id.* at 382.

132. *Genesis* 2:7-15.

133. *Genesis* 2:20-22.

134. *Genesis* 2:24.

135. *Genesis* 34:8-9.

136. *Deuteronomy* 7:3.

137. *Romans* 7:2.



Paul further discusses marriage in First Corinthians in forty verses of discussion of husband and wife.<sup>138</sup> These Christians point to the timeframe of the Bible, in which they have a sincere religious belief, to indicate that the very first marriage was a religious marriage (pregovernment) and that later marriages also followed the law of the Lord.

Members of the Church of Jesus Christ of Latter-day Saints (LDS) will point to scriptures in the Book of Mormon as well as the writings of current church leaders, who are considered Prophets of God. In 1995, the leaders of the LDS church issued *The Family: A Proclamation to the World*, which is considered doctrine.<sup>139</sup> That document states,

We, the First Presidency and the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children.<sup>140</sup>

Catholics share this belief as witnesses in the Catechisms of the Catholic Church.<sup>141</sup> In fact, the Catechisms dedicate forty-six sections to the topic of marriage.<sup>142</sup> The Muslim's Qu'ran has over thirty different sections dedicated to marriage and the religious rules related to marriage.<sup>143</sup> Even the Supreme Court has acknowledged that marriage is extremely religious in history and nature. In *Reynolds*, the Court stated that marriage "from its very nature [is] a sacred obligation."<sup>144</sup>

Given the passion of the same-sex marriage movement, it is unsustainable to continue to allow marriage to be defined by religious leaders and by the government in potentially different ways. Because there is no clear answer to the question of whether marriage is a religious or civil concept, and given that it is impossible to state with any clarity that one's religion is clearly wrong, this Article moves forward under the assumption that marriage is primarily a religious concept. In order to determine whether the government violates the Free Exercise Clause

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138. See *1 Corinthians* 7.

139. Gordon B. Hinckley, President, The Church of Jesus Christ of the Latter-Day Saints, Address at the General Relief Society Meeting: *The Family: A Proclamation to the World* (Sept. 23, 1995), available at <http://www.lds.org/family/proclamation>.

140. *Id.*

141. See CATECHISM OF THE CATHOLIC CHURCH, §§ 1613, 1653 (2d ed. 2003), available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p2s2c3a7.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a7.htm).

142. *Id.* §§ 1621-1666.

143. *An Index to the Qur'an*, U. S. CAL. CENTER FOR MUSLIM-JEWISH ENGAGEMENT, <http://www.usc.edu/org/cmje/religious-texts/quran/quranindex.php#M> (last visited Oct. 26, 2012).

144. *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

and/or the Establishment Clause, we need to evaluate the definition of religion and how those clauses have been interpreted.

2. Can Organizations Include Same-Sex Marriage in Their Teachings and Meet the Definition of “Religion”?

Once we have defined religion and determined that marriage is primarily a religious function, we must address whether it is possible that a *bona fide* religion may have same-sex marriage as a core belief and principle. To answer this question, two different religious orders that support same-sex marriage are examined. First, the Metropolitan Community Churches, an organization created primarily to serve the gay and lesbian population’s spiritual needs, and second, the Unitarian Universalist Association.

The Metropolitan Community Churches had their first church service on October 6, 1968, held in the living room of a reverend’s home and attended by twelve people.<sup>145</sup> In that first meeting, the founding pastor announced that the church would be an inclusive Protestant-based church.<sup>146</sup> In the following months and years, membership grew and the church became more organized.<sup>147</sup> By 2004, the church had become the Universal Fellowship of Metropolitan Community Churches (MCC) and had over 43,000 members in 22 countries.<sup>148</sup> As of 2012, the MCC participates in several state, national, and international organizations of churches.<sup>149</sup> The MCC clergy are all seminary-trained, attending the seminaries of “mainline Christian denominations around the world.”<sup>150</sup> The MCC has a vision statement that “faithfully proclaims God’s inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.”<sup>151</sup> The church’s core values include community, inclusion, spiritual transformation, and social action.<sup>152</sup> The churches are governed by commonly adopted bylaws that set forth the foundation of the doctrine of the churches.<sup>153</sup> These bylaws set forth the foundation for use with the Brimmer test. The organization

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145. *History of MCC*, METROPOLITAN COMMUNITY CHURCHES, <http://mccchurch.org/overview/history-of-mcc/> (last visited Oct. 26, 2012).

146. *Id.*

147. *Id.*

148. *Id.*

149. *See Fact Sheet*, METROPOLITAN COMMUNITY CHURCHES, [http://www.mccchurch.org/files/2009/08/MCC-FACT-SHEET\\_2011-Craig-Suggestions.pdf](http://www.mccchurch.org/files/2009/08/MCC-FACT-SHEET_2011-Craig-Suggestions.pdf) (last updated October 2011).

