

THE GAY RELIGION

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I. INTRODUCTION

On the morning of November 5, 2008, Californians upset by the passage of Proposition 8 took to the streets and voiced their disagreement, disappointment, and dissatisfaction with the measure which amended the California State Constitution to effectively ban same-sex marriage.¹ Much of the initial anger against Proposition 8 was directed at churches and religious institutions.² Some protestors accused religious leaders and congregants of “bigotry” and “intolerance.”³ The focus on religious groups was probably not misplaced, for Proposition 8 received significant, if not the majority of its support, from religions and religiously-minded citizens across the country.⁴ For many Californians, Proposition 8 pitted gay civil rights against religious beliefs.

While the Proposition 8 conflict centers on marriage, the marriage debate is just a particularly sharp focal point in a broader conflict between two ideologies—one focused on the rights of gays, the other on the beliefs of traditional religionists. Because of their different emphases, this conflict forces an outcome where beliefs win at the expense of rights or vice versa. Californians who voted against Proposition 8 for example, may have felt that the right of gays to marry was eliminated at the expense of promoting a

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¹ See California Ballot Initiative to Limit the Definition of Marriage (2001), http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf. Proposition 8 amended the California State Constitution to read, “Only marriage between a man and a woman is valid or recognized in California.” This amendment was intended, in part, to reverse the decision by the California Supreme Court which held the earlier marriage statute, Proposition 22, was unconstitutional “and that the remaining statutory language must be understood as making the designation of marriage available both the opposite-sex and same-sex couples.” In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008). For the reactions of those dissatisfied with the measure, see Ari B. Bloomekatz, Joanna Lin & Raja Abdulrahim, *PROPOSITION 8: Throngs Protest Across the State; In Silver Lake, San Diego and other Sites, Demonstrators vent their Anger over the Ban on Gay Marriage*, L.A. TIMES, Nov. 9, 2008, at B1.

² See Jessica Garrison & Joanna Lin, *Mormons’ Prop. 8 aid protested; Gay-Rights Activists Criticize the Church for its Role in Helping to Pass California’s Ban on Same-Sex Marriage*, L.A. TIMES, Nov. 7, 2008, at B1.

³ See Letters to the Editor, *Prop. 8’s Politics of Intolerance*, L.A. TIMES, Dec. 28, 2008, at A25; Rachel Abramowitz & Tina Daunt, *Prop. 8 Rifts Put Industry on Edge; Hollywood is at Odds over whether to Shun Supporters of the Ban*, L.A. TIMES, Nov. 23, 2008, at A1.

⁴ David Kelly, *PROPOSITION 8; Election Brings Feeling of Isolation Conservative Bastion with an Evangelical Base; Temecula-Murrieta Area is GOP Turf with an Evangelical Base. Prop. 8 Battle Raised Hostility, Gay Pair Say*, L.A. TIMES, Nov. 9, 2008, at B1. See Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Election 2008: GAY MARRIAGE; Nation Watches as State Weighs Ban; Prop. 8 Battle drew more Money and Attention from Across the U.S.*, L.A. TIMES, Nov. 5, 2008, at A1.

religious belief. An outcome which subjugates civil rights to religious beliefs seems incredible given the First Amendment of the United States Constitution which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁵

However, the problem of religious beliefs subjugating civil rights loses its sting if the gay ideology shifts its focus from gay *rights* to gay *religious beliefs*. A conflict that pits the gay ideology against the religious ideology will force an outcome where one religious belief wins at the expense of another religious belief, if either wins at all. Describing the two ideologies as religious ideologies creates parity in the debate, because the description clarifies the notion that the two ideologies stand on equal ground. From here, the debate will be allowed to proceed as a traditional religious debate.

The aim of this paper is to describe why the gay ideology should be termed a gay religion. This paper attempts to show that being “gay” is the result of religious belief much in the way that being “catholic” is the result of religious belief. Thus, when laws are enacted or policies are instituted that specifically affect the experience of gays, the analysis of those laws and policies should account for the religious beliefs of gays.

In order to show why the law should account for a gay religion, Part II of this paper will analyze a description of “religion” offered by the courts and legal commentators. The ambiguity of the religion clause of the First Amendment has been the topic of judicial opinions and legal commentaries for decades.⁶ As a result of the religion clause’s ambiguity, Part II will also analyze how other, non-legal, scholars have described religion. Part II will not decide what the definition of religion *is*, rather it will provide a framework of religion helpful in analyzing the gay ideology.

Part III of this paper will then apply the framework from Part II to argue that the gay ideology is a religious ideology. Though this argument will be made in general terms which cannot account for the highly personal and individualized experiences of all gay people, its purpose is to show that the gay person’s experiences could be just as plausibly termed religious as the experiences of the believing religionist.

Finally, Part IV will examine how laws and legislators should account for the “gay religion.” This section will include issues arising from the First Amendment’s Free Exercise of Religion Clause, exemption clauses, and how the debate between gay rights and religious belief is a false dilemma.

Some definitions are in order before the analysis begins. The term “gay ideology,” as used throughout this paper reflects the social needs and aspirations of the gay community. While the needs and aspirations of the community may be diverse, it is assumed generally that the gay community seeks social acceptance, dignity, respect, and equality under the law. It also stands for the proposition that acting in harmony with one’s same-sex

⁵ U.S. CONST. amend. I.

⁶ See, e.g., JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (Westview Press 2000); FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION (Michigan State University Press 2003); KENT GREENAWALT, RELIGION AND THE CONSTITUTION (Princeton University Press 2008).

attraction requires entering into intimate relationships with members of the same sex. Traditionally, the body of ideas that reflect these values has been a mixture of political ideas, concepts of natural law, and patterns in civil rights.

The term “gay experience” is used to mean the lifestyle and experiences of a self-identified gay, lesbian, bisexual, or transgendered person. It involves processes of self-discovery and decisions to act in harmony with one’s same-sex attraction. No single experience may be common to all gays but some examples of the gay experience may be the “coming out” experience or the act of entering an intimate relationship with a same-sex partner. Being gay reifies certain beliefs, identities, and choices found in a gay ideology. However, a person who has same-sex attraction but who does not act in accordance with that attraction does not live the “gay experience.” The “gay experience” requires the willingness to enter intimate relationships with members of the same sex.

The term “homosexuality” is used sparingly because modern parlance uses “homosexuality” to refer to the term “gay experience” as used in this paper, and sometimes to refer to a biological condition. Here, the use of “gay” refers to one’s identity, belief, and choice dynamics and the term “same-sex attraction” is used to reference a biologically reductive description. In cases where the term “homosexuality” is used, it has been limited to a biological description.

Since most of the article is used to discuss what a “gay religion” is, only a brief definition is offered here. A “gay religion” is a body of *religious* ideas that reflect the social needs, aspirations, and spirituality of the gay community. These ideas are religious because they “push . . . toward some sort of ultimacy and transcendence that will provide norms and power for the rest of life.”⁷ While religion is also a very broad topic, it connotes a deeper commitment to a personal lifestyle than does one’s political beliefs or notions of social equality. Thus, reifying a gay ideology does not manifest political views or a conception of natural law or civil right as much as it manifests religious aspirations.

II. DEFINITIONS OF RELIGION

A. RELIGION IN THE COURT

The Supreme Court’s best attempts to define religion were made in two cases dealing with religious exemptions from the Selective Service.⁸ Even though these cases analyze the statutory language of the Universal Military Training and Selective Service Act rather than the meaning of religion in the First Amendment, they provide an instructive and likely starting point for the Court in defining religion for First Amendment purposes.⁹

⁷ Winston L. King, *Religion*, in *ENCYCLOPEDIA OF RELIGION*, Vol. 11, 7692, 7695 (Lindsay Jones ed., 2d ed. 2005).

⁸ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 1189 (Aspen Publishers 2006).

⁹ *Id.*

In 1890, before the Court analyzed religion in the Selective Service cases, it opined that “the term ‘religion’ has reference to one’s . . . relation[] to his Creator, . . . reverence for his being and character, and of obedience to his will.”¹⁰ The idea that religion referenced divinity persisted through 1931 when the Court said that “the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”¹¹ But as time passed the Court began to broaden its concept of religion. The Court held in a footnote that other belief systems could be deemed religious, even if they did not teach what others might consider a belief in God, such as “Buddhism, Taoism, ethical culture, secular humanism and others.”¹² Finally, in 1965, the Court in *United States v. Seeger* effectively eliminated a theistic requirement for religious belief and expanded the notion of what religion means in American jurisprudence.¹³

United States v. Seeger concerned the Universal Military Training and Selective Service Act, which granted an exemption from combat training and service in the armed forces to any individual “who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.”¹⁴ The Court struck down as unconstitutional the requirement that “religious training and belief” meant “‘an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.’”¹⁵ In its place, the Court held that to receive a religious exemption, the belief must be “sincere and meaningful[ly] occup[y] a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”¹⁶

Not only did *Seeger* show the Court’s willingness to broaden the definition of religion, it did so with the support of a contemporary theologian, Paul Tillich.¹⁷ The Court used Tillich in support of the notion that a Supreme Being is a broad concept which does not necessarily entail an anthropomorphic entity.¹⁸ By referring to a modern theologian, the court recognized its incompetence on the matter of religion while also showing that it was open to hear new “definitions” of religion. The court’s willingness to hear new definitions of religion is essential for the acceptance of a gay religion in American jurisprudence.

The second conscientious objector case, *Welsh v. United States*, explained how an individual’s personal religious belief might run parallel to an orthodox religious belief. In *Welsh*, the petitioner Elliot Welsh sought a religious exemption from military service on his belief that “human life is valuable in and of itself” and that he would not therefore “injure or kill

¹⁰ *Davis v. Beason*, 133 U.S. 333, 341–42 (1890).

¹¹ *United States v. MacIntosh*, 283 U.S. 605, 633–34 (1931).

¹² *Torcaso v. Watkins*, 367 U.S. at 495 n. 11 (1961).

¹³ See CHEMERINSKY, *supra* note 8, at 1189.

¹⁴ *United States v. Seeger*, 380 U.S. 163, 164–65 (1965).

¹⁵ *Id.*

¹⁶ *Id.* at 166.

¹⁷ *Id.* at 180–83.

