CALIFORNIA'S SAME-SEX MARRIAGE DECISION:
HOW DID WE GET HERE?

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ABSTRACT: *This paper explores the traditional importance of religion as a basis for American law and argues that, by diminishing the role of religion in the law, our Supreme Court has unleashed a torrent of sexual immorality on an unwilling populace. In particular, the author analyzes the reasoning in* Perry v. Schwarzenegger *and focuses on the way Judge Walker ruled moral considerations as impermissible. The author then discusses the Christian influences in the founding, the original meaning of the Establishment Clause and its use throughout American judicial history before analyzing the reinterpretation of the First Amendment as a "wall of separation between church and state." This change in judicial philosophy opened the door for a number of decisions removing religion and morality from public life and paved the way for decisions such as* Lawrence v. Texas *and* Perry v. Schwarzenegger *which disregarded the beliefs of the majority of Americans.*

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I. Introduction.

For the better part of two centuries, American courts deemed Christianity a part of the common law, and our governmental institutions explicitly endorsed religious belief. Only in the post-World War II era has our jurisprudence separated church and state so as to require legislative acts to have primarily secular purposes. At the same time that the Supreme Court was reducing the role of religion in American public life, it was creating new Constitutional protections for activities traditionally condemned as immoral, and even criminally proscribed, such as contraception, pornography, abortion and sodomy. Indeed, the Supreme Court now views moral objections as trivial if not irrational when analyzing the Constitutional validity of a law. Only in such a jurisprudential environment could *Perry v. Schwarzenegger*[1] have come about.

Perry v. Schwarzenegger, of course, is the 2010 case that struck down California's Proposition 8 same-sex marriage ban as unconstitutional under the Fourteenth Amendment's Due Process and Equal Protection Clauses. In so doing, *Perry* invalidated the legislative will of over seven million California voters who, like

1 704 F.Supp.2d 921 (N.D. Cal. 2010.)

voters in every other same-sex marriage referendum to date[2], voted to uphold marriage as between one man and one woman. *Perry* is the first (and so far only) case finding a right to same-sex marriage under the U.S. Constitution.

This paper explores the traditional importance of religion as a basis for American law and argues that by diminishing the role of religion in the law, our Supreme Court has unleashed a torrent of sexual immorality on an unwilling populace.

II. The Perry Case.

A. Procedural History.

California's same-sex marriage decision had its roots in a referendum ten years before called Proposition 22. In November 2000, California voters, using the state's initiative process, adopted the California Defense of Marriage Act. Proposition 22 stated, "Only marriage between a man and a woman is valid or

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2 Citizens in the following 30 states have voted to ban same-sex marriage: Alabama, 2006 (81% voted in favor); Alaska, 1998 (68%); Arizona, 2008 (56%); Arkansas, 2004 (75%); California, 2008 (52%); Colorado, 2006 (56%); Florida, 2008 (62%); Georgia, 2004 (76%); Hawaii, 1998 (69%); Idaho, 2006 (63%); Kansas, 2005 (70%); Kentucky, 2004 (75%); Louisiana, 2004 (78%); Michigan, 2004 (59%); Mississippi, 2004 (86%); Missouri, 2004 (72%); Montana, 2004 (67%); Nebraska, 2000 (70%); Nevada, 2000 and 2002 (69.6% and 67.1%); North Dakota, 2004 (73%); Ohio, 2004 (62%); Oklahoma, 2004 (76%); Oregon, 2004 (57%); South Carolina, 2006 (78%); South Dakota, 2006 (52%);Tennessee, 2006 (81%); Texas, 2005 (76%); Utah, 2004 (66%); Virginia, 2006 (57%); and Wisconsin, 2006 (59%). *See* http://en.wikipedia.org/wiki/List_of_U.S._state_constitutional_amendments_banning_same-sex_unions_by_type.

recognized in California."[3] In defiance of Proposition 22, the Mayor of San Francisco instructed county officials to issue marriage licenses to same-sex couples beginning in February 2004.[4] The California Supreme Court enjoined this practice and nullified the marriage licenses that had been issued.[5]

The City of San Francisco and various other parties filed suit challenging the California Defense of Marriage Act. In May 2008, the California Supreme Court held Proposition 22 unconstitutional because it failed to afford equal protection under the California Constitution. California's highest court directed all California counties to issue marriage licenses to same-sex couples.[6]

In November 2008, California voters passed Proposition 8, which reinstated the definition of marriage as between one man and one woman in California's constitution.[7] Several gay and lesbian couples filed suit in the Northern District of California to challenge the constitutionality of Proposition 8 under the Due Process and Equal Protection clauses of the Fourteenth Amendment.[8] Plaintiffs named as defendants then-Governor Schwarzenegger, Attorney General Edmund G. Brown, Jr., and other California officials.[9] Various organizations and individuals who had organized the Proposition 8 referendum effort ("the Proponents")

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3 704 F.Supp.2d at 927.

4 *Id.* at 928.

5 *Id.*, *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004).

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

7 704 F.Supp.2d at 927.

8 704 F.Supp.2d at 927, 929.

9 *Id.* at 928.

intervened in the case.[10] Because Governor Schwarzenegger and Attorney General Brown declined to defend Proposition 8 -- to the contrary, for the most part they sided with Plaintiffs -- the Proponents presented the case in support of Proposition 8.[11]

The case was tried to Chief Judge Vaughn R. Walker without a jury January 11-27, 2010.[12] According to Judge Walker, the evidence at trial was lopsided. The Proposition 8 Proponents offered only "a rather limited factual presentation."[13] The Proponents presented only two witnesses. One was an expert on marriage named David Blankenhorn, whose testimony Judge Walker ultimately disregarded.[14] The other, Kenneth Miller, was offered as a political expert to testify that gay men and lesbians are not without political power.[15] Judge Walker assigned little weight to Prof. Miller's opinions.[16]

Other expert witnesses identified by the Proponents refused to testify at trial out of concern for their personal safety.[17] Supporters of Proposition 8 were subjected to "harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence,

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10 *Id.* at 928, 930.

11 Although obligated to defend the state's duly enacted laws, Attorney General Brown conceded that Proposition 8 was unconstitutional. The other government defendants "refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8." *Id.* at 928.

12 *Id.* at 929.

13 *Id.* at 931.

14 *Id.* at 931, 934, 945-50.

15 *Id.* at 950.

16 *Id.* at 952.

17 *Id.* at 944.

at least one death threat, and gross expressions of anti-religious bigotry."[18] Because Judge Walker insisted, over the Proponents' objection, on having the trial videotaped, these experts declined to testify for fear that subsequent disclosure of the video record might subject them to violent reprisals.

Plaintiffs, represented at trial by illustrious attorneys including former United States Solicitor General Theodore Olson, presented eight lay witnesses and nine expert witnesses.[19] The trial court found all of Plaintiffs' witnesses reliable and persuasive.[20] On August 4, 2010, Judge Walker issued an opinion finding that Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. As of this writing, the decision is on appeal before the U.S. Court of Appeals for the Ninth Circuit.[21]

B. The Trial Court Finds Prop 8 Unconstitutional.

Judge Walker agreed with Plaintiffs that Proposition 8 was unconstitutional for two reasons. First, under the Due Pro-

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18 Thomas Messner, "The Price of Prop 8," Oct. 22, 2009, available at http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8 (last viewed Nov. 4, 2011.)

19 704 F.Supp.2d at 932.

20 *Id.* at 938-45.

21 *Perry v. Brown*, No. 10-16696 (9th. Cir. filed Aug. 5, 2010). As a preliminary matter, the Ninth Circuit referred to the California Supreme Court the question of whether the Proponents had standing to appeal. On Nov. 17, 2011, the California high court confirmed that the Proponents do have standing. *Perry v. Brown*, No. S189476 (Sup. Ct. Cal. Nov. 17, 2011).

cess Clause, the court found that Proposition 8 denied homosexuals the fundamental right to marry the person of their choice. Second, under the Equal Protection Clause, the court found that the voters of California had no rational basis to discriminate against homosexuals in the definition of marriage.

1. Due Process Analysis.

Judge Walker correctly noted that "when legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny,"[22] and that "to determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted 'in our Nation's history, legal traditions, and practices.'"[23] Of course, while marriage is indeed deeply rooted in our Nation's history, legal traditions and practices, same-sex marriage is not. To the contrary, until recently homosexual relations were criminal.[24]

In his concept of marriage, Judge Walker focused on two parties giving free consent and forming a household. He concluded that the State's interest in marriage is its interest in stable households, which contribute to a stable society.[25] He omitted the

22 704 F.Supp.2d at 991, citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978.)

23 704 F.Supp.2d at 992, quoting *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

24 In both of the U.S. Supreme Court sodomy cases, the Court discussed the long history of criminalization of homosexuality. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986), and *Lawrence v. Texas*, 539 U.S. 558, 596-98 (2003) (Scalia, J., dissenting).

25 704 F.Supp.2d at 992.

fact that marriage has traditionally been focused upon the procreative act. While fertility is not necessary for a valid marriage, the procreative act has always been the *sine qua non* of a valid marriage. Indeed, coitus has been legally required for the consummation of marriage.[26]

Judge Walker concluded that the right to marry the person of one's choice was a fundamental right "rooted 'in our Nation's history, legal traditions, and practices.'"[27] Having found as a matter of fact that "same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions,"[28] the court drew the legal conclusion that "same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same."[29] Therefore, according to Judge Walker, allowing Plaintiffs to marry would not be recognizing a new right, but would simply "recognize their relationships for what they are: marriages."[30]

Predictably, Judge Walker drew an analogy to American laws that had once forbidden interracial marriage.[31] Such laws, of course, were struck down by the U.S. Supreme Court in *Loving v.*

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26 Sherif Girgis, Robert P. George & Ryan T. Anderson, "What Is Marriage?" 34 HARV. J.L. & PUB. POL. 245 (2011), available at http://www.harvard-jlpp.com/wp-content/uploads/2011/08/GeorgeFinal.pdf (hereinafter cited as GEORGE).

27 704 F.Supp.2d at 992, quoting *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

28 704 F.Supp.2d at 967, Finding of Fact ("FF") 48.

