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## Towards an Establishment Theory of Gay Personhood

Jeffrey A. Kershaw

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# NOTES

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I. INTRODUCTION

Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that “homosexual acts are intrinsically disordered.” They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.<sup>1</sup>

The Catholic Church remains, like so many institutions, troubled by its inability to explain the origins of homosexuality. In the face of its confusion, the Church has justified continuing condemnation of gays, lesbians, and bisexuals as living in opposition to “natural law.” It was the Church itself, led by figures such as Augustine, that popularized a natural law outlook in medieval Western society and originated the view that engaging in sexual

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1. CATECHISM OF THE CATHOLIC CHURCH ¶ 2357 (Doubleday 2003) (citations omitted), available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a6.htm#2357](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm#2357).

activity is immoral unless it occurs within the confines of marriage to an opposite-sex partner and for the purpose of procreation.<sup>2</sup> A significant proportion of Americans today share this “natural law” stance; a majority, while eschewing a distinction between procreative and nonprocreative sex, disapprove of homosexual sex under any circumstances.<sup>3</sup> Such views can be justified in part because homosexuality’s “genesis remains largely unexplained” despite the fact that various disciplines, including biology, psychology, and sociology, have had more than one hundred years to wrestle with the issue.<sup>4</sup> The inability to answer these questions, however, stems more from cultural assumptions and biases rooted in the United States’ Judeo-Christian tradition,<sup>5</sup> which obscure genuine scientific understanding. These biases have also played a role in the development of our legal tradition, although it was not until the last century that legislators in many jurisdictions shifted their focus from general sexual immorality to the regulation of homosexual conduct.<sup>6</sup> This shift corresponded with the “invention” of homosexuality as a “distinct category of person.”<sup>7</sup>

In *Lawrence v. Texas*, the Supreme Court held that the Constitution protects private, consensual, homosexual conduct.<sup>8</sup> The petitioners in that case made a tactical decision to argue for the unconstitutionality of Texas’ sodomy laws by relying on the right to

2. See, e.g., JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 587 (1987) (“Virtually all restrictions that now apply to sexual behavior in Western societies stem from moral convictions enshrined in medieval canonical jurisprudence.”); ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 10-11 (2002) (introducing the natural law perspective and discussing Augustine’s theory that “[a]ll nature is good”).

3. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* tbl.8-20 (3d ed. 2003). It also speaks to modern sentiment that citizens of eleven states overwhelmingly approved various amendments to their respective states’ constitutions banning gay marriage, bringing the total number of states with some sort of ban to forty-one, also speaks to modern anti-gay sentiment. Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at P9; Todd Purdum, *An Electoral Affirmation of Shared Values*, N.Y. TIMES, Nov. 4, 2004, at A1.

4. See, e.g., DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 400-04 (1988) (discussing the medicalization of homosexual behavior in the latter half of the nineteenth century and later scientific inquiry into the origins of homosexuality).

5. *Id.*

6. See *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (“At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”).

7. *Id.*; see also GREENBERG, *supra* note 4, at 397-404. The medicalization of homosexuality in the late nineteenth century corresponded with passage of the first laws in England and the United States specifically outlawing homosexual acts. *Id.*

8. *Lawrence*, 539 U.S. at 578-7.

privacy embedded in the substantive due process guarantees of the Fourteenth Amendment.<sup>9</sup> Given the development of the Supreme Court's jurisprudence in this area, and in particular the predilections of the more moderate members of the Court, this was probably the wisest course, and it achieved the desired result. Yet our nation's efforts to exclude gays<sup>10</sup> from the protections afforded other groups in the context of civil rights, marriage, and, until recently, consensual sexual relations, also violate the Constitution's Establishment Clause. It is upon this basis that questions regarding the status of gays should ultimately be resolved if gays are to achieve full personhood under the law.