¹⁸ *Id.*

another human being.”¹⁹ Originally, Welsh characterized his beliefs as nonreligious but qualified his characterization later by explaining that though his belief may not have been religious “in the conventional sense,” “his beliefs were ‘certainly religious in the ethical sense of the word.’”²⁰

In striking down the lower court’s decision to deny Welsh an exemption from military service, the Court held that a religious belief need not be derived from “traditional or parochial concepts of religion.”²¹ Rather, a person can derive one’s religious beliefs from personal, internal sources.²² It does not matter whether some people find a religious belief “incorrect” or “incomprehensible.”²³ What matters is that the belief “stems from [one’s] moral, ethical, or religious beliefs about what is right and wrong and . . . these beliefs be held with the strength of traditional religious convictions.”²⁴ In this formulation, the exact content of one’s belief is second to the function of that belief in one’s life.

Seeger and *Welsh* broadly define religion to cover both traditional, theistic notions of religious belief as well as less traditional, non-theistic religious belief.²⁵ A religious belief need not be similar to a Catholic or Protestant ideology in order to find protection under the First Amendment. Nor does it matter if some people find the religious belief incomprehensible or wrong.²⁶ As long as the belief is sincere, meaningful, and “occupies a place in the life of its possessor parallel to that filled by an orthodox belief in God,”²⁷ a person should be able to find protection under the First Amendment.

The Court did introduce at least one important ambiguity though—the definition of an orthodox belief. If the courts want to compare a less traditional, non-theistic believer to an orthodox believer, it must choose criteria for defining what an orthodox believer looks like. When the Court referenced Tillich, it indicated that it would allow other experts to define orthodox belief. What follows are the attempts of legal and religious scholars at defining orthodox belief.

B. RELIGION ACCORDING TO LEGAL COMMENTATORS

One attempt at providing a definition of orthodox religion could be seen in the article *Toward a Constitutional Definition of Religion*, which emphasizes that a religious belief is a set of beliefs embodying the ultimate concern for the believer.²⁸ An ultimate concern gives meaning and orientation to a person’s whole life. It is a concern which no other concern can supersede—the believer would rather “disregard elementary self-interest and . . . accept martyrdom” than transgress the tenets of the

¹⁹ *Welsh v. United States*, 398 U.S. 333, 335, 343 (1970).

²⁰ *Id.* at 341.

²¹ *Id.* at 339.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 340.

²⁵ CHEMERINSKY, *supra* note 8, at 1189.

²⁶ *Welsh*, 398 U.S. at 339.

²⁷ *Seeger*, 380 U.S. at 164–65.

²⁸ Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1072–75 (1978).

belief.²⁹ The content of the belief is irrelevant as far as traditional notions of religion are concerned. The concern may be political, economic, or cultural; it will be protected “regardless of how ‘secular’ that concern might seem to be.”³⁰ Finally, since the concern must be “unconditional, made without qualification or reservation,” it cannot be defined conjunctively such as “X and Y and Z.”³¹

Clearly, the ultimate concern test stresses the personal nature of religious belief as well as the belief’s singular and guiding force in the life of the believer. In fact, this test implies that every person has a religion. Under the ultimate concern test, orthodox religion is different for every person because orthodoxy equals one’s ultimate concern. Essentially, the ultimate concern test eliminates the notion of orthodox belief.

By focusing on the ultimate concern of a person’s life, the author of the test appears to implicitly eschew the necessity of organized religion as an indicator for First Amendment religious belief. While it may be *relevant* that a person’s religious belief is taught in an organized religious denomination, it is not necessary. Religious belief can spring from the heart of the believer. The ultimate concern test points us to a broader sense of religion than the sense engendered by the customs and structure of organized religion.

In response to the ultimate concern test, George Freeman argues that giving religion such a broad meaning is mistaken.³² In *The Misguided Search for the Constitutional Definition of Religion*, Freeman argues that religion cannot be used as a term of art similar to the way courts treat the word “speech” in the free speech clause.³³ Speech as a term of art encompasses, but is not limited to talking—it includes painting, displaying a red flag, and marching in a demonstration.³⁴ Treating “religion” as a term of art like “speech” would “convert[] the right to the free exercise of religion into a seemingly illimitable right of personal autonomy.”³⁵ For Freeman,

“[t]here simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else. There is only a focus, coupled with a set of paradigmatic features They alone are sufficient to give ‘religion’ its meaning.”³⁶

How do the courts avoid “converting the right to the free exercise of religion into a seemingly illimitable right of personal autonomy” under Freeman’s notion of religion? Freeman suggests the Court undertake an

²⁹ *Id.* at 1075 n. 108 (quoting *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943)).

³⁰ *Id.* at 1075.

³¹ *Id.* at 1076 n. 110 (citing PAUL TILLICH, *THE DYNAMICS OF FAITH* 8–9 (Harper 1957)).

³² See George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 *GEO. L. J.* 1519 (1983).

³³ *Id.* at 1564.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1565.

analysis summed up by Judge Adams in *Africa v. Commonwealth of Pennsylvania*.³⁷

Africa involved a prisoner who, because of his beliefs as a “Naturalist Minister” in the MOVE organization, filed a civil action against the state prison because it infringed on his religious beliefs.³⁸ As a follower of MOVE, the prisoner argued that it was against one of his religious tenets to eat anything other than raw food.³⁹ The court, however, did not view the MOVE organization as religious.⁴⁰ Judge Adams wrote that a belief system is secular rather than religious if it is “more akin to Thoreau’s rejection of ‘contemporary values accepted by the majority’ than to the ‘deep religious convictions’ of the Amish.”⁴¹

Freeman uses Judge Adams’s opinion to suggest that the Amish are paradigmatic of the religious believer, while a system of belief whose purpose is to “reject the contemporary values of the majority” is paradigmatic of irreligion.⁴² Furthermore, it is such paradigms of religion and irreligion that guide courts in their decisions regarding whether a certain belief is religious.

In making his argument clearer, Freeman insists that defining the “essence” of religion is misguided in the same way that Ludwig Wittgenstein argued that defining the essence of a “chair” is misguided.⁴³ Our decision whether X is a chair will depend on whether we can use X in the same manner as the standard chair.⁴⁴ The closer X resembles a chair the easier it is to include X in the class of standard (paradigmatic) chairs.⁴⁵ The more dissimilar X is to a standard chair, the easier it is to exclude X from the class of standard chairs.⁴⁶ Ostensibly, Freeman’s purpose in invoking Wittgenstein’s philosophy of language is to suggest not only that there is no definition of religion, but that the courts do not *need* a definition.

We all use the word “religion” without agreeing on a precise, exhaustive definition. The duty of the court then, is to rely on the family of resemblances surrounding “religion,” realize that there is a gradient between religion and irreligion, and make plausible determinations of religion in the indeterminate cases.⁴⁷ Freeman asks the court to abandon the assumption that “religion” has meaning, not because it will “make the task of deciding cases under the religion clauses any easier,” but because “it should improve the way in which that task is performed.”⁴⁸

³⁷ *Id.* at 1559.

³⁸ *See Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981).

³⁹ *Id.* at 1026–27.

⁴⁰ *Id.* at 1033.

⁴¹ *Id.* at 1035.

⁴² Freeman, *supra* note 32, at 1559.

⁴³ *Id.* at 1549.

⁴⁴ *Id.* at 1551–52.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Id.* at 1565. Whether the task of deciding cases based on definitions of religion will improve by understanding Wittgenstein’s *Philosophical Investigations*, however, is not the purpose of this paper. Freeman’s reference to Wittgenstein however, suggests an important component to understanding how “religion” functions in the First Amendment.

Though Freeman did not go into length concerning Wittgenstein's view on the origins of language, it is Wittgenstein's philosophy that makes the fact that we use words without knowing their essences meaningful to understanding what religion means. Wittgenstein posited that definitions surface from the culture and society in which they are used.⁴⁹ In order to properly use a word, we have to be alert to the social backdrop from which the word emerges.⁵⁰ Wittgenstein gives the example that, "[i]f a lion could talk, we could not understand him," to explain that even if a lion could use words we would not understand it because we do not have access to the lion's culture and society.⁵¹ Religion, then, is a highly contextual concept. Our ability to use the word "religion" in the First Amendment rests on our understanding of American society, culture, and constitutional interpretation. By invoking Wittgenstein's philosophy, Freeman is indirectly claiming that some reference to orthodox religion is essential in shaping the court's use of the term "religion" but that the understanding of orthodox religion will come out of American culture.

So far, the definitions and analyses provided by the Court and commentators in the preceding paragraphs are problematic for defining a gay religion because they refer to an existing notion of religion in the process of defining religion. The gay religion is not an orthodox or an existing religion *per se*. For the Court to accept the gay religion in its decision making, it will need to fit in religion's family of resemblances. The Court will need to see how the gay experience can plausibly be described as religious.

The following section will critically approach religion from how it has been used among religious scholars in an attempt to gain a better grasp on what the courts and commentators relied on when they sought to make their definitions of religion. In so doing, the proceeding section will also buttress the notion that a "gay ideology" is properly a "gay religion."

C. RELIGION ACCORDING TO OTHER SCHOLARS

The purpose of this section is not to definitively outline the contours of religion in America. That would be a never ending task. Rather, the purpose is to determine whether the American use of "religion" can be applied to the gay experience. Hopefully, by taking a detour into other, non-legal commentary, a more robust and practical understanding of religion will be provided to assist those who think about the gay experience to think about it in terms of religious experience.

This analysis relies primarily on Harold Bloom's *The American Religion* and William James's *The Varieties of Religious Experience*. Both these authors speak to American conceptions of religion. This is important because ideas concerning religion are not universal and by providing American theories concerning religion, the argument can be made that the "gay religion" is an American religion fit for the First Amendment.

⁴⁹ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 68 (Blackwell Publishers, 2001).

⁵⁰ *Id.*

⁵¹ *Id.* at 190.

In *The Varieties of Religious Experience*, James focused his work on examining religion as a personal sentiment rather than as an institutional or ecclesiastical organization.⁵² One reason for doing this is that James believes that personal religion is “more fundamental than either theology or ecclesiasticism.”⁵³ All churches or religious institutions are “second hand” traditions which rely on the personal experience of their founders.⁵⁴ This is not only true for the “superhuman founders,” that is Christ, Buddha, or Mahomet, but also for each of the founding members of the sects of Christianity. From the beginning, James orients his readers on the necessarily personal nature of religion. He, like the author of the ultimate concern test, casts a wide net meant to catch individuals and not institutions. Institutional religion then, “with its priests and sacraments and other go-betweens sinks to an altogether secondary place.”⁵⁵ James is more concerned with the personal nature of religion—“the inner dispositions of man himself which form the centre of interest, his conscience, his deserts, his helplessness, his incompleteness.”⁵⁶

As a result of James’s focuses on the personal, it is not surprising that he think that there should be many types of religions.⁵⁷ He reasons that since no two people are alike, since no two of us have identical difficulties, and since each of us has his own “peculiar angle of observation,” we cannot expect to “work out identical solutions”—“different men may all find worthy missions.”⁵⁸ But James’s test of religion is not as solipsistic as the ultimate concern test. Even with this conception about the multitude of religious lives, James was able to distill some points of commonality which are relevant to religious belief.