29 *Id.* at 1001.

30 *Id.* at 993.

31 *Id.* at 958.

Virginia.[32] There are at least two flaws with the court's analogy. One is that race is not central to what marriage is, but sexual intercourse is.[33] The other is that race is an inherited, immutable characteristic, whereas homosexuality is not.[34] But to Judge Walker, the ban on same-sex marriage was merely an anachronism, "an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed."[35]

Judge Walker concluded that the right to marry involves "the right to choose a spouse and, with mutual consent, join together and form a household."[36] He left out procreative sexual intercourse as central to the idea of marriage. In Judge Walker's mind, marriage is nothing more than State recognition of "committed relationships."[37] But as Professor Robert P. George has persuasively argued, marriage has always been more than this. A friendship is a committed relationship, but it is not a marriage.[38]

Judge Walker found that Plaintiffs were not seeking a new kind of marriage but recognition of their same-sex relationships as within the bounds of the fundamental right to marry.[39] Once

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32 388 U.S. 1 (1967).

33 GEORGE at 249.

34 *See e.g.*, Stanton L. Jones & Mark A. Yarhouse, "A Longitudinal Study of Attempted Religiously-Mediated Sexual Orientation Change," J. SEX & MARITAL THERAPY, 37:404-27 (2011).

35 704 F.Supp.2d at 993.

36 *Id.*

37 704 F.Supp.2d at 993.

38 GEORGE at 253: "Marriage is distinguished from every other form of friendship inasmuch as it is comprehensive. It involves a sharing of lives and resources, and a union of minds and wills. . . [I]t also includes organic bodily union."

39 704 F.Supp.2d at 993.

he concluded that Plaintiffs had been denied a fundamental right, the people voting in the Proposition 8 referendum were powerless to overturn that right. In other words, fundamental rights are subject to strict scrutiny and cannot be overturned by the will of a majority.[40]

Of course, Judge Walker did not frame the issue before the court as whether homosexuality was a fundamental right, or whether homosexual marriage was a fundamental right. Instead, he defined the right at stake as the right to marry the person of one's choosing and form a stable household. His definition of marriage is debatable. Marriage does not hinge upon an unbridled right to choose one's partner. The law forbids one to choose one's sister or one's pet as a spouse. Likewise, marriages arranged by a couple's parents may lack choice, but are still marriages. The fundamental characteristic of marriage is not unfettered choice but bearing and raising children. By focusing on choice of partner and ignoring marriage's procreative roots, Judge Walker redefined marriage in a way that allowed him to declare it a fundamental right.

2. *Equal Protection Analysis.*

Under the Equal Protection Clause, the court held that the voters of California had no rational basis to discriminate against homosexuals in the definition of marriage. Restricting mar-

40 704 F.Supp.2d at 994-95: "fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections," quoting *West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943.)*

riage to one man and one woman was based upon nothing more than "unfounded stereotypes and prejudices specific to sexual orientation."[41] "Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation" and "eliminates a right only a gay man or a lesbian would exercise. . . ."[42] Under the Equal Protection Clause, "California's obligation is to treat its citizens equally, not to 'mandate [its] own moral code. . . .' '[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation."[43]

Judge Walker concluded, "The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples," and he held that such views are irrational.[44]

C. Judge Walker Rules Moral Objections Out of Bounds.

To a man on the street, the most important objection to same-sex marriage would probably be based on traditional morality. Near the beginning of his opinion, in only three sentences, Judge Walker quickly dispatched any and all moral arguments. "A state's interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose. See *Lawrence v. Texas*, 538 U.S. 558, 571, 123 S.Ct. 2472,

41 704 F.Supp.2d at 996.
42 *Id.*
43 *Id.* at 1002 (citations omitted).
44 *Id.* at 1001.

156 L.Ed.2d 508 (2003); see also *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711(1947)."[45] *Everson* is infamous for the statement that "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[46] Thus in *Perry* did the mere invocation of the proverbial "wall of separation between church and state" dismiss one of the principal arguments against same-sex marriage.

As will be shown below, religious morality was a cornerstone of American jurisprudence until *Everson* and its progeny. In the post-*Everson* legal culture, religious belief is not only an improper basis for law-making; it is a pernicious one. Judge Walker cited with disdain evidence in the trial record about the religious motivations of opponents of same-sex marriage. "The testimony of several witnesses disclosed that a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California."[47] Judge Walker said, "The moral disapprobation of a group or class of citizens" will not suffice to support a legislative enactment, even a constitutional amendment by referendum, "no matter how large the majority that shares that view."[48]

As evidence that California voters impermissibly relied

45 704 F.Supp.2d at 930-31.
46 330 U.S. at 18.
47 704 F.Supp.2d at 936.
48 *Id.* at 938.

upon religious motivations in adopting Proposition 8, Judge Walker cited "data showing 84 percent of those who attend church weekly voted yes on Proposition 8, 54 percent of those who attend church occasionally voted no on Proposition 8 and 83 percent of those who never attend church voted no on Proposition 8."[49] Apparently in Judge Walker's mind, it was not only constitutionally impermissible for a state legislature to adopt a statute based upon religious convictions, but also for church-going referendum voters to apply their moral beliefs at the polls.

Judge Walker made a Finding of Fact that "religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." In support, he cited evidence that "religions teach that homosexual relations are a sin and that contributes to gay bashing. . . ," that "[t]here is a religious component to the bigotry and prejudice against gay and lesbian individuals. . . ," that the "Catholic Church views homosexuality as 'sinful. . . ,'" and that "[r]eligion is the chief obstacle for gay and lesbian political progress. . . ."[50] Instead of seeing Biblical morality as a valid reason to oppose a redefinition of marriage, Judge Walker saw it as a sign of hatred and intolerance.

Judge Walker considered faith-based arguments by the Proposition 8 campaign as superstitious or unsophisticated. Proposition 8 leader Hak-Shing William Tam was an official with the "American Return to God Prayer Movement," which encouraged voters to support Proposition 8 because, among other things,

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49 *Id.* at 952.

50 *Id.* at 985, FF 77.

same-sex marriage would cause states "one-by-one to fall into Satan's hands."[51] Judge Walker thought any references to God or Satan denoted bizarre, outmoded beliefs that held no persuasive value when compared with the scholarly opinions of the secular academics called by Plaintiffs.

Judge Walker cited religious beliefs against homosexuality only to castigate such beliefs. He declined to address Biblical morality head-on or to explore the merits of long-standing religious objections to homosexual conduct. Under his view of the law, he was not required to confront religious objections on their merits; indeed, he was precluded from doing so by the so-called "wall of separation between church and state." Freed from any need to debate the religious teachings against homosexual conduct, Judge Walker treated such teachings with derision, as further evidence of prejudice. In Judge Walker's analysis, the fact that "Sacred Scripture condemns homosexual acts as 'a serious depravity'" did not mean that Scripture should be accorded weight in the debate over same-sex marriage, only that Scripture's condemnation further evidenced the narrow-minded bigotry of people of faith.[52]

According to Judge Walker, the majority of California citizens simply may not amend their State constitution to enact their "profound and deep convictions accepted as ethical and moral principles."[53] "California's obligation is to treat its citizens

51 *Id.* at 937.

52 *Id.* at 985, FF 77(i).

53 704 F.Supp.2d at 1002, citing *Lawrence v. Texas*, 539 U.S. at 571.

equally, not to "mandate [its] own moral code."[54] The fact that between 1998 and 2008, thirty states took affirmative action to define marriage as between one man and one woman did not cause Judge Walker to reconsider his conclusions. To the contrary, this was additional proof that "stereotypes and misinformation" have caused gays and lesbians to suffer legal disadvantage.[55] "'[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation."[56]

"Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples."[57] Judge Walker overlooked that moral objections are based upon reason. He dismissed moral objections as mere superstitions and prejudices. Because Supreme Court precedents had ruled out morality as a proper foundation for legal enactments, Judge Walker was easily able to rationalize a radical change in one of society's most fundamental units, the family. He saw no cause for alarm that school children might be taught about homosexuality and gay marriage, or that such children might be receiving a message "that is absolutely contrary to the values that their family is attempting to teach them at home."[58] To Judge Walker, such concerns were simply further evidence of bigotry and ignorance.

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54 *Id.*

55 *Id.* at 988, FF 78(k).

56 704 F.Supp.2d at 1002, citing *Lawrence v. Texas*, 539 U.S. at 582 (O'Connor, J. concurring.)

57 *Id.* at 1003.

58 704 F.Supp.2d at 988-90, FF 79(i)-(j) and (q).

As recently as 1986, moral objections to homosexuality were sufficient to support anti-sodomy legislation:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. *The law, however, is constantly based on notions of morality,* and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[59]

The *Bowers* Court's acknowledgement that morality is a valid -- indeed, routine -- basis for lawmaking was consistent with American legal traditions that prevailed from the Founding into the middle of the 20th Century. As of 1986, *Bowers*' endorsement of morality was somewhat unusual, against a backdrop of Supreme Court cases that had tended to diminish the role of religious morality in our jurisprudence.[60] As will be shown below, our Nation was founded as a Christian republic.[61] By 1986, only vestiges of solicitude for morality remained in our constitutional law. By the time of *Lawrence v. Texas* in 2003, the prevailing

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59 *Bowers v. Hardwick*, 478 U.S. 186, 196 (emphasis added.)

60 *See* Part IV.F, *below*.

61 *See* Part IV.A through IV.D, *below*.

worldview of the Supreme Court had resumed its path away from Judeo-Christian foundations of the Nation toward increasing protection for sexual freedom outside of marriage.

III. Traditionally, Homosexuality Was Considered Morally Wrong, Indeed, Criminal.

The *Perry* decision contradicts the lessons of centuries of Western Civilization, lessons with origins in biblical principles that found their way into the fabric of American government. One of the reasons *Perry* is so troubling is because the opinion seems almost to revel in the overthrow of so many ancient, tried-and-true teachings about sexuality and the family.