Part II of this Note describes the Court's past and present approaches to the status of gays, highlighting the profound shift that occurred in *Lawrence*. Part III explores the Court's somewhat convoluted establishment jurisprudence and argues for *Lemon*'s survival through modification. Part IV asserts that Judeo-Christian morality, while an important part of our cultural traditions and a powerful force in our legal thinking, is an illegitimate foundation upon which to build a stable legal regime, especially in light of the Establishment Clause.

Since *Muller v. Oregon*,<sup>11</sup> the Supreme Court has entertained so-called "Brandeis briefs," documents containing data and other information to help the Court achieve a reasoned result.<sup>12</sup> Accordingly, Part V examines scientific research regarding homosexuality and homosexual behavior, which reveals that the line between gay and straight is much more tenuous than antigay advocates would claim, undercutting the "otherness" of gays and further delegitimizing arguments that they should be denied full personhood under the law. Finally, Part VI asserts that a context-specific modification of the *Lemon* test applied in the face of legislation motivated solely or primarily by moral concerns serves as a more legitimate ground for decisionmaking than substantive due process, which, while effective in protecting privacy, may need to be expanded significantly by courts to strike down antigay marriage legislation and

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9. *Id.* at 564-65, 572-74. The Court first utilized substantive due process to protect individual privacy rights in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. For conciseness, this Note uses the term "gays" to refer to gay, lesbian, bisexual, and transgendered individuals.

11. 208 U.S. 412 (1908).

12. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 209-10 (1987) (discussing the "Brandeis briefs" and noting that the briefs emphasized statistics and commission reports more than judicial precedents).

ensure gays full civil rights. Although much of the Supreme Court's substantive due process jurisprudence discusses the illegitimacy of naked morality as a basis for law,<sup>13</sup> such assertions function at the periphery of the clause's core individual liberty concerns. An establishment approach provides a more logical, stable, and legitimate answer to the issues of gay marriage and civil rights waiting over the horizon.

## II. THE LAW OF HOMOSEXUALITY: THE OLD AND NEW TESTAMENTS

Laws regarding homosexuality have traditionally derived much of their legitimacy from a majoritarian interest in upholding traditional morals. While other groups traditionally "targeted" by the majority (e.g. racial minorities, women, the disabled) have been accorded certain rights, gays have remained comfortably "other."<sup>14</sup> Today, discrimination against gays differs in at least two important respects from race and sex discrimination. First, although federal laws prohibit various forms of discrimination based on race and sex,<sup>15</sup> no law explicitly protects homosexuals.<sup>16</sup> In fact, the U.S. government maintains policies that actively discriminate on the basis of sexual preference. In 1996, for example, Congress passed the Defense of Marriage Act, which denies federal recognition of same-sex marriages and permits the states to refuse to recognize same-sex marriages performed in other states.<sup>17</sup> In the same year, Congress refused to

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13. See, e.g., *Lawrence*, 539 U.S. at 573-74, 576 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

14. See, e.g., GREENBERG, *supra* note 4, at 1-21.

15. Aside from the Civil War Amendments, the most famous example is the Civil Rights of Act of 1964. 42 U.S.C.A. § 2000a et seq. (2003).

16. See, e.g., LEE EPSTEIN AND THOMAS WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* 696 (4th ed., 2001).

17. 28 U.S.C. § 1738C (2003) states that:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

1 U.S.C. § 7 (2003) provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

extend the remedies of the 1964 Civil Rights Act to sexual orientation.<sup>18</sup>

Second, while Americans' views about African-Americans and women have changed substantially since the early 1970s, they have remained remarkably consistent and negative with regard to gays. In 1974, more than a third of the population believed that interracial marriages should be prohibited and that a woman's job was to take care of the home.<sup>19</sup> By 2000 those figures had fallen to around 10 percent and 15 percent, respectively.<sup>20</sup> In 1974, 75.5 percent of Americans believed that homosexual behavior was wrong.<sup>21</sup> By 2000, that number was 63.3 percent.<sup>22</sup>