As a way of broadly summarizing the characteristics of religious life, James came up with five characteristics that are included in religious belief:

1. That the visible world is part of a more spiritual universe from which it draws its chief significance;
2. That union or harmonious relation with that higher universe is our true end;
3. That prayer or inner communion with the spirit thereof—be that spirit ‘God’ or ‘law’—is a process wherein work is really done, and spiritual energy flows in and produces effects, either psychological or material, within the phenomenal world.

Religion includes also the following psychological characteristics:

4. A new zest which adds itself like a gift to life, and takes the form either of lyrical enchantment or of appeal to earnestness and heroism.
5. An assurance of safety and a temper of peace, and, in relation to others, a preponderance of loving affections.⁵⁹

⁵² WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 32 (Harvard University Press 1985).

⁵³ *Id.* at 32.

⁵⁴ *Id.* at 33.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.* at 384.

⁵⁸ *Id.*

⁵⁹ *Id.* at 382–83.

These five characteristics point to the importance of religion in the life of the believer, for religion gives the believer's life purpose, "zest," safety, peace, and love. James grants that his formulation sounds egotistical. "Religion, in short, is a monumental chapter in the history of human egotism."⁶⁰ Therefore, he is confident that the religious individual will tell you "that the divine meets him on the basis of his personal concerns."⁶¹

James contrasts religion with the "Science of Nature" which "utterly repudiate[s] the personal point of view."⁶² Science "catalogues her elements and records her laws indifferent as to what purpose may be shown forth by them, and constructs her theories quite careless of their bearing on human anxieties and fates."⁶³ He marks an important distinction between religion pre-scientific revolution and religion post-scientific revolution. Theology before science explained a God "who conformed the largest things of nature to the paltriest of our private wants."⁶⁴ This is not the case in our modern age. Science teaches us that the world follows a course indifferent to our human purposes.

For gays questioning why they experience same-sex attraction, this is an important observation. In American culture, science is the means by which we understand the causes of same-sex attraction; religion is the means through which gays give purpose to their lives given their same-sex attraction.

From James we learn about the religious experiences of believers. This lesson will be important for understanding the experiences of gays, but when it comes to defining what religion means or what orthodox religion is, James's analysis only takes us so far. For example, James presents a plausible description of orthodox religious experience, but doctrinally, the descriptions of religious experience do little to settle the question of orthodoxy. With 78.4% of Americans identifying themselves as Christian in 2007,⁶⁵ one might think that the orthodox religious doctrine might lean Christian. However, Harold Bloom assures us that "we think we are Christian, but we are not."⁶⁶ Bloom explains that the American religious doctrine is not a denominational orthodoxy but a broad description of an American Religion which encompasses three ancient religious movements.

For Bloom, the American Religion is a triad of Enthusiasm, Gnosticism, and Orphism.⁶⁷ Enthusiasm is the movement that describes religion as a religion of experience. A religious conversion, for example, must be "felt, manifested, and exuberantly communicated."⁶⁸ Later Bloom calls Enthusiasm's contribution to the American Religion the "fundamental

⁶⁰ *Id.* at 387.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 390.

⁶⁵ See Pew Forum on Religion & Public Life, Statistics on Religion in America Report (Feb. 2008), <http://religions.pewforum.org/reports>.

⁶⁶ HAROLD BLOOM, AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION 37 (Simon & Shuster 1992).

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at 49.

but scarcely ever avowed principle . . . [of] creedlessness, or the *doctrine of experience*⁶⁹ and compares an early American manifestation of Enthusiasm to the Woodstock Rock festival of 1969—complete with orgies and altered states of consciousness.⁷⁰

Pure Enthusiasm though would have “left an emptiness in America but for something more vibrant that replaced doctrine, a timeless *knowing* that in itself saves.”⁷¹ Gnosticism, Bloom’s second in the triad of American religion is the “*knowing* that in itself saves.”⁷² To begin to understand Gnosticism, Bloom writes that we need only ask ourselves: “What do I actually regard my innermost self as being?”⁷³ One answer to that question, and the one that seems to resonate with many Americans, is that inside each of us is “the spark or transcendental self that is free of the fallen or created world.”⁷⁴ This knowledge of ourselves is particularly attractive for Americans because it confirms what we have always believed about ourselves: we are free.⁷⁵

The third movement in Bloom’s triad, Orphism, teaches believers of the American Religion the “potential divinity of the elitist self.”⁷⁶ This last leg of the American Religion triad supports the notion of the importance of self. “The self is the truth, and there is a spark at its center that is best and oldest, being the God within.”⁷⁷ Orphism, by vaunting the self, gives the American religion an American faith rooted in self-awareness.⁷⁸

The American Religion leads Bloom to discover that religion in America is primarily selfish.⁷⁹ “The God of the American Religion,” writes Bloom, “is an experiential God, so radically *within* our own being as to become a virtual identity with what is most authentic (oldest and best) in the self.”⁸⁰ Americans are much quicker to find fault with “nature, time, and history” than they are to find fault with “God nor with herself or himself.”⁸¹ Furthermore, American religionists seek the American Jesus (“an internalized quest”) rather than the historical Jesus.⁸² American individualism warrants each American to seriously claim, “God loves me.”⁸³ Bloom argues that historical religions, those that predated the United States of America, did not engender such individualized attention from divinity.⁸⁴ This is a uniquely American concept.⁸⁵

⁶⁹ *Id.* at 63.

⁷⁰ *Id.* at 59–64.

⁷¹ *Id.* at 49.

⁷² *Id.*

⁷³ *Id.* at 50.

⁷⁴ *Id.* at 52.

⁷⁵ *Id.* at 49.

⁷⁶ *Id.* at 52.

⁷⁷ *Id.* at 54.

⁷⁸ *See id.*

⁷⁹ *Id.* at 260.

⁸⁰ *Id.* at 259.

⁸¹ *Id.* at 260.

⁸² *See id.* at 260–61.

⁸³ *See id.* at 257.

⁸⁴ *See id.* at 260–63.

⁸⁵ *See id.*

This fixation with the self has peculiar ramifications for religion. When a person testifies that she believes in God, or that he loves Jesus, Bloom argues that such phrases generally mean “‘I cannot function because I dread dying’ or ‘My neighbor won’t vote for me.’”⁸⁶ Bloom may too harshly criticize religion by indicating that a person’s “supposed faith” is “essentially political,”⁸⁷ but his criticism suggests that religious beliefs and political beliefs may be conflated even in the mind of the believer.

Even bleaker than the mixing of politics and religion is what Bloom fears is the deterioration of community as the result of American Gnosticism.⁸⁸ Bloom writes “[u]rging the need for community upon American religionists is a vain enterprise; the experiential encounter with Jesus or God is too overwhelming for memories of community to abide, and the believer returns from the abyss of ecstasy with the self enhanced and otherness devalued.”⁸⁹ Understanding that American religion reinforces the notion that individuality takes precedence above community will help to explain why battles between a gay religion and a traditional religion may be so fierce. If both sides are willing to devalue the other, as Bloom’s brand of religion leads us to believe, then finding a solution will require that each side realize just how committed they are to their sets of beliefs.

Where James gave us some discrete elements of the experienced religion, Bloom gives us the broader package of American Religion, where experience is tied with knowledge of self-importance, and the goal to become something great, even divine. Bloom’s stance may be more cynical than James’s because religion in Bloom’s eyes appears to act as a validation of oneself whereas James sees religion as a means of understanding self. But both James and Bloom seem to agree that religion is deeply personal and never necessarily connected to a traditional belief system. While Bloom explored many different American religions, he recognized that their doctrines “essentially stem from their self-concealed core of the American Religion: Orphic, Gnostic, millenarian.”⁹⁰ He also recognized that the American Religion can “establish itself within nearly any available outward form.”⁹¹ Which leads to the next question: Has the American Religion established itself within the “outward form” of the gay experience?

III. GAY RELIGION

A. THE NATURE OF THE GAY EXPERIENCE

Though they may not always agree, from the various definitions of religion posited by courts, legal commentators, and religious critics, it seems safe to say that the following statement is false: “If X is a religion,

⁸⁶ *Id.* at 257–58.

⁸⁷ *See id.*

⁸⁸ *Id.* at 27.

⁸⁹ *Id.*

⁹⁰ *Id.* at 31.

⁹¹ *Id.*

then it is Christian, Jewish, Buddhist, or Islamic.” Religion is personal rather than institutional. While a believer’s personal religion may reflect the particular doctrine of a religious institution, it need not be tied to any traditional doctrine. Religion is not the means for learning the world’s functions, but the means by which we give the world’s functions meaning in our lives.

What then of the gay experience? Traditional religions have not universally embraced gay views on morality, nor is there such a thing as an orthodox gay faith. But it is obvious that the gay experience is highly personal. Many gays must struggle alone for acceptance in a society that does not share in the same concerns. Furthermore, being gay entails acceptance of preconditions, such as having a same-sex attraction, and giving those preconditions purpose and meaning in one’s life as a gay person. But is this sufficient to make a case for a gay religion? What follows is a rough answer to an often personal and complicated issue, but one which hopefully answers that question in the affirmative. If a person classifies herself as gay she probably means, at the very least, that she experiences same-sex attraction. Same-sex attraction is a necessary precondition for being gay and will be pivotal in understanding that a gay religion can spring from this attraction. Therefore same-sex attraction is a good starting point for deciding whether the gay experience is properly religious.

While same-sex attraction undoubtedly exists, it is not manifestly the case that same-sex attraction is an immutable characteristic. Some studies show that same-sex attraction can be linked to genetic indicators,⁹² others show that it is linked to experiential factors.⁹³ This is the centuries old nature versus nurture debate. Though this debate will likely continue for some time, it suffices to quote the handbook on neural science:

For many years the debate over the causes of homosexuality has been framed in terms of nature versus nurture: Is homosexuality determined by choice, that is by experiential factors, or by biological factors such as hormones or genes? It is likely that *both* are involved. A complex behavioral trait such as sexual orientation is unlikely to be caused by a single gene, a single hormone-induced alteration in brain structure, or a single experience in life. The etiology of homosexuality—and heterosexuality—must be multifactorial.⁹⁴

Thus, at present, the notion that a person is naturalistically determined to be homosexual or heterosexual is not warranted. Most likely, many factors combine to result in one’s sexual orientation.