A. Major Religions Taught (And Still Teach) That Homosexuality Was Sinful.

1. New Testament.

To Christian sensibilities, Judge Walker's decision is shocking because it flies in the face of several explicit Biblical condemnations of homosexual conduct. In his First Letter to the Corinthians, St. Paul said: "Do you not realize that people who do evil will never inherit the kingdom of God? Make no mistake -- the sexually immoral, idolaters, adulterers, the self-indulgent, sodomites, thieves, misers, drunkards, slanderers and swindlers, none

of these will inherit the kingdom of God."[62] Likewise, in his Letter to the Romans, St. Paul wrote that men, thinking themselves wise, had in fact been stupid to exchange God's truth for a lie:

> That is why God abandoned them to degrading passions: why their women have exchanged natural intercourse for unnatural practices; and the men, in a similar fashion, too, giving up normal relations with women, are consumed with passion for each other, men doing shameful things with men and receiving in themselves due reward for their perversion.[63]

In his First Letter to Timothy, St. Paul compares sodomy to murder and other serious crimes:

> We know that the law is good, provided that one uses it as law, with the understanding that law is meant not for a righteous person but for the lawless and unruly, the godless and sinful, the unholy and profane, those who kill their fathers or mothers, murderers, the unchaste sodomites, kidnappers, liars, perjurers, and whatever else is opposed to sound teaching. . . .[64]

These New Testament passages do not distinguish between homosexual acts in the context of a committed relationship and otherwise.

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62 1 Corinthians 6:9-10.

63 Romans 1:22-28.

64 1 Timothy 1:8-10.

2. Old Testament.

The word "sodomy," of course, derives from the Biblical town of Sodom, which a wrathful God destroyed in the book of Genesis. Two angels of God were guests in the home of a holy man named Lot.

> They had not gone to bed when the house was surrounded by the townspeople, the men of Sodom both young and old, all the people without exception. Calling out to Lot they said, "Where are the men who came to you tonight? Send them out to us so that we can have intercourse with them." Lot came out to them at the door and, having shut the door behind him, said, "Please, brothers, do not be wicked. Look, I have two daughters who are virgins. I am ready to send them out to you, for you to treat as you please, but do nothing to these men since they are now under the protection of my roof."[65]

To Lot, it was better to see his virgin daughters raped by the mob than his two male guests sodomized. God protected the angels from harm and destroyed Sodom and Gomorrah with fire.[66]

The other Old Testament passage prohibiting homosexuality is the straightforward command in Leviticus: "You will not have intercourse with a man as you would with a woman. This is a hateful thing."[67] Some Bibles translate "hateful thing" with the

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65 Genesis 19:1-9.
66 Genesis 19:24.
67 Leviticus 18:22.

word "abomination."

The Judeo-Christian faith unmistakably condemns homosexuality.

3. Roman Catholic Catechism.

The Catechism of the Catholic Church, noting that Scripture "presents homosexual acts as acts of grave depravity," declares homosexual acts to be "intrinsically disordered" and "contrary to the natural law." The Church calls homosexual persons to chastity.[68] At the same time, the Church teaches that "Men and women who have deep-seated homosexual tendencies. . . must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided."[69] The Church is compassionate toward homosexuals while condemning homosexual behavior.

4. Other Major Faiths.

Among Orthodox Jews, sexual relations between men is forbidden by the Torah.[70] Based on the writings of the Qur'an and various Hadith narrations, homosexuality is not only a sin but a

68 CATECHISM OF THE CATHOLIC CHURCH, Second Ed., ¶¶ 2357-59 (1997).

69 *Id.*, ¶ 2358.

70 *See, e.g.*, "Homosexuality and Orthodox Judaism," http://www.religionfacts.com/homosexuality/judaism.htm (last viewed Nov. 4, 2011).

crime under Islamic law.[71] In 1997, the Dalai Lama (the leader of Tibetan Buddhism) stated that because the purpose of sex is procreation, homosexual acts are unnatural. "From a Buddhist point of view, [gay sex] is generally considered sexual misconduct."[72]

On November 20, 2009, American Orthodox, Catholic, and Evangelical Christians issued the Manhattan Declaration, which states in part:

> Because we honor justice and the common good, we will not . . . bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriage or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family. We will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to Caesar what is God's.[73]

Perry, if affirmed, not only will condone practices that many Americans consider sinful, but it will also require people of faith to surrender their conscientious objections to homosexual conduct

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71 *See, e.g.*, "Islam and Homosexuality," http://wikiislam.net/wiki/Islam_and_Homosexuality (last viewed Nov. 4, 2011).

72 *See, e.g.*, "Homosexuality in Vajrayana/Tibetan Buddhism," http://www.religionfacts.com/homosexuality/buddhism.htm (last viewed Nov. 4, 2011).

73 MANHATTAN DECLARATION, http://manhattandeclaration.org/home/aspx, cited in WAYNE GRUDEM, POLITICS ACCORDING TO THE BIBLE, Zondervan, Grand Rapids, MI, 2010, at 227 hereinafter cited as GRUDEM).

or face legal jeopardy.[74]

B. As Recently As 1973, Psychiatry Diagnosed Homosexuality As a Disorder.

Objections to homosexuality are not only based on religion; they have scientific support, as well. Judge Walker cited with approval the testimony of one of Plaintiffs' experts to the effect that "homosexuality is not considered a mental disorder. The American Psychiatric Association, the American Psychological Association and other major professional mental health associations have all gone on record affirming that homosexuality is a normal expression of sexuality and that it is not in any way a form of pathology."[75] But Judge Walker did not mention that the mental health profession believed otherwise as recently as 1973.

The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM), published by the American Psychiatric Association, classifies various psychiatric disorders. Homosexuality was a listed diagnosis until 1973. In 1970, the American Psychiatric Association held its convention in San Francisco. Gay rights activists invaded the meeting and shouted down speakers. This disruptive

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74 *See, e.g., Elane Photography v. Willock*, No. CV 2008-06632 (County of Bernalillo (NM) 2d Jud. Dist. Ct. Dec. 1, 2009), available at http://oldsite.alliancedefensefund.org/userdocs/ElanePhotoOrder.pdf, where a Christian photographer who respectfully declined to photograph a lesbian commitment ceremony was found liable for discrimination under the New Mexico Human Rights Act, NMSA 1978, § 28-2-7(F) (2004).

75 704 F.Supp.2d at 967, FF 47(e).

behavior continued at the next several APA conventions. Finally, at the 1973 convention, the APA surrendered to the "intense political pressure" and voted to remove homosexuality from the DSM.[76] The APA's decision was in response to protests, not any new scientific insight into the causes of or treatments for homosexuality. The APA decision, according to gay activists themselves, "never was a medical decision."[77]

By suggesting that leading psychiatry and psychology organizations do not consider homosexuality to constitute a pathology, the *Perry* court was using pseudo-science to support its conclusion. While it is true that same-sex attraction is no longer listed as a mental disorder in the DSM, this cannot, given the historical facts, be equated with a scientific conclusion that homosexuality is a normal expression of sexuality. The fact that the American Psychiatric Association no longer considers homosexuality a treatable disorder was not the product of reasoned scientific deliberation, but political intimidation.

C. There Are Public Health Reasons for Preferring Traditional Marriage.

Judge Walker framed much of his Equal Protection analysis in terms of equality, but with respect to medical outcomes,

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76 THE ADVOCATE, December 28, 1993 at 40; Andrew Sullivan, LOVE UNDETECTABLE, 1998 at 107; Mark Thompsan, Ed., THE LONG ROAD TO FREEDOM, 1994 at 97; Kay Tobin and Randy Wicker, THE GAY CRUSADERS, 1972 at 98, 130-31.

77 Eric Marcus, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, at 224.

heterosexual and homosexual relationships are not equal. To the contrary, male homosexuals have a substantially decreased life expectancy, a higher incidence of infectious hepatitis, AIDS, rectal cancer, bowel and other infectious diseases, and a higher incidence of suicide.[78]

Homosexual men and women are 14 times more likely to attempt suicide than heterosexuals[79] and 3½ times more likely to do so successfully.[80] These statistics have not improved as homosexuality has gained greater public acceptance. Male and female homosexuals have higher rates of maladjustment, depression, child abuse (both sexual and violent), domestic violence, substance abuse, anxiety, and psychiatric treatment than heterosexuals.[81] Only 2% of homosexual men live past age sixty-five.[82]

Male homosexuals are uniquely susceptible to anal cancer, which is rare among male heterosexuals. Male homosexuals have

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78 Jeffrey Satinover, HOMOSEXUALITY AND THE POLITICS OF TRUTH, Grand Rapids: Baker, 1996, 51, cited in GRUDEM at 226.

79 C. Bagley and P. Tremblay, "Suicidal Behaviors in Homosexual and Bisexual Males," CRISIS 18 (1997): 24-34.

80 R. A. Garofalo et al., "The Associations Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents," PEDIATRICS 101 (1998): 895-902.

81 R. Herrell et al., ARCHIVES OF GENERAL PSYCHIATRY 56 (1999): 867-74; D. M. Fergusson, J. Horwood, A. L. Beautrais, "Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?" ARCHIVES OF GENERAL PSYCHIATRY 56 (1999): 876-80; M. J. Bailey, "Homosexuality and Mental Illness," ARCHIVES OF GENERAL PSYCHIATRY 56 (1999): 883-4.

82 *Id.*

high incidence of various sexually transmitted diseases,[83] partly due to high rates of promiscuity. According to a San Francisco study, 43% of male homosexuals had had more than 500 sexual partners,[84] 79% of whom were strangers.[85]

Lesbian promiscuity is less than that of male homosexuals but greater than that of heterosexual women: 42% had more than ten sexual partners.[86] Like male homosexuals, lesbians have high rates of drug abuse, psychiatric disorder, and suicide.[87]

If, as Judge Walker asserted, gay relationships are equal to heterosexual relationships, then why do so many homosexuals of both sexes pursue so many sexual encounters with strangers? This tends to refute Judge Walker's insistence that gay couples participate in the same kinds of committed relationships as heterosexual couples, and so their homosexual relationships should be recognized as marriages.[88]

Monogamy and sexual fidelity are important components of traditional marriage. One study showed that "90 percent of heterosexual women and more than 75 percent of heterosexual men have never engaged in extramarital sex." By contrast, "a

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83 Laura Dean et al., "Lesbian, Gay, Bisexual and Transgender Health: Findings and Concerns," JOURNAL OF THE GAY AND LESBIAN MEDICAL ASSOCIATION 4, no. 3 (2000): 101-51.