### A. *Bowers v. Hardwick: Leviticus Reloaded*

Until 2003, when the Supreme Court announced its decision in *Lawrence*, the most influential of the Court's gay rights decisions was *Bowers v. Hardwick*.<sup>23</sup> In *Bowers*, the Court held, in line with popular sentiment, that the Constitution did not protect homosexual conduct.<sup>24</sup> The Court rejected the petitioner's privacy argument and upheld the Georgia antisodomy law at issue in the case, asserting that the Due Process Clause of the Fourteenth Amendment did not grant "a fundamental right [to] homosexuals to engage in sodomy."<sup>25</sup>

In announcing the decision, Justice White argued that "[p]roscriptions against [homosexual] conduct have ancient roots," pointing out that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States."<sup>26</sup> In his

18. EPSTEIN & WALKER, *supra* note 16 at 770-71.

19. See EPSTEIN ET AL., *supra* note 3, tbls.8-10, 8-14.

20. *Id.*

21. *Id.* tbl.8-20.

22. *Id.* (reporting that 63.3 percent of Americans responded "always" or "almost always" to the question, "Do you believe that sexual relations between two adults of the same sex is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?"). Some researchers believe that Americans' views towards homosexuality can be best described as homophobic—characterized by a strong, irrational fear of homosexuals and fixed negative attitudes and reactions to homosexuals. See, e.g., B. Fyfe, "Homophobia" or Homosexual Bias Reconsidered, 12 ARCHIVES OF SEXUAL BEHAVIOR 549, 549-50 (1983). Although many Americans have anti-gay feelings that are strong enough to equate to a phobia, negative attitudes and prejudiced behaviors are more common; a more appropriate term may be *anti-gay prejudice*.

23. 478 U.S. 186 (1986).

24. *Id.* at 189.

25. *Id.* at 190.

26. *Id.* at 192.

concurrence, Chief Justice Burger emphasized the propriety of the Court's holding by reference to a moral and historical perspective:

Condemnation of [homosexual] practices is firmly rooted in Judaeo-Christian [sic] moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named."<sup>27</sup>

Chief Justice Burger went on to assert that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."<sup>28</sup> What the Justices failed to note, of course, was that these "ancient" proscriptions on sodomy in England applied equally to both women and men, and were not enacted with regard to gays specifically.<sup>29</sup>

The "millennia of moral teaching" in Western culture to which Chief Justice Burger referred, and to which Justice White alluded, stem primarily from religious traditions. Opponents of the "gay-rights agenda" often cite Biblical authority to support their arguments. There are two important explicit references to homosexual activity in the Bible. The first occurs in Leviticus, which declares that for a man to "lie with a male as with a woman . . . is an abomination" and that both men who have engaged in such an act "shall be put to death."<sup>30</sup> The second reference is the Apostle Paul's discussion of same-sex intercourse in Romans, in which he cites homosexuality to prove gross and deliberate sin on the part of Gentiles against God's truth accessible in creation or nature.<sup>31</sup> Despite the Justices' extensive discussion of morality, however, the legal focus in the case was (at least ostensibly) on the so-called "right to privacy," originally articulated in *Griswold v. Connecticut*.<sup>32</sup>

### B. *Romer v. Evans: A Foot in the Door*

Ten years after its decision in *Bowers*, the Court began to acknowledge the possible legitimacy of gay rights in the groundbreaking case *Romer v. Evans*.<sup>33</sup> Authored by Justice Kennedy,

27. *Id.* at 196-97 (Burger, C.J., concurring).

28. *Id.* at 197.

29. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

30. *Leviticus* 18:22, 20:13 (New Revised Standard Version).

31. *Romans* 1:24-27 (New Revised Standard Version).

32. 381 U.S. 479, 483-486 (1965).