⁹² See J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES OF GEN. PSYCHIATRY 1089 (1991); Dean H. Hamer et al, *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321 (1993); R.C. Friedman & J. Downey, *Neurobiology and Sexual Orientation: Current Relationships*, 5 J. OF NEUROPSYCHIATRY 149 (1993).

⁹³ See RICHARD C. LEWOTIN ET AL., NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE (Pantheon Books 1984); RUTH HUBBARD & ELIJAH WALD, EXPLODING THE GENE MYTH: HOW GENETIC INFORMATION IS PRODUCED AND MANIPULATED BY SCIENTISTS, PHYSICIANS, EMPLOYERS, INSURANCE COMPANIES, EDUCATORS, AND LAW ENFORCERS (Beacon Press 1993).

⁹⁴ ERIC R. KANEL, JAMES H. SCHWARTZ & THOMAS M. JESSELL, PRINCIPLES OF NEURAL SCIENCE 1146 (McGraw-Hill 2000).

However, whether same-sex attraction is an immutable characteristic is irrelevant for purposes of describing the gay experience. The question is not whether one *feels* same-sex attraction, rather it is what one *does* with those feelings.⁹⁵ Bald statements such as, “If you are attracted to someone of the same sex, then you live the gay experience,” mask the complexity and varieties of life experiences. Our culture prefers binaries and neat classifications of groups.⁹⁶ Thus, when a devout Christian claims to be a heterosexual who “struggles” with same-sex attraction—meaning that he feels attracted to the same sex but believes he should resist those feelings—some immediately claim that the person is gay and is denying his identity, while others may insist he is caught up in perverted sin.⁹⁷ It is much easier to make sense of the world with axioms such as, “If you feel attraction for your same sex, then you are gay,” but this is not always the case.

Most of the dialogue surrounding the gay experience focuses on people who are consistent in their decisions to act according to their same-sex attraction. But these types of people are only one segment in the class of the gay experience. Janet Halley writes that some people have made a choice about their sexuality, while others reject that homosexuality is central to their identities “whether because they identify as bisexual, because they seek to de-emphasize the gender parameters of sexuality, because they are experimental about sexuality, or because they experience sexuality not as serious self-expressiveness but as play, drag, and ironic self-reflexivity.”⁹⁸ What emerges from a description of the gay experience is not a logical “if, then,” but a personal choice.

If a person feels attracted to the same sex, that person may decide how she will react to that attraction. Note that her choice dynamic often begins *after* she has felt same-sex attraction. She may then classify herself as gay, as a “heterosexual with issues,” as bisexual, or not classify herself at all but insist that such attractions are not serious self-expressions, but a sort of “ironic self-reflexivity.” How should she proceed? The discussion of

⁹⁵ Cf. W. Byne & B. Parsons, *Human Sexual Orientation: The Biological Theories Reappraised*, 50 ARCHIVES OF GEN. PSYCHIATRY 228, (1993). The authors suggest that “[c]onspicuously absent from most theorizing on the origins of sexual orientation is an active role of the individual in construing his or her identity. . . . [The authors] propose an interactional model in which genes or hormones do not specify sexual orientation *per se*, but instead bias particular personality traits and thereby influence the manner in which an individual and his or her environment interact as sexual orientation and other personality characteristics unfold developmentally.” *Id.* at 236–37. Byne and Parsons’s theory strongly suggests that how one interacts with one’s same-sex attraction is essential to forming one’s sexual identity.

⁹⁶ The subject of this paper is a testament to that fact. Religious experience is wide and vast, and it makes us uneasy when we have to think about religious experiences that are not neatly religious. Yet the struggle to classify is also a result of the American Religion according to Bloom. We closely identify ourselves with the divine such that if it is not a part of us, then it is not true religion.

⁹⁷ For a real-life example, see Denis Staunton, *Preacher-Turned-Pariah*, IRISH TIMES, Jan. 31, 2009, at 11. The article explains that Ted Haggard, a once evangelical preacher, “acknowledges that he still has sexual feelings for men but he insists that he is not gay, describing himself as a heterosexual with issues. . . . believ[ing] that the Bible teaches that sex should only be between a married man and his wife.” *Id.* Haggard’s calling himself a “heterosexual with issues” elicited statements such as “‘heterosexual with issues’ is just code for a ‘self-hating gay man afraid to come out.’ . . . You cannot ‘pray away gay.’ You are born with your orientation and nothing can change that.” Letter to the Editor, *Haggard has a Reality to Face*, L.A. TIMES, Jan. 31, 2009, at 12.

⁹⁸ Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Arguments from Immutability*, 46 STAN. L. REV. 503, 520 (1994).

religion up to this point offers one solution: she may choose the meaning of same-sex attractions in her life. Whether consciously or not, everyone who is attracted to members of the same sex (not to mention those who are attracted to the opposite sex) decide how those attractions factor into one's life. What makes that decision religious is the subject of the following paragraphs.

B. RELIGIOUS BELIEF AND THE GAY EXPERIENCE

When a gay rights activist accused Ted Haggard, a married evangelical preacher who had sexual encounters with a gay man,⁹⁹ that he was disingenuous or confused about his sexuality, or when any evangelical preacher condemns gay people for committing sin, both the gay rights activist and the evangelical preacher makes an assertion based on their personal religious beliefs. The evangelical preacher's religious belief may be easier to define because it can be explained by ready reference to codified dogma. The gay rights activist on the other hand, does not enjoy such a condensed set of beliefs. This allows the activist to couch his belief in terms other than religious, such as in terms of politics or civil rights. However, one thing is clear in the activist's assertion: he is prescribing a "should" to Ted Haggard's conduct just as the evangelical preacher is prescribing a "should" to the gay man's conduct. Both assert what the gay man should do with his same-sex attraction. Where does the activist's notion of "should" come from? As mentioned earlier, the statement, "if you are attracted to the same sex, then you live the gay experience," is not an axiomatic statement. It is a statement which follows from other premises. The religious characteristics of these premises make the case that gay ideology is a gay religion.

Returning to James's five characteristics of religious belief, the following provides one evaluation of the gay experience in America, and one set of premises which support this conclusion: "if you are attracted to the same sex, then you *should* live the gay experience." This treatment is not intended to be anyway representative of any one person, only just as one plausible, yet broad, treatment of a person's experience when he finds that he is attracted to members of the same sex. James's five characteristics will provide a context to find meaning with the man's same-sex attraction.

1. *That the visible world is part of a more spiritual universe from which it draws its chief significance.*

A gay man, like a heterosexual man, may feel that one's sexuality is an invisible part of the spiritual world. A person cannot readily apprehend one's sexuality with the same senses which allow us movement in the visible world. Rather, one's sexuality exists in the world of relationships, pleasures, wants, and needs. Though the gay man feels sexual urges, he may not be certain where they come from, only that they have force.

⁹⁹ See Matea Gold, *After the Fall: Ted Haggard Left his Church in Same After a Notorious Sex Scandal. HBO Tells His Story, and Now Has His Blessing*, L.A. TIMES, Jan. 28, 2009, at E1.

2. *That union or harmonious relation with that higher universe is our true end.*

A gay man who feels attraction to another man may feel that harmony is achieved only when he acts on those attractions. Suppressing those attractions and denying them manifestation would be antithetical to their purpose.

3. *That prayer or inner communion with the spirit thereof—be that spirit ‘God’ or ‘law’—is a process wherein work is really done, and spiritual energy flows in and produces effects, either psychological or material, within the phenomenal world.*

As the gay man openly “comes out,” he effects real changes in his life. He embraces these changes, seeks out communities where his beliefs are respected and honored. By following the dictates of his heart, he realizes that his course is a good one and can lead to happiness. He may believe that God or divine law made him with his same-sex attraction.

4. *A new zest which adds itself like a gift to life, and takes the form either of lyrical enchantment or of appeal to earnestness and heroism.*

A gay man who makes peace with his same-sex attraction in this way may find a new “zest” for life. This “zest” propels him in the community. He may actively preach his beliefs to others. He may stand heroically in the face of those who disagree with him.¹⁰⁰

5. *An assurance of safety and a temper of peace, and, in relation to others, a preponderance of loving affections.*

While society surrounding him may seem unaccommodating, a gay man may feel safety and peace in the knowledge that he has not denied “what is most authentic (oldest and best) in the self.”¹⁰¹ A gay man who has found a community where his beliefs are shared may also enjoy a “preponderance of loving affections.”

This formulation can be extended further to meet the criteria of Bloom’s particular brand of American Religion. A gay man may preach a “*doctrine of experience*”¹⁰² claiming that in order to know what it is to be gay, you have to experience gayness. Furthermore, upon serious self-reflection, he believes that the oldest and best part of himself is gay. Knowing this helps him cope with the world around him and allows him the freedom to be who he is despite cultural norms and laws. Becoming aware of these facts give him the most pleasure and meaning in life. Lastly,

¹⁰⁰ Cf. Kelly, *supra* note 4. A lesbian couple living in Orange County during the Proposition 8 debates leading up to election day continually replaced their “No on 8” signs on their front lawn after they were repeatedly taken. Note that the controversy surrounding Proposition 8 created heroes for the “Yes on 8” campaign as well. After Proposition 8’s passage, many religious individuals were targeted by protestors, yet these religious members stood their ground as well. See *supra* notes 2–4.

¹⁰¹ BLOOM, *supra* note 66, at 259.

¹⁰² *Id.* at 63.

though he may be selfless in every other way, he will selfishly hold onto his beliefs, rejecting the pleadings of family and friends to “just be normal.”

While this is just one possible formulation, some may criticize it because of its vagueness. “If this is religion, then any process of self-actualization could be called a religion,” some may argue. What makes this characterization significant is that it parallels the experience of an orthodox believer. If Bloom’s description of the American Religion is accurate, then the gay man’s experiences fit Bloom’s doctrinal triad of Enthusiasm, Gnosticism, and Orphism. Enthusiasm teaches that a gay conversion must be “felt, manifested, and exuberantly communicated.”¹⁰³ Gnosticism teaches that the gay person must regard his innermost self as being free from hetero-normative culture. And Orphism teaches the gay man that his self, same-sex attraction included, embodies the truth and is the central spark of divinity. Because this doctrine is at the heart of the American Religion, it justifies the notion that the choice dynamics of the gay person are religious.