84 A. P. Bell and M. S. Weinberg, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (New York: Simon and Schuster, 1978).

85 *Id.*

86 *Id.*

87 J. B. Lehmann, C. U. Lehmann, and P. J. Kelly, "Development and Health Care Needs of Lesbians," JOURNAL OF WOMEN'S HEALTH 7 (1998) 379-88.

88 704 F.Supp.2d at 993.

1981 study revealed that only two percent of homosexuals were monogamous or semi-monogamous -- generously defined as ten or fewer lifetime partners. . . ."[89]

D. The Interests of Children Justify a Preference for Traditional Marriage.

Judge Walker concluded that children raised in gay or lesbian families have equally successful outcomes.[90] This contradicts the bulk of modern scholarship. Married biological parents nurture children better than other parenting combinations. Children who live with their parents have better educational outcomes. They are more likely to achieve economic success. They have better physical and emotional health. They are less likely to commit crimes or abuse alcohol or drugs. They are less likely to experience physical abuse.[91]

"[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. . . . [I]t is not simply the presence of two parents. . . but the presence of *two biological parents* that seems to support children's development."[92]

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89 Jeffrey Satinover, HOMOSEXUALITY AND THE POLITICS OF TRUTH, Grand Rapids: Baker, 1996, 55, cited in GRUDEM at 226-27.

90 704 F.Supp.2d at 980-81, FF 69-71.

91 GRUDEM at 224-25, citations omitted.

92 Kristen Anderson Moore et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children, And What Can We Do about It?," CHILD TRENDS RESEARCH BRIEF, June 2002, at 1-2, 6, available at http://www.childtrends.org/files/MarriageRB602.pdf, cited in GEORGE at 258.

Although same-sex couples are permitted to adopt children, American experience with this novel family arrangement is limited. We would never permit the introduction of a new drug without thorough scientific testing, yet we are now conducting a social science experiment on a generation of children, based on little more than the hope that gay parenting will yield outcomes comparable to those of the traditional family. These are the kind of radical social changes that should be attempted slowly, if at all.[93]

IV. The Supreme Court Has Markedly Reduced The Power Of Traditional Moral Teachings To Influence Our Law.

Judge Walker's opinion in *Perry* built upon decades of Supreme Court jurisprudence that transformed the relationship between religious belief and public policy. It is impossible to conceive of the notion of same-sex marriage being taken seriously at any earlier stage in American legal history.

A. The Founders' Views about Faith and America.

The Founders -- meaning those who signed the Declaration of Independence, led our government under the Continental Congress, and forged our Constitution -- were generally men of Christian faith. They did not create a Nation that separated religious morality from public policy. To the contrary, the Founders

93 *Cf. Perry*, 704 F.Supp.2d at 999, where Judge Walker concluded that recognizing marriage for same-sex couples would not be a sweeping social change.

thought religion and government would have to support each other if freedom were to prevail. The Founders' statements and actions show beyond debate that they incorporated Christian faith into the fabric of the new republic. John Adams said that the Revolution "connected, in one indissoluble bond, the principles of civil government with the principles of Christianity."[94]

Our history includes countless instances where the founding generation, acting in official capacities, expressly endorsed Christian belief. At the beginning of the Revolutionary War, Congress designated May 17, 1776, as a national day "of humiliation, fasting and prayer; that we may with united hearts confess and bewail our manifold sins and transgressions and, by a sincere repentance and amendment of life, . . . and through the merits and mediation of Jesus Christ, obtain His pardon and forgiveness."[95] In response to the shortage of Bibles caused by the British embargo during the Revolutionary War, the Continental Congress appointed a committee to print Bibles in the colonies. The first English translation of the Bible ever printed in America bore a Congressional endorsement: "Whereupon, *Resolved*, That the United States in Congress assembled. . . recommend this edition of the Bible to the inhabitants of the United States."[96] The Founders considered it perfectly appropriate for government to endorse and encourage

94 Larry Schweikart and Michael Allen, A PATRIOT'S HISTORY OF THE UNITED STATES, 2004, at 71 (hereinafter cited as SCHWEIKART).

95 JOURNALS OF CONG. (1905), Vol. IV, 208-09 (May 17, 1776), *cited in* DAVID BARTON, ORIGINAL INTENT (3d ed. 2002) (hereinafter cited as BARTON), at 99.

96 JOURNALS OF THE CONT'L CONG. (1914), Vol. XXIII, 574 (Sept. 12, 1782), *cited in* BARTON at 108.

the reading of the Bible.

After Lord Cornwallis' surrender to end the Revolutionary War, Congress organized a procession to a local church to thank God for the victory.[97] When debates over the new Constitution were bogged down, Ben Franklin -- not considered one of the most religious Founders -- proposed prayer: "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth -- *that God governs in the affairs of men.* And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid?"[98]

When George Washington was inaugurated as the first President under the new Constitution, his first official act was to pray:

> [I]t would be peculiarly improper to omit, in this first official act, my fervent supplications to that Almighty Being who rules over the universe. . . . No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States.[99]

On September 25, 1789 -- the same day Congress approved the final wording of the First Amendment -- Congress asked President Washington to declare a day of prayer, "[T]o be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peace-

97 JOURNALS OF THE CONT'L CONG. (1823), Vol. III, 679 (Oct. 24, 1781), *cited in* BARTON at 107-08.

98 Daniel L. Dreisbach and Mark David Hall, Eds., THE SACRED RIGHTS OF CONSCIENCE, 2009, at 348-49.

99 1 ANNALS OF CONG. 27-28 (1834.)

ably to establish a Constitution of government for their safety and happiness. . . ."[100] Rep. Tucker of South Carolina argued that Congress was barred by the First Amendment from doing so, because "it is a religious matter." Yet the resolution passed over his objection. This shows that the First Amendment was not intended to bar Congressional action endorsing or encouraging religion, but simply to prohibit the establishment of a national church.[101] The debates over the wording of the First Amendment make clear that there was no intent to create a secular government or prohibit government support for religion. There was no limit on the ability of churches to petition the government or influence policy. The only concern was that a national church would infringe upon liberty of conscience.[102]

As President, George Washington made frequent proclamations of the importance of religious faith to the political health of the new nation. In October 1789, he declared, "while just government protects all in their religious rights, true religion affords to government its surest support."[103] In the same vein, Washington said:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great

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100 704 F.Supp.2d at 949-50.

101 Stephen Mansfield, TEN TORTURED WORDS, 2007 at 24 (hereinafter cited as MANSFIELD.)

102 MANSFIELD at 23. SEE ALSO BARTON at 115.

103 12 GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 167 (Jared Sparks ed., American Stationers' Company 1838.)

> pillars of human happiness. . . . Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert. . . ? And let us with caution indulge the supposition that morality can be maintained without religion. . . . [R]eason and experience both forbid us to expect that national morality can prevail, in exclusion of religious principle.[104]

At the same time the United States was framing its Constitution, the French Revolution was underway. "[T]he essential difference between the American Revolution and the French Revolution is that the American Revolution. . . was a religious event, whereas the French Revolution was an anti-religious event."[105] As France turned toward atheism, the American Founders reacted with disgust. Alexander Hamilton said:

> The attempt by the rulers of [France] to destroy all religious opinion and to pervert a whole people to atheism is a phenomenon of profligacy. . . . [T]o establish atheism on the ruins of Christianity [is] to deprive mankind of its best consolations and most animating hopes and to make a gloomy desert of the universe.[106]

These are a few of the dozens of statements that establish

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104 George Washington, Address of George Washington, President of the United States . . . Preparatory To His Declination 22-23 (George & Henry S. Keatinge eds., 1796), *cited in* BARTON at 117.

105 SCHWEIKART at 97.

106 21 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 402-04 (Harold C. Syrett ed., Columbia Univ. Press 1979), *cited in* BARTON at 144-45.

beyond argument that our Founding Fathers were men of strong religious beliefs, who believed Providence to be responsible for the success of the Revolution, who considered religion to be indispensable to a free and civilized society, and who never intended the First Amendment to prohibit governmental encouragement of religion. The Founders' religious faith is also evident in the founding documents of our Nation.

B. The Declaration of Independence.

The Declaration of Independence contains several explicit references to Almighty God. The first paragraph reads as follows:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[107]

In other words, the laws of nature and the laws of God entitle the American people to a separate and equal status among the other nations of the earth. The second paragraph of the Declaration contains these famous words:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are

107 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776.)

life, liberty and the pursuit of happiness.[108]

According to the Founders, fundamental rights come from God, not from the English King or from any other government source. After listing a series of grievances against the King of England, the Declaration of Independence closed with this stirring paragraph:

> We, therefore, the Representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the Authority of the good people of these Colonies, solemnly publish and declare that these United Colonies are, and of right ought to be, free and independent States. . . . And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.[109]

Again, the Founders, in declaring the independence of our Nation and challenging the military might of the (then) strongest country on earth, explicitly invoked the protection of God Almighty. Of the fifty-six men who committed their lives, their fortunes and their sacred honor to our Nation's cause by signing the Declaration of Independence, twenty-four (nearly half) held seminary degrees.[110]

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108 *Id.* at para. 2.

109 *Id.* at para. 32.

110 David Barton, Address at National Litigation Academy, Laguna Niguel, Cal. (June 30, 2005.)

C. God in the Constitution

Aside from the First Amendment, religion appears in the Constitution in the provisions requiring state and federal officials to swear an oath "to support this Constitution. . . ."[111] By requiring officials to swear oaths, the Founders *presupposed* that public officials would believe in God. Rufus King, a signer of the Constitution, said that by an oath, "we appeal to the Supreme Being so to deal with us hereafter as we observe the obligation of our oaths."[112] In his farewell address, George Washington said, "[W]here is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths. . . ?"[113] Chancellor James Kent, sometimes called a Father of American Jurisprudence, referred to an oath of office as a "religious solemnity" and said that to administer an oath was to "call in the aid of religion."[114]

Arguing before the United States Supreme Court, Daniel Webster asserted:

> "What is an oath?" . . . [I]t is founded on a degree of consciousness that there is a Power above us that

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111 U.S. CONST. art. II, § 1. (the President); art. VI, cl. 3. (other federal and state officials).