33. 517 U.S. 620 (1996).

the majority opinion declared that an amendment to the Colorado state constitution prohibiting local governments from protecting gays from discrimination violated the Equal Protection Clause.<sup>34</sup> The amendment had been adopted by a statewide initiative that arose in response to local laws passed by communities such as Boulder, Aspen, and Denver giving sexual orientation the same protected status as race and gender.<sup>35</sup> The Court held the statute lacked a rational relationship to legitimate state interests:

[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group . . . . Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects.<sup>36</sup>

Justice Kennedy also noted “the constitution ‘neither knows nor tolerates classes among citizens.’”<sup>37</sup>

Justice Scalia’s dissent in *Romer* focused in large part on the right of Coloradoans to enact legislation expressing traditional sexual morality. He described the state constitutional amendment at issue as an attempt “to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores,” and compared homosexuality to “murder, for example, or polygamy, or cruelty to animals” as conduct deserving of “animus.”<sup>38</sup> He went on to argue that “moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers* . . .” was an appropriate basis for the legislation at issue.<sup>39</sup>

Although *Romer* appears to represent Justice Kennedy’s first step towards the reasoning that would lead to his opinion in *Lawrence*, his treatment of gay rights traces back to a 1980 decision he wrote while sitting on the Ninth Circuit Court of Appeals. In *Beller v.*

34. *Id.* at 626-36. The Colorado amendment stated:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

35. *Id.* at 623-24.

36. *Id.* at 632.

37. *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

38. *Id.* at 636, 644 (Scalia, J., dissenting).

39. *Id.* at 644 (Scalia, J., dissenting).

*Middendorf*, that court held that the Navy's decision to discharge individuals for engaging in homosexual conduct was appropriate.<sup>40</sup> In language foreshadowing *Lawrence*, however, Kennedy wrote:

We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right of privacy.<sup>41</sup>

He went on to note that "[u]pholding the challenged regulations as constitutional is distinct from a statement that they are wise."<sup>42</sup> Indeed, Kennedy emphasized the context-specific nature of the decision, citing the "needs of the military, the Navy in particular."<sup>43</sup> This sort of thinking would come to its full fruition twenty-three years later in *Lawrence v. Texas*.

### C. *Lawrence v. Texas: Leviticus Overruled*

Justice Kennedy's opinion in *Lawrence* declared unconstitutional a Texas statute criminalizing certain intimate sexual conduct between two persons of the same sex.<sup>44</sup> Specifically, the opinion stated that as consenting adults, petitioners were free to engage in private conduct in the exercise of their liberty under the Due Process Clause.<sup>45</sup> In announcing its decision, the Court explicitly overruled *Bowers v. Hardwick*, noting that:

[T]he Court in *Bowers* was making the . . . point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs . . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.<sup>46</sup>

The Court, then, decided that laws motivated solely by moral concerns fail to overcome citizens' right to privacy, first articulated in *Griswold v. Connecticut*<sup>47</sup> and expanded in *Eisenstadt v. Baird*<sup>48</sup> and *Roe v. Wade*,<sup>49</sup> among other cases.

40. 632 F.2d 788, 792 (1980).

41. *Id.* at 809.

42. *Id.* at 812.

43. *Id.*

44. *Lawrence v. Texas*, 539 U.S. 558, 562-79 (2003).

45. *Id.* at 560-74.

46. *Id.* at 571.

47. 381 U.S. 479, 485 (1965) (holding that a law prohibiting the use of contraceptives violated a married couple's right to privacy).