But the peculiarities of the gay experience and religion do not end with a hypothetical set of religious premises warranting the gay experience. Some have explicitly linked the gay experience with religion. One gay theologian, Chris Glaser, has argued that the “coming out” experience of a gay person is a religious sacrament.¹⁰⁴ Glaser writes:

Coming out signals *Confirmation* in and affirmation of our creation as gay, lesbian, bisexual, or transgendered, and in our citizenship within the commonwealth of God. It serves as our personal assent to something that God has already done, that is, created us by nature and nurture, and we affirm with the psalmist: “you knit me together in my mother’s womb”¹⁰⁵

Thus, Glaser affirms Bloom’s doctrine of Orphism in the American Religion—being gay was created by God’s spark in the womb. Furthermore, James would likely find the religious experience described by Glaser, when he writes, “[c]oming out as sacrament means recognizing God’s Word acting in our own life, delivering us from the closet, guiding and sustaining us, and promising us a new and more meaningful life.”^{5,106}

C. OBJECTIONS TO THE GAY RELIGION

Those who find the prospect of a gay religion troubling may do so on any of three grounds. First, gay people do not make the decision to be gay, unlike the members of a religion who make the decision to join their faith. This is the argument from immutability. Religious people are generally not born with an immutable Christian, Jewish, or Islamic characteristic. Gay people on the other hand are born with an immutable homosexual characteristic. Since the origins are different, then being gay and being religious are different. The second objection is closely related to the

¹⁰³ *Id.* at 49.

¹⁰⁴ See CHRIS GLASER, *COMING OUT AS SACRAMENT* (Westminster John Knox Press 1998).

¹⁰⁵ *Id.* at 13.

¹⁰⁶ *Id.* at 82.

argument from immutability—being gay is a person’s identity not an expression of belief. According to this argument from identity, a person may identify herself as Catholic, but this is different from identifying herself as gay. Gay identity connotes deeper certainty, whereas Catholic identity connotes situational contingency. Gay identity has a higher likelihood of persisting across cultures than does Catholic identity. The difference between the argument from immutability and from identity is that the identity argument does not rest on the notion that being gay is wholly immutable. The final objection argues that even if there was such a thing as a gay ideology, the First Amendment does not countenance it as a religion because being gay may be cultural, political, or philosophical, but it is not religious. This is the philosophy argument.¹⁰⁷

A form of the immutability argument has been advocated in an attempt to grant gays heightened protection under the Equal Protection Clause.¹⁰⁸ However successful these arguments have been in the courts,¹⁰⁹ their application to a notion of gay religion is uncharted. The strongest argument from immutability would point out the clear distinction between biological determinism and religious choice. Having same-sex attraction is a product of genetic history whereas joining a religion is clearly a product of a personal choice and social pressures. Because the two are so dissimilar in their origins, they cannot be the same.

Superficially, this argument makes a lot of sense. How can something like picking a religion be the result of genetic programming? If a person was born into a tribe in the Amazon where Christianity is nonexistent, it is difficult to imagine that the person would have the genes to become a Southern Baptist. While there is probably not a Southern Baptist gene, it is a different question whether there is a biological explanation for why some people are believers and some are not.

Many theoreticians throughout history have argued that religion is as much the result of biology as the color of one’s hair.¹¹⁰ James calls the idea that religious experiences are the result of biology “medical materialism.”¹¹¹ Medical materialism explains that Saint Paul’s vision on the road to Damascus was a “discharging lesion of the occipital cortex, he

¹⁰⁷ One can also make an originalist argument that drafters of the First Amendment did not consider a “gay religion” a religion for First Amendment purposes. I will not address this argument here for two reasons. First, I take for granted the notion that religion is an inherently sticky and evolving topic. New religions are certain to appear that may change our notions of what is religious. Second, I consider my analysis of orthodox faiths above as a possible starting point for a counterargument to the originalist argument.

¹⁰⁸ See *Stefan v. Aspin*, 8 F.3d 57, 64–68 (D.C. Cir. 1993); *Romer v. Evans*, 517 U.S. 620 (1995); *Dahl v. Secretary of the U.S. Navy*, 830 F. Supp. 1319 (M.D. Fla. 1993). See *Romer v. Evans*, 517 U.S. 620 (1995); *Stefan v. Aspin*, 8 F.3d 57, 64–68 (D.C. Cir. 1993); *v. Secretary of the U.S. Navy*, 830 F. Supp. 1319 (M.D. Fla. 1993).

¹⁰⁹ See Halley, *supra* note 98.

¹¹⁰ Spinoza argued that “In the Mind there is no absolute, or free, will, but the Mind is determined to will this or that by a cause that is also determined by another, and this again by another, and so to infinity.” Steven Nadler, *Baruch Spinoza*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Spring 2009 ed.), <http://plato.stanford.edu/archives/spr2009/entries/spinoza/> (quoting BARUCH SPINOZA, *ETHICS* part II, proposition 48 in *THE COLLECTED WRITINGS OF SPINOZA* (Edwin Curley, trans., Princeton University Press) (1985)).

¹¹¹ JAMES, *supra* note 52, at 20.

being an epileptic.”¹¹² But a consistent theory of medical materialism will not only explain the origin of religion, it will explain the origin of every belief: “Scientific theories are organically conditioned just as much as religious emotions are; and if we only knew the facts intimately enough, we should doubtless see ‘the liver’ determining the dicta of the sturdy atheist as decisively as it does those of the Methodist under conviction anxious about his soul.”¹¹³ James’s point, however, was that the origin does not matter when we consider religious belief. By extension of James’s argument, I argue that origins do not matter when analyzing religion and homosexuality.

Given that being religious probably has some biological origins, just as being gay has some biological origins, one cannot argue that religion is different from homosexuality on organic grounds. A religious believer may have a “disordered colon” which induces him to “pin[e] for spiritual veracity”¹¹⁴ just as a gay man may have neurons which induce him to pine for male companionship. James argues that when we judge between states of mind, we do not judge them on their “organic antecedents” but whether we “take an immediate delight in them” or whether “we believe them to bring us good consequential fruits for life.”¹¹⁵ A gay man does not evaluate the decision to act on his same-sex attraction on “organic antecedents” but on whether he believes that such actions will bear “consequential fruits for life.” The same can be said of the Catholic who begins his religious quest.

The second argument which asserts that being gay is different from being religious rests on notions of identity. Identity closely parallels, and even intersects immutability when discussed in a courtroom. In *Watkins v. United States Army*, Judge Norris wrote that “the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.”¹¹⁶ Kenji Yoshino writes that “‘immutable characteristic’ becomes a metonym for ‘core identity’ rather than remaining a synonym for a characteristic the bearer cannot shed.”¹¹⁷ Chai Feldblum argues that one’s identity is the result of “those big decisions in life that go to the core, essential aspects of our selves.”¹¹⁸ These are decisions such as marriage, the choice to have sexual intimacy with a partner, choosing a job, and practicing a religion according to one’s conscience.¹¹⁹

Though Feldblum does not explicitly make the argument that being gay is dissimilar from being religious because being gay is a question of identity, one can infer it from her argument of “identity liberty” and “belief liberty.” Feldblum contends that the spectrum of liberty interests extend

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* I question whether a “disordered colon” is ever responsible for a religious quest, but such statements endear me to William James.

¹¹⁵ *Id.* at 21.

¹¹⁶ *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989).

¹¹⁷ Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1819 (1996).

¹¹⁸ Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 100 (2006).

¹¹⁹ *See id.* at 99–100.

under the categories of bodily liberty, identity liberty, and belief liberty.¹²⁰ This spectrum also facilitates a ranking system in which belief liberty is subservient to an identity liberty.¹²¹ Feldblum argues that being gay is a species of identity liberty while being religious is a species of belief liberty.¹²² Thus, a law that protects the identity of gays at the cost of burdening religious belief is justified because identity is ranked above belief.¹²³

The problem with Feldblum's argument lies in her definition of identity. First, under Feldblum's distinction between identity and belief, is the possibility that the core of a person's identity is religious.¹²⁴ Immediately she recognizes that "[b]elief liberty presumably could be subsumed under identity liberty, since our beliefs are very often constitutive of our identities."¹²⁵ But she does not explain why the reverse is not also possible; that identity liberty is subsumed under belief liberty. Instead she explains that identifying belief liberty separately from identity liberty is valuable because belief liberty is "often conflated with First Amendment rights."¹²⁶ Her classification, on the other hand, appears to conflate identity with belief, calling into question whether there is actually a difference between saying one's identity is gay and saying that one has a gay religious belief.

Secondly, and related to the first objection, her definition of identity rests on "those big" decisions that are essential to defining ourselves.¹²⁷ Most big decisions are made with reference to antecedent principles. For example, a person usually does not decide to marry on a whim. Instead, a bride-to-be may make the decision based on her religious, political, social, or philosophical beliefs. Her religion may have taught her that marrying is a way to come closer to God, or she may believe that marrying will position her favorably in the public eye when she runs for President. It is not important what the reason is, only that there is a reason. Religion, though one of many different reasons, is still a means by which identity is formed. Religion is just as important to identity as same-sex attraction is to identity.

Feldblum's error may be further illuminated by her belief that heterosexuality and homosexuality are morally neutral, "similar to having red or brown hair."¹²⁸ It is true that same-sex *attraction* or opposite *attraction* is morally neutral, but Feldblum mistakenly equates same-sex attraction with being gay and opposite sex attraction with being "straight." Feldblum only confuses the issue more when she claims that "acting consistently with one's sexual orientation" is a morally good choice.¹²⁹ It is

¹²⁰ *Id.* at 98.

¹²¹ *See id.* at 119–20.

¹²² *See id.* at 100.

¹²³ *See id.* at 119.

¹²⁴ *Id.* at 99.

¹²⁵ *Id.* at 100.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 101.

¹²⁹ *Id.*

as though she is saying a gay man's identity is fixed and his decisions respecting his identity are based on belief. This argument takes for granted that orientation is a decision based partly on same-sex or opposite sex attraction and partly on a person's beliefs.

While it is true that some people have same-sex attraction and others do not, not all people who have same-sex attraction will identify themselves as gay.¹³⁰ How a person orients himself sexually is a choice based on the attraction he feels and the justifications he has for making sexual decisions.¹³¹ For example, a man may have an attraction for a woman but may choose never to have sex because he would rather swear a vow of celibacy. For this reason, he chooses no sexual orientation because he has decided not to pursue sexual intimacy with man or woman. His decision, however, was based on a belief that in order to sufficiently worship God, he should not honor his opposite sex attraction by pursuing sexual intimacy with another woman. Indeed, he should try to suppress that attraction.