112 REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 575 (E. & E. Hosford 1821) (statement of Rufus King given on Oct. 30, 1821.)

113 George Washington, Address of George Washington, President of the United States . . . Preparatory To His Declination 23 (George & Henry S. Keatinge eds., 1796.)

114 JAMES KENT, MEMOIRS AND LETTERS OF JAMES KENT 164 (William Kent ed., Little, Brown & Co. 1898), *cited in* BARTON at 37.

> will reward our virtues or punish our vices. . . . [O]ur system of oaths in all our courts, by which we hold liberty and property and all our rights, are founded on or rest on Christianity and a religious belief.[115]

By incorporating oaths into the Constitution, the Founders assumed that the maker of the oath would be a person of religious faith bound to testify honestly due to a fear of eternal damnation. The Founders manifestly did not intend to divorce religious and moral considerations from the government of our Nation.

D. The Original Intent of the First Amendment.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."[116] Upon study of the history of the First Amendment in particular and the founding of our Nation in general, three conclusions are inevitable. First, the Founders intended to prohibit the federal government from establishing a national religion. Second, the Founders intended that the federal government leave religious matters to the states. Third, the Founders intended to give full constitutional protection to the free exercise of religion. Since the 1947 decision in *Everson v. Board of Education*,[117] our federal courts have departed markedly from

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115 Daniel Webster, Speech in Defense of the Christian Ministry, delivered in the Supreme Court of the United States in the case of Stephen Girard's Will (Feb. 10, 1844), *cited in* BARTON at 37-38.

116 U.S. CONST. amend I.

117 330 U.S. 1 (1947).

these precepts.

In enacting the First and Tenth Amendments, the Founders intended to prohibit the federal government from establishing a national religion but did not intend to prohibit the states from doing so. The current notion that states, cities and school districts may not even encourage religious belief is directly contrary to the intent of the First Amendment. All fifty state constitutions encourage religious practice, and some even gave Christianity a special status. For example, New Hampshire's Constitution read:

> And every denomination of Christians. . . shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.[118]

The Constitution of Connecticut stated:

> And each and every society or denomination of Christians in this State shall have and enjoy the same and equal powers, rights, and privileges.[119]

While the First Amendment to the United States Constitution prohibited the federal government from establishing a national religion, it did not prohibit the states from establishing official

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118 THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 4 (Norman & Bowen 1785) (discussing article 1, section 6 of the Constitution of New Hampshire).

119 THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION 110 (Hogan & Thompson 1838) (discussing article 7, section 1 of the Constitution of Connecticut).

religions. Therefore, prohibiting state legislatures from enacting laws informed by religious belief, such as laws defining marriage based on Biblical truth, cannot be reconciled with the true meaning of the First Amendment.

E. Judicial Decisions Once Protected Public Morality.

At least until 1947, judicial decisions across the United States showed strong support and reverence for religious belief. In *Church of the Holy Trinity v. United States*,[120] the United States Attorney sought to enforce a federal anti-immigration law against a church that had hired a clergyman from England as its pastor. The Supreme Court ruled that the statute could not be used against the church, because "[N]o purpose of action against religion can be imputed to any legislation, State or national, because this is a religious people. . . . [T]his is a Christian nation."[121]

The Supreme Court traced the Christian heritage of America.[122] The first charter of Virginia, granted by King James I in 1606, was for the purpose of propagating the Christian religion.[123] Similar language is found in the various charters of the other colonies.[124] The Supreme Court in the *Holy Trinity* case, after many additional historical examples, turned to legal precedent to support its rationale:

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120 143 U.S. 457 (1892.)
121 *Holy Trinity*, 143 U.S. at 465, 471.
122 *Id.* at 465-66.
123 *Id.* at 466.
124 *Id.* at 465-68.

> [W]e find that in *Updegraph v. The Commonwealth*, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law. . . not Christianity with an established church. . . but Christianity with liberty of conscience to all men." And in *The People v. Ruggles*, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice. . . . [W]e are a Christian people, and the morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of those impostors [other religions]." And in the famous case of *Vidal v. Girard's Executors*, this Court. . . observed: "It is also said, and truly, that the Christian religion is a part of the common law. . . ."[125]

The Supreme Court concluded:

> There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. . . . These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.[126]

Updegraph involved a criminal action against a man who, during the course of a debate, asserted that the Holy Scriptures

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125 *Id.* at 470-71 (citations omitted.)

126 *Holy Trinity*, 143 U.S. at 470-71.

were mere fable and that the Bible contained lies.[127] Updegraph was convicted under a state law against blasphemy.[128] The mere existence of a statute prohibiting blasphemy shows that government support for religion was to be expected. On appeal, the Supreme Court of Pennsylvania affirmed the conviction. The court considered vilification of the Christian religion a serious matter.[129] Noting that "Christianity is and always has been a part of the common law," the court stated:

> Thus this wise legislature framed this great body of laws for a Christian country and a Christian people. . . . This is the Christianity of the common law. . . and thus it is [undeniably] proved that the laws and institutions of this State are built on the foundation of reverence for Christianity. . . . In this, the Constitution of the United States has made no alteration nor in the great body of the laws which was an incorporation of the common-law doctrine of Christianity.[130]

The other case cited in *Holy Trinity* was *People v. Ruggles*, decided by New York's highest court in 1811.[131] Like *Updegraph*, *Ruggles* involved a criminal indictment for blasphemous utterances.[132] Mr. Ruggles was convicted for saying, "Jesus Christ was a bastard and his mother must be a whore."[133] Chief Justice James

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127 *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 398 (Pa. 1824).

128 *Updegraph*, 11 Serg. & Rawle at 398-99.

129 *Id.*

130 *Id.* at 403.

131 *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811).

132 *Ruggles*, 8 Johns. at 290.

133 *Id.*

Kent, one of the Fathers of American Jurisprudence, wrote:

> Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. . . .The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussion on any religious subject, is granted and secured; but to revile. . . the religion professed by almost the whole community is an abuse of that right. . . . [We are] people whose manners. . . and whose morals have been elevated and inspired. . . by means of the Christian religion.[134]

Justice Kent wrote that although the Constitution declined to establish a religion, it certainly did not prevent prosecution of offenses against religion and morality.[135] The Constitution never meant to withdraw religion from the notice of the law.[136] "To construe [the Constitution] as breaking down the common law barriers against licentious, wanton, and impious attacks upon Christianity itself, would be an enormous perversion of its meaning."[137]

As recently as the 1950s, the United States Supreme Court continued to recognize the religious heritage of American law. In *Zorach v. Clauson*,[138] the Court said:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the State encourages

134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 343 U.S. 306 (1952.)

> religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[139]

From the Founding until relatively recent times, American courts consistently recognized the importance of protecting the virtue of society in general and the young in particular. This concern sometimes arose in the context of the moral threat posed by obscene materials:

> The destruction of morality renders the power of the government invalid. . . . The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences. . . . No man is permitted to corrupt *the morals of the people*.[140]

As of 1957, Supreme Court decisions followed the long-established view that indecency could be suppressed in the inter-

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139 *Zorach*, 343 U.S. at 312-14.

140 *Commonwealth v. Sharpless*, 2 Serg. & R. 91, 103, 104 (Sup. Ct. Pa. 1815) (emphasis added).

ests of public morality. In *Roth v. United States*,[141] the Court affirmed obscenity convictions based on the "common conscience of the community."[142] Protection of public decency remained a viable rationale for legislative action. Justice Harlan, concurring in part in *Roth*, emphasized that state legislatures had a rational basis to protect public morality:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the *moral fabric* of society. . . . The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards*.[143]

In the 1950s, courts not only upheld notions of public morality but allowed individual states the flexibility to determine their own moral standards. This was to change in the 1960s.

F. The Courts' Misuse of the "Wall Of Separation."

Over the first 150 years of our nation's history, Christianity was deemed to be an integral part of the American legal system. Decisions since 1947 purporting to erect a "wall of separation between church and state" represent a dramatic departure from American constitutional traditions on the proper role of religion in

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141 354 U.S. 476 (1957.)

142 *Id.* at 490.

143 *Id.* at 502 (Harlan, concurring in part and dissenting in part; emphasis added.)

our public policy. Those decisions, in turn, laid the groundwork for cases limiting the ability of the people and their elected representatives to prohibit sexual misconduct.

1. *Everson, Engel, Abington*

Over a relatively short period of time, the U.S. Supreme Court transformed the First Amendment from a "vibrant shield of protection" for religious freedom into "a sword to use against people of faith."[144] The journey begins with the 1947 decision, *Everson v. Board of Education*.[145] The issue in *Everson* was whether New Jersey tax dollars could be spent to transport students to a parochial school.[146] The Court allowed the public funding to continue.[147] Nevertheless, the case is critical for two reasons. First, no case before had applied the First Amendment to the states. *Everson* made every local official and school teacher a "state actor" forbidden to violate the Establishment Clause.[148] Second, *Everson* incorporated Thomas Jefferson's "wall of separation" language into American jurisprudence.[149] By dint of repetition, the phrase has taken on precedential force, even though it originated not in the First Amendment but in a simple letter from

144 ALAN SEARS & CRAIG OSTEN, THE ACLU VS. AMERICA 4 (Broadman & Holman Publishers 2005.)
145 330 U.S. 1 (1947).
146 *Everson*, 330 U.S. at 3.
147 *Id.*
148 *Id.* at 8.
149 *Id.* at 16.