150. *Id.*

151. *Id.*

152. *Id.*

153. *See Governance*, METROPOLITAN COMMUNITY CHURCHES, <http://mccchurch.org/how-we-work/governance/> (last visited Oct. 26, 2012).

meets the Ultimate Idea factor in that its clearly defined mission is to help congregants define the “meaning of life.”<sup>154</sup> There is a distinct focus on “mak[ing] God’s will dominant” in the lives of the members of the churches and in living by the law of the Bible.<sup>155</sup>

With regard to the metaphysical factor, the MCC church identifies as a “Christian” church, with a foundational belief in God, Jesus Christ, and the Holy Spirit.<sup>156</sup> The church performs baptisms, funerals, and conferral of God’s blessings on relationships.<sup>157</sup> They believe in the traditional Christian concepts of Heaven and Hell.<sup>158</sup>

Brimmer’s third factor, the behavioral factor, can be seen throughout the MCC literature. The church formally adopted the Human Rights Protocol, a document that sets forth a standard that members are called to be activists working to make the world a better place and sets forth guidelines for how to do such.<sup>159</sup> For example, one enunciated standard is “to only go where we are invited.”<sup>160</sup> The church hosts a program called “Creating a Life That Matters” which teaches about Christian interactions with others.<sup>161</sup> Similar to other Christian and Protestant churches, the MCC churches teach of kindness, love, and tolerance.

The fourth factor, the comprehensive nature of the belief system, is also seen in the documents. Members of the church do not have a strict lifestyle commitment like the Amish or the Mormons, but there is clear guidance as to the type of life that a member should live. As mentioned above, the Human Rights Protocol and the teachings on “Creating a Life That Matters” give members a set of clear criteria for how to treat others. The church documents also encourage communication with God (prayer) and working toward a life consistent with biblical teachings.

The MCC has many “accoutrements of religion” as can be seen in their web pages and bylaws. The church performs baptisms, holy communion, the blessing of relationships (marriage), blessings for the

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154. *History of MCC*, *supra* note 145.

155. *Bylaws of the Universal Fellowship of Metropolitan Community Churches*, METROPOLITAN COMMUNITY CHURCHES (June 29, 2010), <http://mccchurch.org/how-we-work/governance/> (follow “UFMCC Bylaws as of June 2010” hyperlink).

156. *Id.*

157. *Id.*

158. *See id.*

159. *Human Rights Protocol*, METROPOLITAN COMMUNITY CHURCHES, <http://mccchurch.org/overview/human-rights-protocol/> (last visited Oct. 26, 2012) (adopted Aug. 11, 2008).

160. *Id.*

161. *See Creating a Life That Matters*, METROPOLITAN COMMUNITY CHURCHES, <http://mccchurch.org/resources/creating-a-life-that-matters/> (last visited Oct. 26, 2012).

sick, and membership rites.<sup>162</sup> As can be seen on the home page of the MCC website, pastors wear traditional-looking Christian robes.<sup>163</sup> Many of the accoutrements parallel those of Protestant churches.

The MCC churches have been performing gay marriages for more than forty years.<sup>164</sup> The church has a series of manuals and teaching on why homosexuality is not a violation of biblical teachings and why their supreme being accepts homosexuality.<sup>165</sup>

In addition to the MCC churches, the Unitarian Universalist Association (UUA) has publicly supported religious commitment ceremonies, or marriages, for same-sex couples since 1984.<sup>166</sup> And like the MCC churches, the UUA seems to be a legitimate religion under the Brimmer test. This association of congregations proclaims seven principles of belief to address the purpose and meaning of life (factor 1).<sup>167</sup> These principles include that every person has inherent worth and dignity; that we should treat others with equity, compassion, and justice; that all are entitled to a free search for truth and meaning; and that the ultimate goal of humanity is a world of peace, liberty, and justice for all.<sup>168</sup>

Related to the metaphysical (factor 2), the Unitarians trace their roots back to Christianity and its belief in Heaven and Hell.<sup>169</sup> The code of behavior (factor 3) and the lifestyle (factor 4) components for the Unitarians are highly developed. The church has a well-defined curriculum called the Tapestry of Faith, which includes a course called “Building the World We Dream About” and a course on learning to be a

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162. *Bylaws of the Universal Fellowship of Metropolitan Community Churches*, *supra* note 155.

163. METROPOLITAN COMMUNITY CHURCHES, <http://www.mccchurch.org> (last visited July 20, 2012).

164. *See Stances of Faiths on LGBTQ Issues: Metropolitan Community Churches*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-metropolitan-community-churches> (last visited Oct. 29, 2012).

165. *See Homosexuality and the Bible, Theological Resources*, METROPOLITAN COMMUNITY CHURCHES, <http://mccchurch.org/resources/mcc-theologies/> (last visited Oct. 26, 2012).

166. *Unitarian Universalism and LGBTQ Issues: History and Facts*, UNITARIAN UNIVERSALIST ASS'N OF CONGREGATIONS, <http://www.uua.org/lgbt/history/index.shtml> (last visited Oct. 26, 2012).

167. *Our Unitarian Universalist Principles*, UNITARIAN UNIVERSALIST ASS'N OF CONGREGATIONS, <http://www.uua.org/beliefs/principles/index.shtml> (last visited Oct. 26, 2012).

168. *Id.*

169. *See Beliefs About Life and Death and Unitarian Universalism*, UNITARIAN UNIVERSALIST ASS'N OF CONGREGATIONS, <http://www.uua.org/beliefs/welcome/183025.shtml> (last visited Aug. 27, 2012).

lay minister.<sup>170</sup> The church teaches strongly about social justice and treating others with dignity and respect.<sup>171</sup>

Finally, to the fifth factor, the Unitarians have a structured system of leadership (with theologically educated and ordained ministers) and a structured program that includes the lighting of a flaming chalice as well as a sermon by a minister or lay leader.<sup>172</sup>

In addition to the churches analyzed in this Part, religious leaders from many different (and established) religions have expressed support for same-sex marriage as a religious commitment, endorsed by a god and a part of the religion.<sup>173</sup> Some of these leaders are doing so in conflict with the doctrines of their parent church organization and some are part of “break-off” congregations and religions.<sup>174</sup> Even so, it appears that a legally defined religion may hold as part of its teachings and doctrine a belief in, and support for, same-sex marriage.