A counterargument to the celibate priest analogy is that it focuses too narrowly on sexual acts. Why should someone's identity be based on that person's actions? Is it not enough that the priest feels an attraction to a woman in order for him to have the identity of heterosexual? This counterargument is the "status/conduct" approach to identity.¹³² Feldblum rejects this approach to gay identity for the same reason that one should reject it for the celibate priest's identity.¹³³ She wrote: "It seemed to me the height of disingenuousness, absurdity and indeed disrespect, to tell someone it is permissible to 'be' gay, but not permissible to engage in gay sex. What do they think being gay means?"¹³⁴ Similarly, it is absurd to call someone heterosexual, gay, or sexual at all if he has given up sex in order to serve God.

The Philosophical argument against a gay religion is especially pertinent because it has a direct bearing on whether a gay ideology is a religion for purposes of the First Amendment. This final objection suggests that being gay is not religious, but political or philosophical. Whether a system of belief is religious, political, or philosophical is critical for First Amendment analysis because the amendment guarantees the free exercise of religion, not of philosophy or science.¹³⁵ Though gay people may unite in order to change the political climate in America, it is not a serious argument to say that a person is gay based on a political belief. Whether

¹³⁰ See, e.g., Robert E. Fay, et al., *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 SCI. 3383, 338 (1989); Janet Lever, et al., *Behavior Patterns and Sexual Identity of Bisexual Males*, 29 J. SEX RES. 141, 151-53 (1992).

¹³¹ See Byne & Parsons, *supra*, note 95, at 236-37.

¹³² Feldblum, *supra* note 118, at 104.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1189 (2nd ed. Foundation Press 1988). ("The Framers, whatever specific application they may have intended, clearly envisioned religion as something special; they enacted that vision into law by guaranteeing the free exercise of religion, but not, say, of philosophy or science."); *Seeger*, 380 U.S. at 165-66 (The court notes a difference between religion and philosophy stating that exemption from military training be based on religion and not on "political, sociological, or philosophical views.").

being gay is the result of a life philosophy, however, does present a serious attack on a gay religion.

The argument that being gay is the result of a life philosophy reflects an acceptance that being gay is the product of decisions based on a belief system but a discomfort with classifying a gay ideology as a religion—to call being gay the product of religious belief is going too far because religion is about God, church, and ceremony. As has already been argued, such a conception of religion is too narrow to accommodate the varying religious beliefs in America. However, religion and philosophy are closely aligned and finding a way to tease them apart has been the job of many religious philosophers.¹³⁶

Baruch Spinoza offers one approach in separating religion from philosophy. While his is only one approach among many, his analysis is sufficient in order to suggest one reason why a gay ideology is properly a religion rather than a philosophy. Spinoza argued that the Bible's essential purpose is to convey a simple moral message, "Love thy neighbor," and it is not the source of "natural truth."¹³⁷ The moral message of the scriptures is what makes a religion religious rather than philosophical.¹³⁸ Prophets, according to Spinoza, were not great philosophers but "morally superior individuals" who were capable of "apprehend[ing] that which lies beyond the boundary of the intellect."¹³⁹

Spinoza's idea of religion is consistent with the one argued for here. Religion does not require ancient texts, but a concern for issues of morality, like loving one's neighbor. The gay religion certainly concerns morality if it is a moral question whether someone should have an intimate relationship with another of the same sex. Those who insist that the gay ideology is philosophical rather than religious confuse the search for the "natural truth" of gayness with the moral imperatives of gayness. Certainly it is philosophical to consider whether someone is born with same-sex attraction or whether that attraction was facilitated by social pressures. Questions which lead to the "natural truth" of same-sex attraction are not the same kinds of questions that lead to a meaningful life for a gay man. Religion provides answers to how a gay man can lead a meaningful life.

One last consideration for the argument that being gay is not philosophical concerns Judge Adams's formulation that an ideology is religious if it is similar to the "deep religious convictions of the Amish" and not analogous to "Thoreau's rejection of 'contemporary values accepted by the majority.'"¹⁴⁰ The decision to act according to one's same-sex attraction does not come by reasoning like Thoreau's civil disobedience. The choice to classify oneself as gay may come from deep and ineffable origins—a

¹³⁶ For another approach, see PAUL TILLICH, SYSTEMATIC THEOLOGY v.1. (Tillich argues that the questions of life are best viewed as philosophical, but the answers are theological. Christianity is then one way to answer the philosophical questions of life).

¹³⁷ Nadler, *supra* note 110.

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ See George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L. J. 1519 (1983).

connection with what Bloom might call what is “best and oldest”¹⁴¹ about oneself. That it feels right is often the best reason one can give. This is not unlike many religious believers. When a Mormon is asked why he has chosen to live a life consistent with the Church of Jesus Christ of Latter Day Saints’ teachings, his best answer will be that it feels right and that his experience arriving at that determination is ineffable. Postulating that a person is gay or Mormon because he has been convinced by logic that he must be, misses the point of religious belief.¹⁴² As Spinoza points out, faith and reason inhabit different spheres and neither should tread in the domain of the other.¹⁴³

IV. PRACTICAL EFFECTS OF A “GAY RELIGION”

If the gay experience is best supported by a theory of religious belief, how does that affect gay rights advocacy in the courts and in legislation? This paper has attempted to make the argument that gay rights advocates could rely on the protection of the First Amendment’s Free Exercise clause when making arguments to the court. However, using the Free Exercise clause of the First Amendment is by no means the only method of legal argument available to gay rights advocates. Indeed, “most violations of the free exercise protection may be vindicated without reference to the free exercise clause.”¹⁴⁴ If the gay experience is already protected under other provisions of the constitution, what is gained by analyzing the gay experience in terms of religious belief?

One area where gays might enjoy added protections from the Free Exercise Clause would be in those instances where the clause *ex proprio vigore* mandates an exemption from what would otherwise be a legal duty. However, instances where religiously minded people are exempt from laws purely on the grounds that doing so would constrain their right to free exercise of their religion are hard to find after the ruling in *City of Boerne v. Flores*.¹⁴⁵ *Boerne* maintained the proposition that laws of general applicability can be enforced against religious practices even if the government does not have a compelling interest.¹⁴⁶ Thus, if there were a law of general applicability that constrained the religious practices of a gay person, a gay person would have a difficult time finding a Free Exercise exemption, through the court did not make it impossible.

For a case study demonstrating how a gay person might use the Free Exercise clause to find an exemption from state law, we turn to *Lawrence v. Texas*.¹⁴⁷ *Lawrence* involved two men who were charged with violating a

¹⁴¹ BLOOM, *supra* note 66, at 54.

¹⁴² For situations where philosophers have tried to convince, by force of logic, the existence of God, see St. Anselm’s ontological argument for the existence of God. For a slightly more modern approach at convincing people to live a virtuous life, see Pascal’s Wager.

¹⁴³ Nadler, *supra* note 110.

¹⁴⁴ Jesse H. Choper, *Defending “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579, 581 (1982).

¹⁴⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁴⁶ *See id.*

¹⁴⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

Texas anti-sodomy statute.¹⁴⁸ One of the men, Lawrence, sued successfully on the grounds that his substantive due process rights were violated.¹⁴⁹ Justice Scalia criticized the majority for “apply[ing] an unheard-of form of rational-basis review”¹⁵⁰ while nowhere mentioning that “homosexual sodomy is a ‘fundamental right.’” However, the Court could have avoided applying an “unheard-of form of rational-basis review” and held for Lawrence, had Lawrence used the Free Exercise Clause. The ruling in *Employment Division v. Smith*¹⁵¹ provides the reason.

In *Employment Division v. Smith*, a case where members of a religion sought an exemption from an anti-peyote law, Justice Scalia reasoned that a religious practice could be exempted from a statute of general applicability if the asserted right involved a “hybrid” right consisting of a free exercise right and another right.¹⁵² For example, a licensing system that regulates the publication of religious materials involves two rights—a freedom of religion and a freedom of speech.¹⁵³ Since publishing religious materials involves those two rights, it could be exempted from the licensing system. The peyote law in *Smith*, however, did not “represent[] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs,” so the petitioners could not be exempt on Free Exercise grounds.¹⁵⁴

Applying Scalia’s hybrid rights analysis to the facts in *Lawrence* could have yielded different results. If Lawrence had argued that the Texas Anti-Sodomy statute denied him his right to free exercise of his gay religion in conjunction with another right, then he could plausibly have received an exemption from the statute on Free Exercise jurisprudence. Naturally, the question becomes what is the other right? Though the *Lawrence* Court never asserted that homosexual sodomy was a fundamental right, they operated as though there had to be a right at issue. It is not my purpose to suggest what that other right might be, but only to suggest that the right seems like it could easily be a member of the family of rights Scalia mentioned in *Smith*.

Suppose, however, that the Texas Anti-Sodomy statute provided a religious “exemption clause” analogous to the conscience clauses in the medical community or the conscientious objector clause in the Universal Military Training and Selective Service Act. Suppose further that the exemption was meant to target certain theistic religions where sodomy was a religious rite.¹⁵⁵ Would the exemption be read narrowly to ensure that only claims from the countenanced theistic religions would apply, or would it be interpreted broadly enough to allow functionally equivalent claims, such as those by a gay religion?

¹⁴⁸ *Id.* at 558, 563.

¹⁴⁹ *Id.* at 578.

¹⁵⁰ *Id.* at 586.

¹⁵¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

¹⁵² *Id.* at 881–82.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ This is only hypothetical, I am unaware if there are any such religions.

First, if the exemption clause *named* one of the possible theistic religions countenanced, then the clause would probably violate the Establishment Clause.¹⁵⁶ The reason it would violate the clause is because “some religions cannot be favored over others[;] an exemption given to members of one religion must be given to members of another similarly situated religion.”¹⁵⁷ If this were not the case, then someone wanting to engage in homosexual sodomy may simply convert to the named religion in order to do so—an act the law should not encourage.¹⁵⁸ If, however, the clause did not name a particular religion, then the conception of a “gay religion,” argued for here, would be similarly situated to other theistic religions and would therefore be included in the exemption clause. This is the short answer to whether an exemption clause would include “gay religion.”

Even if the courts did not fully accept the conception of a “gay religion,” they “should [still] recognize *prima facie* equality between religious and nonreligious beliefs and activities.”¹⁵⁹ The government should not favor religious activities over nonreligious activities unless it has reason to do so that is not based on theological or popular opinion concerning the religion.¹⁶⁰

However, the *Lawrence* case study showing how the Free Exercise Clause might extend to a gay religion has been purely academic. *Lawrence* was settled and gays now enjoy the right to engage in conduct consistent with a gay religion. Gays, however, do not yet enjoy all of the rights that they seek. How does framing the rights of gays as religious rights affect the marriage debate?