President Jefferson to a Baptist congregation in Connecticut.[150]

Writing for the majority, Justice Hugo Black said, "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[151] He continued:

> The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs in any religious organizations or groups and *vice versa*.[152]

Justice Black's formulation of the Establishment Clause was wrong on several counts. First, the First Amendment was explicitly aimed at Congress, not the states. Second, the case before the Court did not involve efforts to force anyone to go to church or to profess a belief in any religion. Nor did the case involve punishing anyone for professing religious beliefs or disbeliefs or church

150 BARTON at 43.
151 *Id.* at 18.
152 *Everson*, 330 U.S. at 15-16.

attendance or non-attendance. Third, "virtually everything Justice Black held to have been outlawed by the First Amendment was routinely done, on a daily basis, by the very people who wrote that amendment and annexed it to the Constitution: Tax-supported churches, religious requirements for public office, government-sponsored days of prayer, chaplains for the military forces, and so on in endless sequence."[153] Fourth, the separation of church and state had been previously interpreted by the Supreme Court to mean that laws could not interfere with religious expression unless acts justified by religious belief, such as polygamy, were subversive of peace and good order.[154] Nevertheless, Justice Black's use of the "wall of separation" metaphor laid the foundation for a series of cases that turned America from a Christian nation into a secular society.

In *McCollum v. Board of Education*,[155] the Court declared voluntary religious instruction for public school pupils unconstitutional.[156] Justice Felix Frankfurter's concurring opinion picked up *Everson*'s "wall of separation" language:

> Separation means separation, not something less. . . . It is the Court's duty to enforce this principle in its full integrity. . . . Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this.[157]

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153 M. STANTON EVANS, "The True Wall of Separation," AMERICAN SPECTATOR, Apr. 2007, available at http://findarticles.com/p/articles/mi_hb3465/is_200704/ai_n32216305/?tag=content;col1 (last viewed Nov. 7, 2011).

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

155 333 U.S. 203 (1948.)

156 *McCollum*, 333 U.S. at 207.

157 *Id.* at 231 (Frankfurter, J., concurring.)

Justice Frankfurter's opposition to commingling religious and secular instruction was in direct conflict with the history of Illinois in particular and the United States in general. The 1789 Northwest Ordinance, which provided for the Illinois territory, explicitly encouraged schools in the territory to teach "religion, morality, and knowledge."[158]

Engel v. Vitale[159] concerned a 22-word nondenominational prayer recited in New York public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[160] The prayer was voluntary.[161] The school district did not compel any pupil to pray if parents objected.[162] Nevertheless, the Supreme Court decided that the prayer violated the Establishment Clause because "[p]rayer in [the] public school system breaches the constitutional wall of separation between Church and State."[163] The prayer in *Engel* did not establish a religion or even compel students to acknowledge religion. *Engel* expanded the Establishment Clause to forbid the mere presence of prayer in the public school.

In *School District of Abington Township v. Schempp*,[164] the Supreme Court found it unconstitutional for a student to open the public school day by reading, without comment, a chapter from

158 THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA 364 (Moore & Lake 1813).
159 370 U.S. 421 (1962.)
160 *Engel*, 370 U.S. at 422.
161 *Id.* at 424.
162 *Id.* at 423.
163 *Engel*, 370 U.S. at 425, 430.
164 374 U.S. 203 (1963.).

the Bible.[165] The *Abington* Court held that the purpose of the First Amendment was not merely to outlaw the official establishment of a single sect, but to create a complete and permanent separation of the spheres of religious activity and civil authority.[166] Of course, this completely reversed the intention of the Founding Fathers, who never tried to sever religious belief from its rightful position as the foundation of civil authority.[167]

In *Stone v. Graham*[168] the Supreme Court struck down a Kentucky law that the Ten Commandments should be posted on the walls of schools because the Commandments represented "the fundamental legal code of Western Civilization and the Common Law of the United States."[169] Rejecting the secular purpose announced by the legislature as a mere pretext, the Supreme Court found that the real purpose was "plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposedly secular purpose can blind us to that fact."[170] The Court conveniently ignored the fact that in the very Supreme Court chamber in which oral arguments were held is a prominent and permanent depiction of Moses with the Ten Commandments.[171]

These and other Supreme Court decisions, over a short peri-

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165 *Abington*, 374 U.S. at 205.

166 *Abington*, 374 U.S. at 217 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947)).

167 BARTON at 164.

168 449 U.S. 39 (1980.)

169 *Stone*, 449 U.S. at 39.

170 *Id.* at 41.

171 *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984), *cited in* BARTON at 171.

od of time, upset the well-understood relationship of Christianity and government that had prevailed for over 150 years. By forbidding the government from passing laws that would aid religion or using tax dollars to support religious institutions and by imposing a strict separation between church and state, the Court broke with history and gave birth to "an entire industry of litigation," to the point where "secularizing America became a profit-making venture."[172] As a result, a single atheist can sue to erase God from the Pledge of Allegiance or the Los Angeles County seal.[173]

2. *Griswold, Roe, Lawrence*

Over the same years that the Supreme Court was decreasing the influence of religious belief, it was expanding the constitutional protection for sexual practices long deemed immoral. In effect, the American people were riding a Supreme Court seesaw, where their religious freedoms were going down on one side while sexual immorality was going up on the other.

In *Griswold v. Connecticut*[174] the Court invalidated a state law prohibiting the use of contraceptives, finding a right to privacy, especially within the marital bedroom. The constitutionally-protected zone of sexual privacy soon expanded beyond the bounds of marriage. In *Eisenstadt v. Baird*[175] the Court struck down a law prohibiting the sale of contraceptives to unmarried

172 MANSFIELD at xv-xvii.
173 MANSFIELD at xvii-xviii.
174 381 U.S. 479, 485 (1965.)
175 405 U.S. 438, 454 (1972.)

persons. The Court added that "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[176] In *Carey v. Population Services Int'l*[177] the Court expanded the constitutional right to contraception to persons under 16. Needless to say, these decisions have tended to separate the procreative act from marriage and legitimize promiscuity.

In *Roe v. Wade*[178] the Court established a constitutional right to abortion as an exercise of liberty protected by the Due Process Clause. Other decisions, such as *Memoirs v. Massachusetts*[179] and *Redrup v. New York*[180] tended to legitimize the creation and possession of pornography. Having established a broad zone of sexual privacy that state legislatures could not reach, the Court retrenched a bit in deciding *Bowers v. Hardwick.*[181]

The most important precursor to *Perry* is, of course, *Lawrence v. Texas*, which reversed *Bowers* and held Texas' anti-sodomy statute unconstitutional.[182] The *Lawrence* court began by challenging the way *Bowers* had framed the issue presented. The question was not whether there was a fundamental right to commit sodomy. In fact, the *Lawrence* majority never squarely held that

176 *Id.* at 453.
177 431 U.S. 678 (1977.).
178 410 U.S. 113 (1973.)
179 383 U.S. 413(1966.)
180 386 U.S. 767 (1967.).
181 See Part II.C, *supra.*
182 539 U.S. 558 (2003.)

homosexual sodomy is a fundamental right.[183] Rather, the majority focuses on the personal relationship decisions that people make: "The laws involved in *Bowers* and here. . . touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[184] This seems to beg the question: Why is sodomy "within the liberty of persons to choose without being punished as criminals"? The Court's response seems to be that sodomy might be committed in the context of an enduring personal bond: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[185] Which part of the Constitution gives homosexuals this right? Apparently the same sexual liberty interest suddenly discovered in *Griswold*, *Eisenstadt,* and *Roe*.

The notion of determining whether sodomy was a fundamental American right would seem to depend on the traditions of American liberty, which would imply a look at history. The *Lawrence* Court preferred to consider only recent history: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding

183 539 U.S. at 594 (Scalia, J., dissenting).

184 539 U.S. at 567.

185 *Id.*

how to conduct their private lives in matters pertaining to sex."[186] The Court did not explain why ignoring centuries of legal and cultural tradition was useful in discerning whether a particular sexual act was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Obviously, however, in favoring recent events over traditional values, the Court was elevating the period of the Sexual Revolution over centuries of prior history. This is somewhat like determining the greatest football team of all time by looking only at the last five Super Bowls.

Seeing no need "to reach a definitive historical judgment,"[187] the *Lawrence* Court then attacked the moralistic foundations of *Bowers*. "It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[188]

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186 539 U.S. at 571-72.

187 *Id.* at 568.

188 *Id.* at 571, citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992.)

To the *Lawrence* Court, the fact that many persons, and the legislators representing them, held "profound and deep convictions" over the entire history of the United States condemning certain sexual acts as indecent and depraved was not important. The Court preferred to invoke the "emerging recognition" among American academics that criminal penalties for private sexual conduct should be relaxed. The Court cited with approval decisions by the British Parliament and the European Court of Human Rights to overturn laws against homosexual conduct.[189] In other words, the majority preferred the moral codes of Europe to those of Texas. The Court did not explain how such recent and foreign pronouncements could retroactively bestow fundamental right status on homosexual sodomy under the Due Process Clause of the *American* Constitution.

In fact, the *Lawrence* Court was re-writing the fundamental right standard altogether, and this is the model Judge Walker followed in *Perry*. Instead of looking to determine whether a right was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," both *Lawrence* and *Perry* were applying the "living document" theory of Constitutional jurisprudence, basing Constitutional law upon "evolving standards" as opposed to deeply-rooted traditions.[190] "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[191] In other

189 *Id.* at 572-73.

190 *See, e.g., Trop v. Dulles*, 356 U.S. 86 (1958) ("evolving standards of decency" as a guide to constitutional interpretation).

191 539 U.S. at 579.

words, our Constitution has no fixed meaning.

In dissent, Justice Scalia criticized the majority's notion that states are powerless to mandate moral codes with respect to private sexual conduct. "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" could only be sustained because *Bowers* had validated "laws based on moral choices. . . ."[192] To the extent overruling *Bowers* makes it impermissible for states to legislate based on moral choices, *Lawrence* threatens "a massive disruption of the current social order."[193] If Texas had no rational basis for prohibiting homosexual sodomy, if "the promotion of majoritarian sexual morality is not even a *legitimate* state interest," then "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" cannot survive.[194]

Justice Scalia concluded his dissent bluntly: "Today's opinion is the product of a Court. . . that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . [T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view

192 *Id.* at 590.

193 *Id.* at 591 (Scalia, J., dissenting).