### 3. The Establishment Clause of the First Amendment and Its Relationship to Marriage

The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>175</sup> In general, the first part of this clause, commonly known as the Establishment Clause, is used to prevent the government from allowing religion to dictate policy or from becoming overly involved in religious doctrines.

In 1878, the United States Supreme Court heard one of the first religion cases when it heard *Reynolds v. United States*.<sup>176</sup> In *Reynolds*, the Court reviewed the history of the Establishment Clause, noting:

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170. See *Alphabetical List of Tapestry of Faith Programs and Resources*, UNITARIAN UNIVERSALIST ASS’N OF CONGREGATIONS, <http://www.uua.org/re/tapestry/167075.shtml> (last visited Oct. 26, 2012).

171. See *Social Justice*, UNITARIAN UNIVERSALIST ASS’N OF CONGREGATIONS, <http://www.uua.org/justice/index.shtml> (last visited Oct. 26, 2012); *Our Unitarian Universalist Principles*, *supra* note 167.

172. *Worship and Congregational Life in Unitarian Universalism*, UNITARIAN UNIVERSALIST ASS’N OF CONGREGATIONS, <http://www.uua.org/beliefs/congregationalife/index.shtml> (last visited Oct. 26, 2012).

173. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 193-217 (1996).

174. See *AFFIRMATION: GAY AND LESBIAN MORMONS*, <http://www.affirmation.org> (last visited Oct. 26, 2012); see also *DIGNITY USA*, <http://www.dignityusa.org> (last visited Oct. 26, 2012).

175. U.S. CONST. amend. I. This amendment was approximately the 23rd version of the religion clause discussed, debated and voted upon. See JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 241-43 (2000).

176. 98 U.S. 145 (1878).

Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions.<sup>177</sup>

The Court further noted that the American people were opposed to this intrusion and legislation was proposed across the states to prevent it.<sup>178</sup> In Virginia, a bill was passed that said in its preamble:

[t]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, it is declared that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.<sup>179</sup>

According to the Court in *Reynolds*, this preamble sets forth the line between church and state: that is, the state is not to interfere with the opinions or beliefs of people, but that it may step in when those beliefs lead to actions that violate the peace and good order of society.<sup>180</sup>

Seventy years after *Reynolds*, the Supreme Court reinforced this line of distinction, quoting the *Reynolds* opinion that the First Amendment created “a wall of separation between Church and State.”<sup>181</sup> The 1947 opinion in *Everson v. Board of Education* held that government contracts paying for students to be transported to and from public schools and private, religious schools was constitutional because it provided financial assistance to all students, regardless of religious status.<sup>182</sup> In doing so, the Court stated that the purpose of the religion clauses is “to be . . . neutral in its relations with groups of religious believers and non-believers.”<sup>183</sup>

Twenty-four years later, Chief Justice Warren Burger summarized and encapsulated Supreme Court precedent, including *Everson*, into the

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177. *Id.* at 162-63.

178. *See id.* at 163.

179. *Id.* (quoting the preamble to the Virginia Statute, 12 Hening’s Stat. 84) (internal quotation marks omitted).

180. *Id.* at 166. In *Reynolds*, the Court went on to hold that laws prohibiting polygamy did not violate this line because polygamy was an act that historically was against good order. *See id.* at 164-65.

181. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds*, 98 U.S. at 164) (internal quotation marks omitted).

182. *Id.* at 16-17.

183. *Id.* at 18.

now-famous *Lemon* test.<sup>184</sup> In *Lemon*, the Supreme Court held as unconstitutional two state statutes designed to reimburse private schools for the secular components of education (textbooks and percentage of teacher salary dedicated to nonreligious teaching, for example).<sup>185</sup> In this test, courts look to three characteristics or impacts of a law or regulation to determine if it is a valid regulation: first, whether the statute has a secular purpose (it must); second, whether the principal effect advances or inhibits religion (it must not); and third, whether the statute “foster[s] . . . excessive . . . entanglement with religion” (again, it must not).<sup>186</sup>

Since 1971, the Court has struggled with the application of the *Lemon* test. In 2005, the Supreme Court decided two cases based on the Establishment Clause.<sup>187</sup> Both cases were heard on the same day, decided on the same day, and dealt with the public display of the Ten Commandments, a set of religious rules derived from passages in the Bible, with opposite results.<sup>188</sup> In *McCreary County v. American Civil Liberties Union*, county executives for two different counties in Kentucky hung a display of the Ten Commandments in public hallways of county courthouses.<sup>189</sup> After complaints from the ACLU, each county passed resolutions stating that the displays should demonstrate “the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded.”<sup>190</sup> Each courthouse expanded the display to include other religious-based quotes and themes.<sup>191</sup> The District Court ordered the removal of the displays for failing the *Lemon* test.<sup>192</sup> Instead of removing the displays, the counties again expanded the displays to include the Ten Commandments but also full copies of the Magna Carta, Bill of Rights, Declaration of Independence, and other historical legal documents.<sup>193</sup> The counties further added explanations for each of the documents explaining their significance to the development of Western legal thought.<sup>194</sup> The trial court again ordered the display removed as any

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184. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

185. *Id.* at 606-07.