Probably the most volatile area where religion and gay rights have clashed is in the struggle over gay marriage. In an article in *The Weekly Standard*, Anthony Picarello explains that because the “church is surrounded on all sides by the state . . . [and] . . . marriage affects just about every area of the law, gay marriage is going to create a point of conflict at every point around the perimeter.”¹⁶¹ The gay marriage conflict is especially acute because it argues for “a vision of gay rights . . . [where] . . . sexual orientation is conceptualized as a protected status on par with race.”¹⁶² Therefore, “traditional religions that condemn homosexual conduct will face increasing legal pressures regardless of what courts and Congress do about marriage itself.”¹⁶³

Picarello claims that the marriage debate is especially acute because the debate conceptualizes sexual orientation as a status on par with race.¹⁶⁴ This claim however, makes the same status/conduct fallacy that Feldblum mentioned in her article, *Moral Conflict and Liberty: Gay Rights and*

¹⁵⁶ See Greenawalt, *supra* note 6, at 326.

¹⁵⁷ *Id.* at 325–26.

¹⁵⁸ See *id.* at 327.

¹⁵⁹ *Id.* at 328.

¹⁶⁰ *Id.*

¹⁶¹ Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD, May 15, 2006.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

*Religion.*¹⁶⁵ Race is a status which cannot be controlled whereas being gay is determined by the type of conduct one engages in. It is important to note that “gay rights” includes both “civil rights” and “religious liberties.” “Civil rights” refers to those rights that are common to all people, such as the right to free speech. A gay person’s “religious liberties” refers to the right to freely express one’s gay religion. These distinctions are congruent with “Protestant’s rights,” “Catholic’s rights,” “Buddhist’s rights,” etc. The difference is that we never conceptualize a Catholic’s status on par with race. This is because we easily see the volitional nature of being a Catholic, whereas it is more difficult for us to see the volitional nature of being gay. What follows is an examination of a gay person’s “religious liberty” in the context of gay marriage and not a gay person’s “civil rights” regarding gay marriage.

A gay couple might believe that marriage is a moral imperative for any two committed and loving individuals. They may believe that marrying is a deeply spiritual and sacramental act. A statute that denies the couple the ability to marry would certainly burden their religious beliefs surrounding marriage. However, as *Reynolds v. United States* has shown, it is unlikely that the couple would successfully invalidate the statute using a Free Exercise of religion defense.¹⁶⁶

Reynolds is an instructive case which shows that “the legislative powers of the government reach actions only, and not opinions.”¹⁶⁷ George Reynolds was a member of the Church of Jesus Christ of Latter Day Saints who, by virtue of his religious conviction, believed that marrying a second wife was divinely ordained.¹⁶⁸ Marrying more than one wife was made illegal by an anti-bigamy statute in the Utah Territories, and so Reynolds was charged with bigamy.¹⁶⁹ The court in *Reynolds* held that a statute outlawing bigamy was constitutional even though it burdened Reynolds’s religious belief.¹⁷⁰

Laying aside the value judgments concerning bigamy and gay marriage, the case would have several parallels if a gay man were to argue to the Supreme Court his right to marry on grounds of religious belief. At the time of the *Reynolds* case, the Church of Jesus Christ of Latter Day Saints was still a discrete and insular minority group that had endured persecution. Our hypothetical gay man is a member of a minority class of people, also discrete and insular but united in a religious belief, which has endured persecution. Reynolds probably believed that his opposite sex attraction as well as religious belief justified his marrying more than one wife.¹⁷¹ Similarly, a gay man might believe that his same-sex attraction and

¹⁶⁵ Feldblum, *supra* note 118, at 104.

¹⁶⁶ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹⁶⁷ Feldblum, *supra* note 118, at 164 (quoting Thomas Jefferson).

¹⁶⁸ *Reynolds*, 98 U.S. at 161–62.

¹⁶⁹ *Id.* at 157–58.

¹⁷⁰ *See id.* at 167–68.

¹⁷¹ *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 103 (University of North Carolina Press 2002). Gordon offers one possibility of sexuality beliefs among early Mormons. She writes “latter-day faith was also committed to the connection between sexuality and divinity.” *Id.* Of course some argue that “sexual indulgence was the motivating factor behind Joseph Smith’s marital experimentation.” *Id.* In any event,

religious belief (that it is morally right to act consistent with one's sexual attractions, etc.) justifies his marrying a same-sex partner. Unfortunately for the gay man, the Court would have to conclude that a statute denying gay marriage, like a statute denying bigamy, is constitutional.

With the holding of *Reynolds* looming over potential religious exceptions to marriage statutes, what good is arguing for a gay religious liberty in the gay marriage debate? The argument emphasizes the distinction between religious belief and the American moral, social, and political ethos. Note that both the bigamy statute and California's Proposition 8 reflect prevailing American morality norms, social understanding, and politics. By making religious arguments, one may at least influence moral norms and probably political norms as well. Though the gay rights movement already influences the American public on these issues, basing arguments on religion may catch the ear of other sympathizers. But the most important reason for arguing along religious liberty grounds is that doing so creates parity in the debate and focuses the debate on the central issue—that equality in *marriage* is really a religious issue.

Bloom wrote that the central argument of *The American Religion*, is that:

We all of us are affected by the consequences of our national faith, and that one variety or another of it frequently is the actual substance of what we confront in what at first seem secular phenomena in the United States. The central fact about American life . . . is that our religiosity is everywhere. Even our erotic relationships of the more sustained sort, marriage included, have acquired many of the stigmata of our religious intensities.¹⁷²

Whether or not marriage was originally intended to take on “religious intensities,” it seems marriage and religion are now tightly woven together. Courts need to be mindful of the marriage-religion relationship when they consider arguments for sexual-orientation equality, especially if the arguments stem from the disputes of two religions: a gay religion and a traditional religion.

The California Supreme Court indirectly alluded to the central issue of gay marriage when it opined that “one of the core elements of this fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.”¹⁷³ *Naming* the union of gay spouses a domestic partnership rather than marriage risks “denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.”¹⁷⁴ In California, same-sex couples have most

it seems reasonable to suspect that Reynolds was both religiously and biologically persuaded to practice bigamy.

¹⁷² BLOOM, *supra* note 66, at 38–39.

¹⁷³ *In re Marriage Cases*, 43 Cal.4th 757, 830 (2008).

¹⁷⁴ *Id.* at 831.

of the substantive attributes under the Domestic Partnership Act¹⁷⁵ that they would have under the right to marry.¹⁷⁶ If substantive legal rights are equalized, then the dominant issue for the court to decide is just how much gravitas the name “marriage” carries.

Many who oppose gay marriage are opposed on religious grounds.¹⁷⁷ This is probably because many Americans typically associate marriage with religion. Oftentimes, people get married in a church and use religious language in the ceremony. Certainly, many religions preach the value of marriage and feel responsible for the venerable connotation marriage has in American culture. Whatever the cause, marriage and religion seem to have a particularly close relationship.

This relationship suggests that religion may have vaunted marriage as an institution which engenders dignity, respect, and stature. If that is the case, it seems strange that the court can take one of the “core elements” of the right to marry (a combination of dignity, respect, and stature), which was created by religious institutions, and then demand that this benefit be used in a manner antithetical to the religious institution’s purposes. If religious institutions strongly object and refuse to support a conception of marriage that allows same-sex couples to marry, the respect and dignity of marriage may collapse. The resulting conception of marriage may be divided along the lines of church-marriages and state marriages, with church marriages carrying the respect and dignity.¹⁷⁸ On the other hand, if religious institutions uniformly embrace gay marriages, then respect and dignity remains, but possibly at the cost of the religious institution’s integrity. Religious institutions who currently oppose gay marriage may feel unjustified pressure from the state if courts insist that gay marriage is equal in dignity and respect to opposite sex marriage. While some may believe that pressure is needed if we are to live in a civilized society, the pressure poses a threat to one of our national ideals—plurality of belief.

In his *Notes on Virginia*, Jefferson wrote:

And why subject [religion] to coercion? To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature. Introduce the bed of Procrustes then, as there is danger that the large men may beat the small, make us all of a size, by lopping the former and stretching the latter. Difference of opinion is advantageous in religion. The several sects perform the office of a *ensor morum* over each other What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth¹⁷⁹

¹⁷⁵ For the list of rights, benefits, and responsibilities of domestic partners see CAL. FAM. CODE § 297.5 (LexisNexis 2009).

¹⁷⁶ *Marriage Cases*, 43 Cal. 4th at 830.

¹⁷⁷ See Mark DiCamillo & Mervin Field, *Voters Very Sharply Divided if Asked to Decide on a New Constitutional Amendment to Allow Same-Sex Marriages. Big Differences by Party, Ideology, Age, Marital Status, Gender, Region and Religious Preference*, THE FIELD POLL, Mar. 10, 2009, <http://media.sacbee.com/smedia/2009/03/10/10/rls0310.source.prodaffiliate.4.pdf>.

¹⁷⁸ This assumes that religious institutions remain the catalyst for dignifying social institutions such as marriage.

¹⁷⁹ Jefferson’s *Notes on Virginia*, 1782 as quoted in HAIMAN, *supra* note 6, at 159.

Though gay rights advocates certainly think that uniformity on the issue of gay marriage is desirable, it is not clear such uniformity of religious belief is healthy for a pluralistic society. When the Supreme Court of California implicitly assigns religious institutions the role to bless gay marriage with respect, dignity, and stature equal with opposite sex marriage, it lays the religious institution on the “bed of Procrustes.” All this could be avoided, however, if religious institutions were allowed to debate the issue on even ground. If traditional religious institutions that oppose gay marriage debated with the gay religion over the meaning of marriage, the result may very well be a coalescing of belief. No religion would need fear the judiciary “lopping” and “stretching” its tenets.

The argument here is that dignity, respect, and stature are virtues earned by marriage through the work of religious institutions and not rights that the Supreme Court can give to same-sex couples. The Court can, and should, give same-sex couples the substantive rights of marriage, many of which exist in a domestic partnership. For same-sex couples to enjoy a union commensurate in stature with opposite sex unions though, they will have work to do in the religious realm. This is not as daunting a task as it may sound. Many religions have already adopted a stance of love and respect towards same-sex couples.¹⁸⁰ In a significant respect, these religions have converted to the gay religion.