194 *Id.* at 599 (Scalia, J., dissenting; citations omitted.)

this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination. . . ."[195]

Having excluded prayer (*Engel*) and the Bible (*Abington*) from public schools; having outlawed legislation endorsing religious values (*Lemon*); and having overruled moral objections to contraception (*Griswold*), abortion (*Roe*) and now sodomy (*Lawrence*), the Supreme Court seems to have erased any principled, logical basis to uphold laws criminalizing other long-standing sexual offenses, at least if they are committed consensually and in private. It is difficult to see any path restoring traditional notions of sexual morality to American jurisprudence that does not confront the Court's Establishment Clause jurisprudence that so dramatically reduced the permissible role of religion in public policy.

V. Because Judge Walker Ruled Moral Objections Out-Of-Bounds, His Decision Was Based On Subordinate Considerations.

A. Whether Homosexuality Is an Immutable Characteristic.

One of the premises of Judge Walker's opinion was that homosexuality is an inherent and unchangeable characteristic.[196] Recent scientific research, however, calls this into question. A seven-year study followed 61 subjects and found that 23% suc-

195 *Id.* at 602 (Scalia, J., dissenting).

196 704 F.Supp. 2d at 966, FF 46.

cessfully converted from homosexual orientation to heterosexual. Another 30% remained chaste and no longer identified themselves as homosexual.[197]

But even assuming *arguendo* that homosexuality is an inherent, genetic phenomenon, it does not follow that homosexual acts are morally neutral.

> The fact is that there are plenty of genetically influenced traits that are nevertheless undesirable. Alcoholism may have a genetic basis, but it doesn't follow that alcoholics ought to drink excessively. Some people may have a genetic predisposition to violence, but they have no more right to attack their neighbors than anyone else. Persons with such tendencies cannot say "God made me this way" as an excuse for acting on their dispositions.[198]

As Professor George concludes, if we were to discover that the male of the species has a genetic predisposition toward multiple sex partners, that would not be a good argument for polygamy.[199]

Those who treat homosexuality as an inherent and unchangeable condition compare the ban on same-sex marriage to laws

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197 STANTON L. JONES AND MARK A. YARHOUSE, "A Longitudinal Study of Attempted Religiously-Mediated Sexual Orientation Change," JOURNAL OF SEX AND MARITAL THERAPY, 37:404-27 (2011), available at www.exgaystudy.org.

198 John Corvino, "Nature? Nurture? It Doesn't Matter," INDEPENDENT GAY FORUM (Aug. 12, 2004), cited in GEORGE at 284-85.

199 GEORGE at 285.

against interracial marriage.[200] Judge Walker did so in his *Perry* opinion.[201] "But the analogy fails: Anti-miscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally relevant to the latter question."[202] Race is not central to what marriage is, but sexual intercourse is. There was no doubt that it was possible for a man and a woman of different races to marry. The debate in the same-sex marriage situation is whether it is possible for two men or two women to marry, in other words, whether a same-sex "marriage" is a marriage at all.[203]

B. Whether Homosexuals Are Victims of Discrimination.

1. Circular Logic

Judge Walker cited a long history of what he called discrimination against gays and lesbians. One of the more interesting examples was a 1966 letter from the chairman of the Federal Civil Service Commission warning against the hiring of homosexuals by the government.

> Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent

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200 Black Californians apparently did not appreciate the comparison. Two-thirds of black voters voted to uphold traditional marriage by supporting Proposition 8. Cara Mia DiMassa & Jessica Garrison, "Why Gays, Black Are Divided on Prop. 8," L.A. TIMES, Nov. 8, 2008, at A1, cited in GEORGE at 249 n.10.

201 704 F.Supp.2d at 957-58, FF 24-25.

202 GEORGE at 249.

203 *Id.*

> disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities. . . .[204]

Judge Walker also cited a 1974 letter from the IRS to the Pride Foundation denying a Section 501(c)(3) tax exemption because advancing the welfare of the homosexual community was "perverted or deviate behavior. . . contrary to public policy and [is] therefore, not 'charitable.'"[205]

Of course, Judge Walker's use of these examples begs the question. If one assumes that homosexual conduct is normal and wholesome sexual expression, then such comments are indeed hostile and discriminatory. However, if one assumes the contrary, then discrimination against homosexuality may have a valid societal purpose. Judge Walker engaged in circular logic in decrying these comments as evidence of discrimination without addressing the central moral question. The ultimate questions are how our society wishes to treat homosexual conduct, and whether voters or judges should decide.

2. Whether the Traditional Marriage Definition Is Discriminatory.

There is precedent for the proposition that defining marriage

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204 704 F.Supp.2d at 981, FF 74(c.)

205 *Id.* at 981, FF 74(d).

as between one man and one woman simply does not constitute sex discrimination. As the New York Court of Appeals stated, "by limiting marriage to opposite-sex couples [the State] is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and Men are treated alike -- they are permitted to marry people of the opposite sex, but not people of their own sex."[206] Similarly, the Maryland Court of Appeals held that the Maryland marriage statute "prohibits equally both men and women from the same conduct," and so is not discriminatory.[207]

Assuming that the traditional marriage definition discriminates against same-sex couples, this does not necessarily make the discrimination unconstitutional. When it comes to driving, we discriminate against children, unlicensed drivers, and those who drive under the influence of alcohol. When it comes to marriage, we discriminate against men who wish to marry their mothers, their sisters, their first cousins, their pets, and other men. So the question is not whether marriage laws discriminate, but whether they do so on a legitimate basis.

3. Anti-Gay Discrimination Arguments Are Contrived.

The argument that homosexuals are victims of discrimination, similar to the kind of discrimination assailed by the 1960s

206 *Hernandez v. Robles*, 7 N.Y.3d 388, 821 NYS 2d 770, 855 N.E. 2d 1, 6 (2006.)

207 *Conaway v. Deane*, 401 Md. 219, 264, 932 A.2d 571, 598 (Md. 2007), cited in GRUDEM at 231.

civil rights movement, is part of a strategy hatched in a 1989 book called AFTER THE BALL.[208] AFTER THE BALL offered a specific propaganda program to desensitize and gradually convert those whom the authors repeatedly refer to as homo-hating bigots. They brazenly proposed a "calculated" and "manipulative" propaganda campaign.[209] Among other things, they proposed that gays be presented -- falsely -- as icons of normality. "[I]t makes no difference that the ads are lies; not to us, because we are using them to ethically good effect."[210] The success of their strategy would depend on hiding certain objectionable characteristics of gay culture, such as "drag queens and pederasts."[211] The strategy would be implemented through a relentless media campaign.[212] "You can forget about trying right up front to persuade folks that homosexuality is a *good* thing. But if you can get them to think it is just *another* thing -- meriting no more than a shrug of the shoulders -- then your battle for legal and social rights is virtually won."[213]

There are several major faults with the AFTER THE BALL strategy. First, it assumed that objections to homosexuality are based exclusively upon hatred or prejudice as opposed to intellectual or moral objection. Second, it was deceitful. The plan explicitly sought to win approval by presenting a falsely benign portrait of homosexuality. Third, it was premised on the argument that

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208 MARSHALL KIRK AND HUNTER MADSEN, AFTER THE BALL, Doubleday, New York, 1989 (hereinafter cited as KIRK).

209 KIRK at 161.

210 KIRK at 154.

211 KIRK at 147.

212 KIRK at 163.

213 KIRK at 177.

homosexuality is inherent and unchangeable, and therefore that moral choice is a "myth."[214] This, of course, is debatable.

C. Judge Walker's Debatable Conclusions about What Marriage Is.

Alexis DeTocqueville described the American family in his famous work, DEMOCRACY IN AMERICA:

> There is certainly no country in the world where the tie of marriage is more respected than in America or where conjugal happiness is more highly or worthily appreciated. . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. There his pleasures are simple and natural, his joys are innocent and calm; and as he finds that an orderly life is the surest path to happiness, he accustoms himself easily to moderate his opinions as well as his tastes.[215]

The United States Supreme Court has long recognized the essential definition of marriage: "the idea of the family, as consisting in and springing from the union for life of one man and one woman" is "the sure foundation of all that is stable and noble in our civilization."[216] *Murphy v. Ramsey* was decided in the context of Utah's admission to the union. Utah had petitioned for statehood seven times from 1849 until 1896. Congress refused to admit Utah until that Mormon territory amended its state constitu-

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214 KIRK at 9.

215 ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA, 1:315.

216 *Murphy v. Ramsey*, 114 U.S. 45 (1885.)

tion to ban polygamy.[217]

Princeton Prof. George defines marriage this way: "Marriage is a comprehensive interpersonal union that is consummated and renewed by acts of organic bodily union and oriented to the bearing and rearing of children."[218] This definition requires that marriage be male/female, because only such a couple can achieve organic bodily union oriented to the bearing of children. The definition cannot include three or more persons, because three persons cannot achieve organic bodily union for purposes of reproduction.

According to Professor George, one of the distinguishing characteristics of marriage is "organic bodily union."[219] Sexual intercourse is uniquely capable of creating this kind of bodily union because two bodies, one male and one female, must be united for sexual reproduction.[220] This bodily union characterizes marriage, even though it does not always result in pregnancy and even if one of the partners is infertile. The fact remains that marriage has always been equated with the conjugal act.[221] Indeed it is the conjugal act that has always been treated as the consummation of a marriage, even if the marriage does not produce any children.[222] In the common law tradition, only coitus and no other sex act has been treated as consummation of a marriage.[223] By contrast, same-sex sexual activity is not reproductive in any sense,

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217 GRUDEM at 223.
218 GEORGE at 272.
219 *Id.* at 253.
220 *Id.* at 253-54.
221 *Id.* at 254.
222 *Id.* at 255.
223 *Id.* at 257.

and therefore lacks the orientation to procreation that characterizes marriage.[224]

One of the important public policy reasons to enshrine the traditional definition of marriage is both to facilitate the rearing of healthy children within marriage and to discourage the birth of illegitimate children outside marriage. In other words, the traditional, family-based definition of marriage not only serves to benefit the children raised by their biological parents, but offers a strong disincentive against people tempted to have out-of-wedlock children. By granting legal and economic advantages to married couples, society encourages them to join together and have all their children within the marital family, rather than by random sexual pairings. Likewise, traditional legal disabilities imposed upon illegitimate children were designed to channel sexual activity into the marital context to reduce the possibility of out-of-wedlock births.