186. *Id.* at 612-13.

187. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844 (2005).

188. *Van Orden*, 545 U.S. at 681; *McCreary County*, 545 U.S. at 851-52, 857-58. The Ten Commandments are typically cited in *Exodus* 20:1-17.

189. *McCreary County*, 545 U.S. at 851-52.

190. *Id.* at 853 (citation omitted).

191. *Id.* at 853-54.

192. See *id.* at 854.

193. *Id.* at 855-56.

194. *Id.* at 856.

secular purpose given at that time would “crumble[] . . . upon an examination of the history” of the litigation.<sup>195</sup> The United States Court of Appeals for the Sixth Circuit and the Supreme Court affirmed the order to remove the displays.<sup>196</sup> The Supreme Court did not utilize the entire *Lemon* test, but spent most of its opinion on the “secular purpose” arm of the test.<sup>197</sup> Finding that even the most diverse of the displays continued to have a predominantly religious purpose (for selecting documents that highlight the religious history and ignoring tremendously impactful documents without that religious implication), the Court held that the underlying religious purpose rendered the display unconstitutional.<sup>198</sup>

In the sister case, *Van Orden v. Perry*, the state of Texas had a six-foot-high monument containing the text of the Ten Commandments on the grounds of the state capitol building.<sup>199</sup> The monument was part of a thirty-eight-item display containing monuments and historical markers described as “commemorating the ‘people, ideals, and events that compose Texan identity.’”<sup>200</sup> In analyzing this case, the Court acknowledged that *Lemon* has not been applied consistently or evenly.<sup>201</sup> The Court then refused to apply *Lemon*, calling it “not useful” while focusing on the nature of the monument and the history of our nation.<sup>202</sup> Because of the significance the Ten Commandments have played in the history of America, as well as the “passive” nature of the display (to see it, one almost must seek it out), the Court held that the display was not a violation of the Establishment Clause.<sup>203</sup> It is not clear why the Court did not simply look at the circumstances surrounding the entire display and find a secular purpose that neither advances nor hinders religion and does not entail an excessive entanglement. Justice Thomas concurred in the opinion but argued that the Establishment Clause should not even be a consideration for two reasons: (1) the Establishment Clause was never meant to apply to the states but only to the federal government, and (2) even if the clause applies to the states, there is nothing about this display that coerces a person to view the display.<sup>204</sup> In dissent, Justice

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195. *Id.* at 857 (citation omitted).

196. *Id.* at 857-58.

197. *Id.* at 868-73.

198. *Id.* at 881.

199. 545 U.S. 677, 681 (2005).

200. *Id.* (quoting Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001)).

201. *Id.* at 686.

202. *Id.*

203. *Id.* at 691-92.

204. *Id.* at 693-99 (Thomas, J., concurring).



Stevens addresses the idea that the display may send a message to nonadherents of Judeo-Christian faiths that the government of Texas considers them outsiders.<sup>205</sup> It is clear from the many opinions in *Van Orden* that the Court is in a state of confusion about the test to use for analyzing Establishment Clause cases.

In October 2011, the Supreme Court denied a petition for certiorari in *Utah Highway Patrol Ass'n v. American Atheists, Inc.*<sup>206</sup> In his dissent to that denial, Justice Thomas stated, "Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles."<sup>207</sup> Justice Thomas noted that the Tenth Circuit relied on its own precedent rather than Supreme Court opinions in determining which test to use for the case.<sup>208</sup> Instead of berating the Circuit Court, he supported their decision because the Supreme Court has not given lower courts any guidance on which test should be applied in Establishment Clause cases.<sup>209</sup> The Circuit Court used the test commonly known as the *Lemon* test, which Justice Thomas articulated as having been sometimes ignored, sometimes applied, sometimes used as a guiding, but not binding, test, and sometimes actively held to be inapplicable by the Supreme Court.<sup>210</sup> In this denial of certiorari, the Court let stand the Tenth Circuit's opinion in the Highway Patrol case applying the *Lemon* test.<sup>211</sup>

### B. *Lemon Test Analysis*

Given the Court's recent denial of certiorari, letting an application of the *Lemon* test stand unmolested, this Article proceeds with that test as the most applicable. In applying the three prongs of the *Lemon* test to the government's civil definition of marriage, it is apparent that there are issues with entanglement and effect.

First, does the statute have a secular purpose? In the 2005 *McCreary* case, the Court stated, "[L]ooking to whether government action has 'a secular legislative purpose' has been a common, albeit seldom dispositive, element of our cases."<sup>212</sup> The Court noted that prior

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205. *Id.* at 708 (Stevens, J., dissenting).

206. 132 S. Ct. 12, 12 (2011).

207. *Id.* at 13 (Thomas, J., dissenting).

208. *Id.* at 14.

209. *See id.*; see also Marcia Alembik, Note, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1180 n.54-143 (2006) (discussing the inconsistent usage of the *Lemon* test by the Supreme Court).

210. 132 S. Ct. at 14-15 (Thomas, J., dissenting).

211. *Id.* at 14.