However, is labeling a gay union as a domestic partnership and a man-woman union as a marriage sound in “separate but equal” doctrine? Again, an analysis that employs the gay religion provides an answer to this problem. The fear about domestic partnership is that labeling gay couples “domestic partners” rather than “married,” “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁸¹ This fear rests on the notion that gays will only achieve the dignity and respect commensurate with heterosexuals if the court intervenes. The argument assumes that as far as bigotry is concerned, gays are the new blacks and the only practical way to advance American culture past its new bigotry is by judicial fiat. While the strategy uses the court’s considerable influence to persuade Americans that gays deserve as much dignity and respect as every other American, it forgets that being gay is the product of choices consistent with a religious belief.

This strategy makes the same status/conduct fallacy discussed above.¹⁸² A person, who feels same-sex attraction and chooses to act according to that attraction based on religious beliefs, has conducted herself in a way that gives rise to her identity. A black person on the other hand practices no volition to give rise to the type of identity that was discriminated against in *Brown v. Board of Education*.¹⁸³ Black, for the

¹⁸⁰ See <http://www.gaychurch.org>, (follow “Church Directory” hyperlink which provides a directory for gay friendly Christian churches throughout the world).

¹⁸¹ *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 494 (1954).

¹⁸² See *infra* text accompanying footnotes 132-34.

¹⁸³ *Brown*, 347 U.S. 483.

purposes of *Brown*, is the person's status, not the individual's conduct.¹⁸⁴ If being gay is the manifestation of religious belief, then a person is gay in a way dissimilar to the way a person is black.

The status/conduct fallacy though does not mean that because a person is gay in a different way than a person is black that she does not deserve the same dignity as any other *person*. As a *person*, the gay woman requires from our government the same substantive rights, privileges, and benefits as any other citizen. A gay person's *beliefs*, however, do not by virtue of their existence require the same dignity as any other person's *beliefs*. Americans are free to choose whether gay people should act according to their same-sex attraction or resist acting on their same-sex attraction. When Americans choose that gay people should act according to their same-sex attraction and enter marital unions, then they will have dignified the gay union in a way that traditional marriage is currently dignified. In effect, Americans will have been converted to at least one tenet of the gay religion.

The idea of conversion embodies the other reason why mandating gay marriage by judicial fiat is a poor strategy. If what is at issue is the dignity, respect, and, stature of a group, and not the substantive rights of a group, then judicial intervention is a subtle attempt at converting the American religious meaning of marriage to an American gay-religious meaning of marriage. By pronouncing that gay unions deserve exactly the same respect and dignity as man-woman marriages, the court is trying to forcibly change the hearts of those Americans who simply do not believe that a person should act according to her same-sex attraction. Strong-arm conversion tactics like those of the California Supreme Court's, have rarely been effective at winning docile converts. Instead, religious wars are best fought by gentle persuasion, not violent decree.

What is true for the courts is true for the American majority. Those who believe that gays should not act according to their same-sex attraction are prohibited from disturbing the peace and bodily integrity of a gay person. Denying a gay person the right to safely pursue a religious education, for example, would violate the Free Exercise Clause of the First Amendment, as would denying them the substantive privileges of marriage. As Reynolds learned in 1878, "the legislative powers of the government [can surely] reach actions only, and not opinions."¹⁸⁵ Such is the game with religion—the government can allow people to ridicule your beliefs, condemn you to hell, call you a bigot, and even prohibit conduct based on your deeply held beliefs. If after all that you feel less respected, less dignified, and second-class, you can still hope to persuade others to recognize the value of your religious belief, and maybe one day the majority will recognize a marriage consistent with your religious conviction.

¹⁸⁴ I grant that a person can act "black," but for purposes of invidious racial discrimination it seems unlikely that *Brown* would have been decided the same if the schools had segregated white children who acted white from white children who acted black.

¹⁸⁵ See *Reynolds*, 98 U.S. at 164.

In addition to the marriage debate, the ideological struggle between religion and gay ideology occurs in the areas from religious exemptions to sexual orientation non-discrimination laws. In *Should Religious Groups Be Exempt from Civil Rights Laws?*, Martha Minow uses the story of Catholic Charities of Boston to show how conflict can arise between religious beliefs and sexual orientation laws, and how the conflict can be resolved.¹⁸⁶

Massachusetts State law required that adoption agencies contracting with the state could not discriminate on the basis of sexual orientation.¹⁸⁷ Catholic Charities of Boston held the view that it would be “gravely immoral” to allow same-sex couples to adopt a child.¹⁸⁸ Rather than seek an exemption from the non-discrimination statute—a strategy which was uncertain—Catholic Charities decided it would get out of the adoption business.¹⁸⁹ The highly publicized result hardened the “Vatican’s position as a reaction to the emerging state recognition of rights for gays and lesbians,” as well as caused the Commonwealth of Massachusetts to grow absolutist in their position that “[u]nless Catholic Charities itself accepted same-sex couples, it would lose its license to participate in the adoption practice.”¹⁹⁰

Minow laments this result as an instance where rigidity ruled to the detriment of both sides—Catholic Charities gave up a much needed adoption practice and gay rights advocates lost ground in other states where bans on gay and lesbian adoptions were pursued in reaction to the Catholic Charities case.¹⁹¹ This need not have been the result, however. Minow argues that “attitudes of respect, flexibility, and humility can help generate new answers beyond ‘exemption’ and ‘no exemption’ when religious principles and civil rights laws collide.”¹⁹² She suggests the use of a “value-added negotiation” that leads to “winner-take-all solutions either by creating new options that can be divided across competitors or overlapping consensus that meets the needs of rivals.”¹⁹³

Without a doubt, the clash between religious beliefs and gay rights will require a healthy measure of humility and respect for peaceful solutions, but Minow’s approach is misleading when she frames the clash as one between “religious principles and civil rights laws.”¹⁹⁴ It takes for granted a difference between “religious principles” and the principles that undergird the civil rights law in question. While it is no question that Catholic Charities operated in accordance with its belief system, it is questionable how a gay person’s right to be treated equally by Catholic Charities was characterized as a civil right *per se*. Minow describes the conflict as one between religious belief and civil right. In her view, it is a civil right for a

¹⁸⁶ Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C.L. REV. 781 (2007).

¹⁸⁷ *Id.* at 831.

¹⁸⁸ *Id.* at 833.

¹⁸⁹ *Id.* at 835–36.

¹⁹⁰ *Id.* at 839.

¹⁹¹ *Id.* at 842.

¹⁹² *Id.* at 844.

¹⁹³ *Id.* at 845.

¹⁹⁴ *Id.* at 844.

gay couple to be allowed to adopt just as easily from Catholic Charities as it is for a man-woman couple. If Catholic Charities has qualms with placing a child with a gay couple, it would need to receive a religious exemption from the law. Characterizing the argument in this fashion though is misleading, because the gay couple's civil right at issue is the same as Catholic Charities' civil right—the right to free exercise of religion. Catholic Charities may have resisted placing children in the homes of gay couples, not because Catholic Charities believed the couples' second-class citizens, who lack the right to adopt, but because Catholic Charities believed the couples used their right to freely exercise their religion in a manner inconsistent with their Catholic beliefs.

Minow's characterization of gay religion as gay civil rights suggests that gay religion is the established social truth and that discrimination against gays is *per se* invidious. But is discriminating against belief systems so sinister? While it is true that our nation has tried valiantly to rid our social conscious of discrimination in its pejorative sense, it is not necessarily true that our nation has, or even desired to rid our social conscious of the type of discrimination by which citizens make judgments concerning religion.

Viewed from this perspective, it is curious as to why there was an exemption question at all. How is it that one religion sought an exemption from the beliefs of another religion? The answer is that the Massachusetts legislature assumed that if a person feels attracted to another of the same sex, that person must necessarily classify herself as gay—the type of fallacious reasoning argued against earlier in this paper. Reasoning that “If you have same-sex attraction, you are necessarily gay,” it makes sense to pass laws which create burdens on religious institutions who discriminate based on sexual orientation. Such laws are needed to secure equality among Massachusetts citizens, and their religious beliefs do not matter.

What if, on the other hand, the Massachusetts legislature recognized that being gay was the necessary consequence of a religious belief rather than the consequence of having an attraction for someone of the same sex? Would the result have been any different? It seems likely that the legislature could pass such a law, especially if gays were discriminated against on the basis of their religion. But what happens when it is a religion that is the one discriminating? The result is not so neatly answered. On the one hand, the State should not take the role of religious arbiter and decide which religion is right. Such a role would violate the Establishment Clause of the First Amendment. On the other hand, it seems unjust that one religion can deny another religion some benefit, especially when that benefit is supported by the State. While the answer to this dilemma is not offered in this paper, the solution, as Minow believes, will require a commitment to diversity of opinion and tolerance.

V. CONCLUSION

It was James Madison's view that “religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to

assure competition among sects rather than dominance by any one.”¹⁹⁵ The current conflict regarding gay marriage is a tough issue because, on religious grounds, it appears that traditional religious beliefs dominate the American conscious. Religious exemptions to sexual orientation non-discrimination statutes are hotly contested, and much energy is expended on both sides of the debate. These issues and the marriage issue in particular, appear to be an all or nothing game. They speak to a national religion or ethos—one that is friendly to gay religion or one that is not, but Americans have never shied from healthy debate. We pride ourselves on a diversity of thought and belief, while acknowledging “that [though] our truths may be wrong, [they] should be tested in the marketplace of ideas.”¹⁹⁶ By conceptualizing the conflict as a religious argument, at least the marketplace will be fair.

One final note on tolerance: Dallin H. Oaks, a prominent leader in the Church of Jesus Christ of Latter Day Saints and former Utah Supreme Court Justice wrote: “Tolerance obviously requires a non-contentious manner of relating toward one another's differences. But tolerance does not require abandoning one's standards or one's opinions on political or public policy choices. Tolerance is a way of reacting to diversity, not a command to insulate it from examination.”¹⁹⁷ Religious belief often engenders absolutist feelings. Religious conviction is a great strength for those who use it wisely, but a weakness for those who hide behind it in meaningful discussion. A missionary experiences great satisfaction in helping to persuade someone that his deeply held religious belief is true. If after serious examination and thoughtful discussion, however, a person still does not budge from his conviction, the missionary should refrain from judging the other as intolerant.

¹⁹⁵ TRIBE, *supra* note 135, at 1159.

¹⁹⁶ Minow, *supra* 186, at 844.

¹⁹⁷ Dallin H. Oaks, *Weightier Matters*, February 9, 1999, <http://speeches.byu.edu/reader/reader.php?id=6647>.