It is hard to understand how Judge Walker could find that the citizens of California had no rational basis whatsoever for safeguarding the traditional definition of marriage. As Professor George explained:

> Marriages. . . are a matter of urgent public interest, as the record of almost every culture attests -- worth legally recognizing and regulating. Societies rely on families, built on strong marriages, to produce what they need but cannot form on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit

224 *Id.* at 255, 257.

> from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.[225]

America's experience with the breakdown of the family in areas dominated by public assistance teaches us the importance of healthy families. As absentee fathers and illegitimate births became more common, social ills such as teen pregnancy, poverty, crime, drug abuse and health problems follow.[226] Separating the definition of marriage from its core, child-rearing function will only make our social problems worse and require ever increasing social welfare spending.[227] Given the fiscal realities in Sacramento and Washington, this would be a very bad outcome.

D. Judge Walker's Debatable Conclusions about Marriage And Children.

Judge Walker found as a matter of fact that "California law permits and encourages gays and lesbians to become parents through adoption, foster parenting or assistive reproductive technology. Approximately eighteen percent of same-sex couples in California are raising children."[228] The Attorney General of California admitted "that the laws of California recognize no relationship between a person's sexual orientation and his or her ability to

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225 *Id.* at 270.
226 *Id.*
227 *Id.*
228 704 F.Supp.2d at 968, FF 49.

raise children."[229] Judge Walker found that "the children of same-sex couples benefit when their parents can marry."[230]

Judge Walker made a fact finding that "children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted."[231] Based upon the evidence presented at trial, he found that "the research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."[232] He also found that "children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted."[233] It would seem that these are value-laden political judgments more appropriately to be decided by legislative bodies in the context of a full-fledged public policy debate -- or the people in a referendum -- than by a trial court based upon whatever limited evidence was admitted.

The interests of children explain some of the norms that associated with marriage. Biologically, children can only have two parents, one male and one female. "So marriage, a reproductive type of community, requires two -- one of each sex."[234] Marriage is permanent because divorce would deprive the children of an intact biological family. Marriage is exclusive because infidelity "betrays and divides one's attention and responsibility to

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229 *Id.* at 968, FF 49(b).
230 *Id.* at 973, FF 56.
231 *Id.* at 980, FF 70.
232 *Id.*
233 *Id.* at 981, FF 71.
234 GEORGE at 273.

spouse and children, often with children from other couplings."[235]

Judge Walker concluded that only outmoded, sexist notions supported the idea of male/female parenting as beneficial to children. The best available social science teaches otherwise.[236] Our experience teaches "that children need both a mother and father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways."[237]

In the context of same-sex "marriage," there would be no inherent need for permanence or fidelity because there would be no biological children. Many gay marriage advocates have in fact sought not only to have access to marriage but to redefine it. Such a redefined marriage would likely eliminate the norms of permanence and/or infidelity. Unfortunately, these marriage norms are already beset by increasing rates of divorce and adultery in our society. Redefining marriage to include same-sex unions would only hasten this unfortunate trend.[238]

Some advocates for same-sex marriage have been outspoken about their hope to redefine marriage altogether. "Same-sex couples should 'fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely[, because t]he most subversive action lesbians and gay men can undertake. . . is to transform the notion of "family" entirely.'"[239]

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235 *Id.* at 259.

236 *Id.* at 263.

237 *Id.* at 263.

238 *Id.* at 262.

239 JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2005), cited in GEORGE at 278 n.100.

Whereas traditional marriage implies monogamous exclusivity, gay male couples, even those with fairly long-term relationships, tend to have sexual encounters outside the relationship. In a survey conducted in the 1980s, "more than sixty percent [of gay couples] entered the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years."[240]

It is a radical social experiment on a generation of children to assume, without proof in advance, that same-sex parents will produce outcomes equal to that of the traditional male/female parenting model.

VI. Judge Walker Should Have Recused Himself.

Chief Judge Vaughn R. Walker presided over the *Perry v. Schwarnegger* case from its inception until his retirement in February 2011. He did not disclose his sexual orientation to counsel. After his retirement, on April 6, 2011, he disclosed to the media that he had been in a same-sex relationship for ten years.[241] It is unknown whether Judge Walker would marry his partner if same-sex marriage were legalized in California, but his opinion makes clear that he views same-sex marriage as a salutary benefit.

Where actual or suspected bias could call the impartiality of a court's decision into question, federal statutes require the judge to recuse himself. Title 28 of the United States Code,

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240 DAVID P. MCWHORTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984), cited in GEORGE at 278 n.102.

241 Dan Levine, "Gay Judge Never Thought to Drop Marriage Case," Reuters, Apr. 6, 2011, available at http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406 (last visited Nov. 7, 2011).

Section 455(a), requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[242] Section 455(b)(4) likewise requires a judge to recuse himself when he has "any. . . interest that could be substantially affected by the outcome of the proceeding."[243]

After learning that Judge Walker is homosexual, the Proponents of Proposition 8 filed a motion in the District Court asserting that because Judge Walker should have recused himself and did not, the court should vacate Judge Walker's decision in favor of same-sex marriage.[244] Employing the ancient maxim that "[n]o man is allowed to be a judge in his own cause," the Proponents argued that Judge Walker should have disclosed his homosexuality at the outset of the case or should have recused himself of his own volition. The new district court judge assigned to the case, Judge Ware, denied the motion.[245] Judge Ware decided that there was no evidence that Judge Walker intended to marry, so he did not have a direct interest in the outcome of the case. A line of federal precedents holds that a judge's minority status does not necessarily bar him from deciding a civil rights case involving members of that minority.[246]

As of this writing, Judge Ware's decision is on appeal before the Ninth Circuit.[247]

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242 28 U.S.C. § 455(a).

243 28 U.S.C. § 455(b)(4).

244 Motion to Vacate Judgment, *Perry v. Schwarzenegger*, No. 09-CV-2292 JW, document 768, filed Apr. 25, 2011.

245 Order Denying Motion to Vacate, *Perry v. Schwarzenegger*, No. 09-CV-2292 JW, document 797, filed June 14, 2011.

246 Id. at 5, n.8.

247 *Perry v. Brown*, No. 11-16577 (9th Cir.).

VII. Conclusion.

The *Perry* decision can only be properly understood against the backdrop of the Supreme Court cases that secularized America, downgrading religious influence while uplifting sexual license. *Everson* and its progeny, applying a distorted notion of the "wall of separation between church and state," have effectively disqualified religious morality as a valid basis for lawmaking. The First Amendment Establishment Clause cases, by prohibiting the people and their legislators from making moral choices for society, have paved the way for Fourteenth Amendment Due Process and Equal Protection cases that pay no heed whatsoever to traditional moral values concerning human sexuality. As a result, Judge Walker speedily dismissed moral objections to same-sex marriage as irrelevant and impermissible. Judge Walker then rendered an opinion that did not harmonize with the beliefs of most Americans who have gone to the polls, in California and elsewhere, to reaffirm the traditional definition of marriage.[248]

How did we get here? By separating church and state in a way our Founders never intended. Only a judicial system that had ruled Christian morality out-of-bounds could arrive at decisions like *Griswold*, *Roe*, *Lawrence*, and *Perry*. When our courts disregard the traditional moral principles upon which our Nation was founded, it is not surprising that they render decisions that conflict with the moral sense of the American people.

Only by restoring religious morality as an open and legiti-

248 *See* referendum results collected at note 2, *supra*.

mate consideration in lawmaking can we restore harmony between American public policy and traditional American notions of right and wrong. Unless we do, the adoption of same-sex marriage will inevitably put church and state at odds with each other. If the Constitution requires, as Judge Walker says it does, that same-sex marriages and opposite-sex marriages be treated as equivalent, then the state will be required to treat homosexual marriages as just as wholesome and proper as traditional marriages. This will be manifested, for example, in school curricula. People of faith who oppose this moral equivalency will be found guilty of discrimination. A federal court in California found that a student's religiously-based opinions against homosexuality could be banned by his school.[249] Likewise, an appellate court in Massachusetts held that a public school may, over parental objections, teach that homosexuality is morally good.[250]

Those who oppose homosexuality or same-sex marriage for religious or moral reasons are now, and will continue to be, castigated as hateful bigots.[251] "The implications are clear: If marriage is legally redefined, believing what every human society once believed about marriage -- namely, that it is a male-female union -- will increasingly be regarded as evidence of moral insanity, malice, prejudice, injustice, and hatred."[252] Many of those who wish to practice homosexuality are not content to do so in private.

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249 *Harper v. Poway Unified Sch. Dist.*, 345 F.Supp.2d 1096, 1122 (S.D. Ca. 2004), cited in GEORGE at 264.

250 *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), cited in GEORGE at 264.

251 Frank Rich, "The Bigot's Last Hurrah," N.Y. TIMES, Apr. 19, 2009 (Week in Review) at 10, cited in GEORGE at 265, n.50.

252 GEORGE at 265.

Rather, they insist upon obtaining legal validation for their view and then coercing everyone into agreement.

Arguments in favor of same-sex marriage can be overcome without reference to religious belief. "[T]he human good of marriage, and its implications for the common good of human communities, can be understood, analyzed, and discussed without engaging specifically theological issues and debates."[253] In other words, people of faith can win the marriage argument without citing the Bible or the Catechism. This is the prudent approach taken by the Alliance Defense Fund attorneys representing the Proposition 8 Proponents. The question posed by this paper is: Why should Christian Americans, and others opposed to same-sex marriage, have to fight with one hand tied behind their backs? Why should people of faith have to exclude faith-based arguments in American courts? Only because American courts have, by misusing the so-called "wall of separation between church and state," transformed America from a Christian nation into a secular one. Traditional marriage will be safe only when our courts again recognize the moral and religious principles upon which our Nation was founded.

253 GEORGE at 285.