212. 545 U.S. 844, 859 (2005).

to the case at hand, in only four previous cases had the Court found an illegitimate purpose.<sup>213</sup> The confusion is in footnote ten, which emphasizes that in “special” circumstances, such as legislative prayer, the Court has found government action legitimate even if the purpose is “presumably religious.”<sup>214</sup> It is unclear whether a definition of marriage would be construed as a special circumstance. Even if it is not, there can be secular purposes articulated.<sup>215</sup> One conservative author wrote that the purposes of defining marriage as an opposite-gender phenomenon include the encouragement of childbearing to ensure that the nation has sufficient population to sustain its future.<sup>216</sup> A second potentially secular purpose is to allow the government to save money by limiting spousal benefits to opposite gender couples.<sup>217</sup> While both are indeed secular as articulated, the *McCreary* Court evaluated the stated secular purposes for the posting of the Ten Commandments through a contextual lens.<sup>218</sup> While noting that government reasons generally are given deference, the stated reason must be “genuine, not a sham.”<sup>219</sup> In *McCreary*, the Court determined that tracing the evolution of the display and the articulated reasons given by the government over time demonstrated that the purpose of the action violated the Establishment Clause.<sup>220</sup> In evaluating state and federal definitions of marriage in a contextual sense, it is reasonable to believe that the Court would find that those definitions were enacted as the result of a religious reaction to courts and local governments declaring same-sex marriages legal. For example, Proposition 8 in California, which eliminated the rights of same-sex couples to marry, was a constitutional amendment intended to overturn a state court ruling that same-sex couples had a constitutional right to marry.<sup>221</sup> The arguments in reviewing the voters’ guide for Proposition 8

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213. *Id.*

214. *Id.* at 859 n.10.

215. David W. Thornton, *Nine Myths About the Same-Sex Marriage Debate*, ATLANTA CONSERVATIVE EXAMINER (June 2, 2012), <http://www.examiner.com/article/nine-myths-about-the-same-sex-marriage-debate>. The counterarguments for these purposes will not be explored in this Article, though the author admits that some of the purposes articulated seem weak.

216. *Id.*

217. *Id.* Other arguments against same-sex marriage are clearly non-secular: the government should not sponsor things people find wrong, marriage is a religious rite and so is opposite-gender by its nature, etc. See *Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/> (last visited Oct. 29, 2012).

218. 545 U.S. at 864-66.

219. *Id.* at 864.

220. See *id.* at 864-66.

221. Cal. Const. art. I, § 7.5 (2008); see also *Prop 8 Eliminates Right of Same-Sex Couples To Marry*, OFFICIAL VOTER INFO. GUIDE (Nov. 4, 2008), <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm>.

are littered with religious and moral arguments, such as “the best situation for a child is to be raised by a married mother and father” and “[w]e should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay.”<sup>222</sup> The arguments for Proposition 8 were set forth and signed by the California Family Council<sup>223</sup> and the Director of the Coalition of African American Pastors.<sup>224</sup> In Minnesota, an amendment to define marriage as an opposite-gender-only status was defeated by voters in November 2012.<sup>225</sup> The amendment had outspoken supporters in the Minnesota Catholic Conference<sup>226</sup> and the Minnesota Family Council.<sup>227</sup>

The second *Lemon* factor, the advancement or inhibition of religion, also seems violated by any government definition of marriage. The Court said that the “touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”<sup>228</sup> If we accept the proposition that marriage is predominantly a religious concept, then any definition of marriage by the government will either advance one religion over another or advance religion over nonreligion. If marriage is defined as opposite-gender only, then traditional Judeo-Christian religions are advanced to the detriment of religions such as the MCC and the Unitarian Church. If marriage is defined as a relationship between any two people, regardless of gender, then the MCC and Unitarian beliefs “trump” the beliefs of the mainstream religions. In either case, if marriage is predominantly a religious principle, any definition of marriage advances religion over nonreligion. Those against same-sex marriage often point to the religious nature of marriage as evidence as to

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222. *Prop 8 Eliminates Right of Same-Sex Couples To Marry*, *supra* note 221.

223. The CFC is a nonprofit religious organization with a mission to “protect and promote Judeo-Christian principles.” *About CFC*, CAL. FAMILY COUNCIL, <http://www.californiafamilycouncil.org/about-us> (last visited Oct. 26, 2012).

224. *Prop 8 Eliminates Right of Same-Sex Couples To Marry*, *supra* note 221.

225. *Resources on Minnesota Issues: Same-Sex Marriage* in Minnesota, MINN. LEGIS. REFERENCE LIBR. (Oct. 2012), <http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=gay>.

226. *MN Marriage Protection Amendment*, MINN. CATHOLIC CONFERENCE, <http://www.mncc.org/advocacy-areas/marriage-and-family/marriage-amendment> (last visited Oct. 26, 2012).

227. The MFC is a nonprofit organization whose mission is “to strengthen the families of Minnesota by advancing biblical principles in the public arena.” *Our Mission*, MINN. FAMILY COUNCIL, <http://www.mfc.org/about/our-mission> (last visited Oct. 26, 2012); *see also Issue Resources*, MINN. FAMILY COUNCIL, <http://www.mfc.org/issues/issuesresearch> (last visited Oct. 26, 2012).

228. *McCreary Cnty v. Am. Civil Liberties Union*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

why it should be banned.<sup>229</sup> This simply supports the notion that any definition of marriage advances religion and sends a message that those who do not hold the codified belief are “outsiders.”