Justice O'Connor's concurrence focused on the Equal Protection Clause, rather than on privacy concerns.<sup>50</sup> The majority had avoided this approach, fearing that laws prohibiting sodomy between both same-sex and opposite-sex partners might be found valid under such a reading.<sup>51</sup> According to Justice O'Connor, the issue in *Lawrence* was "whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy."<sup>52</sup> Citing *Romer*, Justice O'Connor argued that the rational basis approach did not protect a desire to restrict the right of an unpopular group and that such a desire was not a legitimate state interest.<sup>53</sup> She noted that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal protection Clause to justify a law that discriminates among groups of persons."<sup>54</sup>

Although both Justice Kennedy and Justice O'Connor asserted that naked morality is illegitimate as a source of law, neither Justice framed this conclusion in terms of the Establishment Clause, despite the fact that a law criminalizing homosexual behavior tends to "establish" Judeo-Christian religious morality as governing every citizen's conduct (at least with regard to sexuality). An examination of the Court's Establishment Clause jurisprudence reveals that, despite its complexities, laws restricting the rights of gays plainly violate the terms of the First Amendment.

### III. THE LAW OF RELIGIOUS ESTABLISHMENT: A CENTURY OF CONFUSION

Although the Supreme Court began its attempts to interpret the Establishment Clause in 1899, now, more than a hundred years later, the Court has yet to develop a coherent jurisprudence. As one scholar has explained, "[f]rom a lawyer's point of view, the Establishment Clause is the most frustrating part of First

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48. 405 U.S. 438, 453 (1972) (finding that the right to privacy prevents governmental intrusion into decisions about the use of contraceptives for both married and unmarried individuals).

49. 410 U.S. 113 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

50. *Lawrence*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

51. *Id.* at 574-75 (O'Connor, J., concurring).

52. *Id.* at 582 (O'Connor, J., concurring).

53. *Id.* at 579-80 (O'Connor, J., concurring) (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

54. *Id.* at 582 (O'Connor, J., concurring).

Amendment law. The cases are an impossible tangle of divergent doctrines and seemingly conflicting results.”<sup>55</sup> More recent case law, however, indicates that the Court has an opportunity to bring stability to its remarkably inconsistent case law.

### A. Initial Attempts

The Supreme Court’s first Establishment Clause dispute, *Bradfield v. Roberts*, involved a government appropriation to a hospital operated by Roman Catholic nuns.<sup>56</sup> The Justices unanimously upheld the statute, finding little relevance in the fact that Catholic nuns administered the hospital; it was the purpose of the facility, they held, that was important.<sup>57</sup> Because the hospital’s purpose was secular, rather than religious, it withstood constitutional scrutiny.<sup>58</sup> Although the Court did not announce a bright line test to apply in future establishment cases, the “secular purpose” requirement first articulated in *Bradfield* has remained an important principle in the Court’s later establishment jurisprudence.

About fifty years passed between the Supreme Court’s decision in *Bradfield* and the next important establishment case, *Everson v. Board of Education*.<sup>59</sup> Arch Everson, a taxpayer, had challenged the local school board’s reimbursement of transportation expenses for parents sending their children to Catholic schools.<sup>60</sup> He argued that this money served to support religion in violation of the Establishment Clause.<sup>61</sup> The Court, in announcing its decision, recognized that the Establishment Clause means that neither a state nor the federal government “can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>62</sup> Nevertheless, the outcome was accommodationist: the Court held that while a state may not contribute tax dollars directly to a religious institution because such support would violate the Establishment Clause, a state must also protect its citizens’ rights under the Free Exercise Clause, and “cannot hamper its citizens in the free exercise of their own religion.”<sup>63</sup> The

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55. DANIEL A. FARBER, *THE FIRST AMENDMENT* 275 (1998).

56. 175 U.S. 291, 298-300 (1899).

57. *Id.*

58. *Id.*

59. 330 U.S. 1 (1947).

60. *Id.* at 3-4.

61. *Id.*

62. *Id.* at 15.

63. *Id.* at 16.

Court declared the township's bussing program constitutional because the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."<sup>64</sup>

Even though Justice Black's majority opinion in *Everson* permitted the funding program at issue, it "constitutionalized" an interpretation of Madison and Jefferson's philosophies that supports a clear division between religious institutions and government.<sup>65</sup> Indeed, Black quoted Jefferson's comment that the clause was intended to build "a wall of separation between Church and State."<sup>66</sup> This view of the church-state relationship would play an important role in later decisions. For example, in *Illinois ex rel. McCollum v. Board of Education*, the Court held that a time-release program in which religious instructors provided weekly religious training in a public school violated the Establishment Clause because the state was thereby providing "invaluable aid" to religion.<sup>67</sup> And in *Engel v. Vitale*, the Court held that daily classroom recitation of a denominationally neutral, state-composed prayer violated the Establishment Clause, even though students could be excused from participation.<sup>68</sup> Government, the Court said, may not be in the prayer-writing business.<sup>69</sup>

Similarly, the Supreme Court held that daily Bible reading and class recitation of the Lord's Prayer offended the Constitution in *Abington Township v. Schempp*.<sup>70</sup> The Court reached this result even though no child was compelled to participate and the religious observance was "nondenominational."<sup>71</sup> The Court stated that the Establishment Clause does not allow a "religious program carried on by government."<sup>72</sup> The Court also articulated in *Schempp*, for the first time, two prongs of the present three-prong *Lemon* test for determining whether a government action violates the Establishment Clause, observing that public school prayer does not have (1) a secular

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64. *Id.* at 18.

65. *Id.* at 11-16.

66. *Id.* at 16.

67. 333 U.S. 203, 212 (1948).

68. 370 U.S. 421, 430-33 (1962).

69. *Id.* at 432.

70. 374 U.S. 203, 203 (1963).

71. *Id.* at 224-26. The notion that the "nondenominational" nature of the religious exercises would spare them from the reach of the Establishment Clause is a remarkably parochial argument, since freedom of religion obviously extends beyond the various sects of Christianity.

72. *Id.* at 221 (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

legislative purpose or (2) a primary effect that neither advances nor inhibits religion.<sup>73</sup>

### B. *Walz, Lemon, and the Aftermath*

In *Walz v. Tax Commission of the City of New York*, the court changed its approach to establishment issues.<sup>74</sup> The case concerned the property tax exemptions enjoyed by religious institutions.<sup>75</sup> *Walz* contended that the tax exemptions resulted in property owners making involuntary contributions to churches in violation of the Establishment Clause.<sup>76</sup> The opinion began predictably enough given the *Abington* precedent, with an examination of the “purpose” prong.<sup>77</sup> But rather than proceeding to analyze whether the law advanced or inhibited religion, Chief Justice Burger, writing for the majority, asserted: “Determining that the legislative purpose of [a] tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result – the effect – is not an excessive government entanglement with religion.”<sup>78</sup> Burger went on to hold that property tax exemptions did not constitute an excessive entanglement with religion.<sup>79</sup>

*Walz*, while modifying the *Abington* standard, did not appear to articulate a new test. Indeed, Burger’s reinterpretation of the “effect” prong of *Abington* seemed to further confuse the Supreme Court’s establishment jurisprudence; however, in *Lemon v. Kurtzman*,<sup>80</sup> the Court articulated a test that, while battered, survives to this day. Under *Lemon*, there are three principal criteria a court should use to determine whether a state legislative enactment comports with the Establishment Clause: (1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion, and (3) whether the statute fosters an excessive government entanglement with religion.<sup>81</sup> None of these prongs, of course, were new—the Court had

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73. *Id.* at 222.

74. 397 U.S. 664 (1970).

75. *Id.* at 666.

76. *Id.* at 667.

77. *Id.* at 672-73.

78. *Id.* at 674 (emphasis added).

79. *Id.* at 674-80.

80. 403 U.S. 602 (1971).