Finally, we must look at whether a government definition of marriage creates an excessive entanglement with religion. The Supreme Court said in *Lemon*, “The objective is to prevent, as far as possible, the intrusion of either [church or government] into the precincts of the other.”<sup>230</sup> According to the *Lemon* opinion, the evaluation of entanglement requires an evaluation of “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>231</sup> One could argue that any civil definition of “marriage” benefits primarily one religious institution or another, and one also could argue that the nature of the benefit to those organizations is negligible. But the third category is the most telling—the resulting relationship between government and religion. Yale law professor Stephen L. Carter once noted, “The purpose of the separation was not to protect the state from religious believers but to protect the church in its work of salvation from the corruption of the state.”<sup>232</sup>

The Supreme Court has acknowledged that some interaction between church and state is inevitable and that to violate the Establishment Clause, the interaction must be “excessive.”<sup>233</sup> The Court has not found excessive entanglement, for example, when the government is reviewing religious counseling programs for funding purposes or where the state audits the funds given to religious schools.<sup>234</sup> The Court has found excessive entanglement in cases where the government has required religious organizations to pay taxes or where government actions abdicate some government responsibility to religions.<sup>235</sup> In this case, the nature of the relationship between the government and the religions is based entirely in the definition of a term

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229. *Should Gay Marriage Be Legal?*, PROCON.ORG, <http://gaymarriage.procon.org/> (last visited Oct. 26, 2012).

230. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

231. *Id.* at 615.

232. Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 294 (2002). This paper is the transcript of a lecture given by Professor Carter to the University of Arizona Law School.

233. *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

234. *See id.* (citing *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) and *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764-65 (1976)).

235. Laura S. Underkuffler, *The Establishment Clause: Political Metaphor or Guarantor of Rights?*, 89 TEX. L. REV. 49, 56-57 & nn.44-49 (2010), <http://www.texaslrev.com/wp-content/uploads/Underkuffler-89-TLRSA-49.pdf>.

that has some meaning to religions and distinct meanings for the civil government. There is no way for the government to define religion without running directly afoul of one of the religious groups.

*C. Alternative Tests Analysis*

Scholars have argued that the Supreme Court's Establishment Clause jurisprudence has resulted in numerous tests to replace or modify the *Lemon* test.<sup>236</sup> Whether these tests are separate tests or merely the Court's attempts to clarify the *Lemon* test is unclear and irrelevant. Even so, should the Court look to alternative tests, it is important to review whether those tests support or undermine the proposition that a civil definition of marriage is a violation of the Establishment Clause.

In *Marsh v. Chambers*, the Supreme Court used a "historical" test to determine that reciting prayers to open legislative sessions did not violate the Establishment Clause.<sup>237</sup> The Court held that the legislative prayer not only was a part of the history of our nation, but that the same Congress that debated and approved the language of the Establishment Clause also approved of a chaplain to begin the meetings with prayer.<sup>238</sup> The Court itself acknowledged limitations to this test—or exception to the use of *Lemon*—saying that "historical patterns cannot justify contemporary violations of constitutional guarantees."<sup>239</sup> The Court said in a later case related to the roles of church and state in public education, "Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."<sup>240</sup> Because of the very narrow limitation of this test, it is not likely to be an appropriate test for analyzing the Establishment Clause with regard to same-sex marriage. If, however, the Court chooses to use this test, it is unclear what ruling would result. On the one hand, proponents of opposite-gender marriage could argue that when the Constitution was written and the Establishment Clause passed, it was so clear that marriage was between a man and a woman that it did not even need to be mentioned by Congress. On the other hand, the historical approach is probably most accurately viewed as an exception to the *Lemon* test, and because the first Congress did not address marriage or have rules related to marriage, it should not apply here.

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236. See *Alembik*, *supra* note 209, at 1180-88.

237. 463 U.S. 783, 786 (1983).

238. *Id.* at 788.

239. *Id.* at 790.

240. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987).

Another alternative to the *Lemon* test has been referred to as the Endorsement Test.<sup>241</sup> This test or approach was first seen in Justice O'Connor's concurrence in *Lynch v. Donnelly*.<sup>242</sup> In her opinion, Justice O'Connor offers endorsement as a clarified definition or component of the purpose and entanglement prongs of the *Lemon* test.<sup>243</sup> In *Lynch*, the majority analyzed the display of a crèche, or manger scene, by a city government using the *Lemon* test and determined that the city did not violate the Establishment Clause.<sup>244</sup> Justice O'Connor attempted to clarify that the entanglement prong goes beyond administrative entanglement where the government is attempting to control religion to include endorsement of religion or support of religion over nonreligion.<sup>245</sup> With regard to same-sex marriage, it should be clear that a governmental definition meets both the administrative entanglement notion as well as the endorsement notion. If the government defines marriage, and that definition matches the definitions of one religion, or one group of religions, it is endorsing that religion over other religions (or nonreligions) as well as potentially influencing the administration of marriage ceremonies. For example, the Episcopal church has decided to endorse same-sex unions but will not perform marriages for same-sex couples in deference to the civil law.<sup>246</sup>

In *Lee v. Weisman*, the Court held that inviting religious leaders to give prayers at commencement ceremonies violated the Establishment Clause.<sup>247</sup> In *Lee*, the majority refused to reconsider the *Lemon* test,<sup>248</sup> but did not apply the test in deciding the case. The basic facts of the case that guided the majority were these: the principal of a school invited clergy to say prayers at commencement, which led to the appearance that the state was forcing all attendees to participate in a religious event.<sup>249</sup> The principal gave guidelines for the prayer to the religious leader, giving the appearance that the government was directing the content of a religious exercise.<sup>250</sup> Rather than applying the three-prong *Lemon* test, the majority couched its decision in language of government coercion.<sup>251</sup> Applying this idea to the marriage definition question, the precise

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241. Alembik, *supra* note 209, at 1181.

242. 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).

243. *Id.* at 689.

244. *Id.* at 687.

245. *Id.* at 687-88.

246. *See* Bratu, *supra* note 13.

247. 505 U.S. 577, 590-91 (1992).

248. *Id.* at 587.

249. *Id.* at 587-88.

250. *Id.* at 588.

251. *Id.* at 587.

argument of many religious leaders is that a civil definition of marriage that includes same-sex couples will lead to coercion to perform those marriages or lose government benefits (such as tax exempt status). On the flipside, same-sex marriage couples are akin to the nonreligious guests at the commencement ceremony who were coerced into standing through the prayer as the government recognized religion. For same-sex couples, they are coerced in the sense that the government around them recognizes and celebrates opposite-gender couples through tax and other benefits to their exclusion.

There are arguably as many modifications or alterations to the *Lemon* test as there are post-*Lemon* cases, but one more is significant enough for mention. In *Agostini v. Felton*, the Court held that it is constitutional for a public school district to send public teachers to religious schools to provide federally required leveling courses or remedial education.<sup>252</sup> In the majority opinion, Justice O'Connor acknowledged that the test had not changed in structure, but that the criteria deciding a violation of the Establishment Clause had changed.<sup>253</sup> In *Agostini*, the Court readdressed a question brought forth in earlier cases which held that public school teachers could not go to the religious schools because of "excessive entanglement."<sup>254</sup> In attempting to clarify the "excessive entanglement" question, Justice O'Connor wrote that the factors that create excessive entanglement are similar to the factors in determining whether the government action has an effect of advancing religion.<sup>255</sup> The opinion seems to combine these two questions. Applying a two-prong *Lemon* test, where excessive entanglement and effect are analyzed together, we see that civil marriage definitions still fail the test—in large part due to the tremendous effect of advancing traditional religion over legitimate, nontraditional, religion or nonreligion.

Regardless of the test used by the Court should it address same-sex marriage issues, a civil definition of marriage violates the Establishment Clause. Eliminating marriage as a civil function, however, creates a need for not only a change of paradigm in the civil government, but practical change to the rules, laws, and regulations of the civil government. Because so many benefits are based on marital status, a thorough review of the federal and state codes and regulations is needed.

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252. 521 U.S. 203, 234-35 (1997).

253. *Id.* at 222-23.

254. *Id.* at 221-22 (citing *Aguilar v. Felton*, 473 U.S. 402, 409 (1985)).

255. *Id.* at 232.

*D. Potential Solutions and Their Implications*

In evaluating what to do with committed couples if civil marriage violates the Establishment Clause, there are two obvious alternatives: first, develop a “marriage substitute,” or second, eliminate marriage as a concept altogether and address each area where marriage impacts legal choice individually.

The first alternative, removing marriage from the text of the codes and regulations and replacing it with a nonreligious “marriage substitute” could solve the religious concerns that any expansion of marriage to include same-sex couples could result in a penalty or loss of benefits to the religions. For example, if the term “civil partnership”<sup>256</sup> replaces marriage in the texts, and the term “partner” replaces the terms “husband,” “wife,” or “spouse,” then churches who refuse to “marry” same-sex couples would no longer be at risk of charges for illegal discrimination or violation of civil rights. Of course, the government would have to establish criteria for the civil partnerships. In theory, religious marriage could be considered one piece of evidence for civil partnerships. For couples who are committed but not religiously married, the government needs criteria to legitimize the partnership. For example, the 2006 bill that created civil unions in New Jersey stated that eligible parties for a civil union are any parties over the age of 18 who are not part of another civil union, domestic partnership, or marriage, and who are not eligible for marriage because they are of the same sex.<sup>257</sup> Any two people meeting those criteria can apply for a civil union license for recognition by the government of New Jersey.

New Jersey declared that the legal benefits under New Jersey law for civil union couples are identical to benefits for married couples.<sup>258</sup> The law specifically states that the ability to inherit under probate law and nonprobate transfer exist for civil union couples.<sup>259</sup> In essence, New Jersey added “civil union” to the statutes whenever the term “marriage” previously existed and so has a dual commitment process. Opposite-sex couples can be married; same-sex couples can enter in to a civil union. While the action does much to protect the legal rights of same-sex couples, the action does not address the Establishment Clause concerns, nor does it address the “second-class citizen” status of same-sex couples. A better solution is to remove the term marriage from the statutes and to

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256. This could be any term that is currently used, such as domestic partnership or civil union, to a new term that is wholly made up.

257. Act of Dec. 20, 2006, ch. 103, 2006 N.J. Laws C.37:1-30.

258. *Id.* at C.37:1-31.

259. *Id.* at C.37:1-32.



cause all citizens of New Jersey to enter into civil unions for all government purposes.

Should the government move to a marriage substitute, political problems may continue to exist with regard to same-sex couples. There is no reason that the government could not define this new status as between two people of opposite genders. The Defense of Marriage Act could become known as the Federal Opposite Gender Benefit Act or something similar and the status of couples in the nation may not change. What would change would be that the government no longer would have entanglements with religion when it comes to who may be married.<sup>260</sup> States too could continue to define this substitute for marriage in different ways. If, in addition to eliminating the Establishment Clause problem, the nation wants to have a consistent definition of a couple eligible for government benefits, then a substitute for marriage is not satisfactory.

Instead of simply replacing the term marriage with some synonym lacking a religious connotation, several prominent legal scholars have advocated for the entire abolition of “marriage” as a legal concept.<sup>261</sup> Feminist scholar and law professor Martha Fineman has argued for nearly twenty years that marriage should be abolished as a legal status.<sup>262</sup> She argues that we can abolish the concept with no replacement—that private law such as contracts, torts, and laws related to independence and dependency can fulfill the legal and societal functions of traditional “marriage.”<sup>263</sup> She argues that it is possible, and preferable, to reallocate any economic and privacy benefits of civil marriage under a new schema of dependents and caretakers.<sup>264</sup> Professor Edward Zelinsky argues that the abolition of civil marriage would “stimulate the democratization of the antenuptial agreement” as couples would be more likely to look to contract to govern the civil aspects of the relationship.<sup>265</sup> For those

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260. This author does not encourage this result and believes that the government should make these decisions based on budget and other secular and public reasons as opposed to private relationship status.

261. See Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239 (2001); see also Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U.J. GENDER SOC. POL’Y & L. 167 (2000); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201 (2003); Edward Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006).

262. See Fineman, *supra* note 261, at 239 n.1. Professor Fineman specifically called for the abolition of marriage as a *legal* function and did not address the issue of religious ceremony.

263. *Id.* at 261, 270-71.

264. *Id.* at 268-71; Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, *supra* note 261, at 173.

265. Zelinsky, *supra* note 261, at 1183.

couples that do not have a signed contract, Professor Zelinsky acknowledges that there would need to be some legal default.<sup>266</sup> This default, according to Professor Zelinsky, should be based in current contract and tort law principles.<sup>267</sup>

Another prominent feminist legal scholar, Professor Nancy Polikoff of American University, has adopted this call to eliminate marriage as a legal status.<sup>268</sup> In analyzing a 2001 Canadian report, *Beyond Conjugalilty*, Professor Polikoff adopts a two-part test for determining what relationships are protected by which benefits.<sup>269</sup> First, there are situations where a self-declaration or self-definition may be sufficient.<sup>270</sup> Polikoff points to the completion of “emergency contact” forms and some benefits forms (such as life insurance) where a person can select any person, regardless of a religious or civil status, to receive the benefit or burden.<sup>271</sup> One federal statute already has created the ability for one to select a nonspouse to receive benefits.<sup>272</sup> Professor Zelinsky notes that the tax code easily could be amended to allow any couple to choose to file a joint tax return.<sup>273</sup> The problem with eliminating marriage comes from situations where self-declaration is insufficient or where the risk of fraud is too great. In order to alleviate this problem, Professor Polikoff’s second test points to statutes to protect against domestic violence.<sup>274</sup> For example, the Violence Against Women Act does not require marriage in order to protect one against domestic violence.<sup>275</sup> Many states also have expansive definitions of who can be protected against domestic violence.<sup>276</sup>

However, the federal government cannot simply eliminate the term “marriage” from its statutes. Because of the number of state constitutional amendments defining marriage, the Supreme Court will have to declare those definitions unconstitutional as violations of the Establishment Clause. States then would be in the same position as the

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266. *Id.*

267. *Id.*

268. See Polikoff, *Ending Marriage As We Know It*, *supra* note 261.

269. *Id.* at 209-15.

270. *Id.* at 210-11.

271. *Id.*

272. *Id.* at 211. Professor Polikoff points to the Mychal Judge Police and Fire Chaplains Public Safety Officers’ Benefits Act of 2002, which allows for a death benefit of \$250,000 to go to the spouse, child, or life insurance beneficiary (if no spouse or child) to any public safety officer killed in the line of duty. 42 U.S.C.A. §§ 3796 (a)-(b) (2003).

273. Zelinsky, *supra* note 261, at 1190.

274. Polikoff, *Ending Marriage As We Know It*, *supra* note 261, at 214-15.

275. *Id.*

276. See *id.* at 214.

federal government in eliminating civil marriage from their statutes and regulations.

In short, while it may seem somewhat radical, it is possible to eliminate the concept of civil marriage and to accomplish all of its civil functions. It will take some effort. Congress may have to restructure the tax code to a certain extent. It also may have to review the “thousand or more” references to marriage in the federal statutes.<sup>277</sup> To eliminate marriage without a replacement status will require even further investigation by states and the federal government in order to modify tort and contract law to fill the gaps.

### III. CONCLUSION

Given that marriage is primarily a religious concept, or at least is a primary and defining concept in many religions, it is a violation of the Establishment Clause of the United States Constitution for the government to be involved in defining religion. The political nature of the topic and the polar differences between governments and religions in defining marriage require Congress and/or the courts to act quickly.

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277. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d. 1, 6 (1st Cir. 2012).