81. *Id.* at 612-13.

articulated them in earlier cases. The *Lemon* test finds its roots in prior Supreme Court holdings based at least in part on a belief that Madison and Jefferson had envisioned a strict wall of separation between church and state; the Court in *Lemon*, then, seemed to indicate that it was not only following precedent but reinforcing its traditional understanding of the values from which that precedent came.<sup>82</sup>

The current Court has made it plain that the *Lemon* test may not be the most appropriate standard to use in establishment cases, and the Justices do not all agree with its historical basis. Alternative approaches have been offered, as well as case-specific modifications of *Lemon*.<sup>83</sup> In *Aguilar v. Felton*, a 5-4 Court used the *Lemon* test to strike down a program that provided for state-supported remedial instruction of private school students.<sup>84</sup> In the more recent case of *Agostini v. Felton*, however, the Court utilized an accommodationist interpretation of *Lemon* to hold that the Establishment Clause does not bar a city from sending public school teachers into parochial schools to provide education to disadvantaged children pursuant to a congressionally-mandated program.<sup>85</sup> The Court noted that “[n]ot all entanglements . . . have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”<sup>86</sup>

In spite of the criticism it has received,<sup>87</sup> the *Lemon* test survives because the Court has yet to announce an alternative standard. Several members of the Court have suggested various non-*Lemon* grounds for deciding establishment cases, although none of these approaches has supplanted *Lemon*'s three-prong test. These approaches are discussed below.

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82. EPSTEIN & WALKER, *supra* note 16, at 147-49.

83. These modifications and alternatives are discussed *infra* Part II.B.

84. 473 U.S. 402, 412-13 (1985).

85. 521 U.S. 203, 230 (1997).

86. *Id.* at 233 (citations omitted).

87. EPSTEIN & WALKER, *supra* note 16, at 146-49.

### C. Alternatives to Lemon

#### 1. Nonpreferentialism

In *Wallace v. Jaffree*, a father with students in the public school system brought an action against the local school board and other public officials, arguing that state-mandated “moments of silence” in the public schools violated the Establishment Clause.<sup>88</sup> The Supreme Court, applying the *Lemon* test, found for the father, holding that the statute providing for silent meditation intended to convey a message of state approval of prayer in the public schools.<sup>89</sup> The Court stated, “[Alabama’s] endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.”<sup>90</sup> The majority also asserted:

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.<sup>91</sup>

Then-Justice Rehnquist dissented and argued that “[t]he framers intended the Establishment Clause to prohibit the designation of any church as a ‘national’ one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.”<sup>92</sup> He argued that a generalized endorsement of “prayer time” could not, then, violate the Establishment Clause.<sup>93</sup> Justice Rehnquist’s nonpreferentialism standard as articulated in *Wallace*, however, rested on an unacceptably narrow view of religious freedom. As applied, the standard would permit “nonsectarian” activity—such as the recitation of a prayer at a middle school graduation<sup>94</sup>—that would harm not only

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88. 472 U.S. 38, 42-43 (1985).

89. *Id.* at 55-60.

90. *Id.* at 60.

91. *Id.* at 52-53 (citations omitted).

92. *Id.* at 113 (Rehnquist, J., dissenting).

93. *Id.* (Rehnquist, J., dissenting).

94. See *Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting). In this case, Chief Justice Rehnquist joined Justice Scalia’s opinion, which dissented from the Court’s holding

those who chose not to embrace *any* religious creed but also those who embraced a faith that did not include prayer. What Rehnquist failed to appreciate in articulating his nonpreferentialism standard, in the end, is that so-called nondenominational religious observances often violate the Establishment Clause in that many sects' beliefs do not involve activities like prayer<sup>95</sup> or other traditionally Judeo-Christian conceptions. As such, nonpreferentialism is more appropriately applied as a corollary to the traditional *Lemon* prongs than as a stand-alone test.

## 2. Endorsement Approach to *Lemon*

Justice O'Connor has suggested a modified *Lemon* test in several concurrences. The Establishment Clause, she argues, forbids the government from making "religion relevant to a person's standing in the political community."<sup>96</sup> Under her view, *Lemon's* inquiry regarding the (1) purpose and (2) effect of a statute would require courts to determine "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."<sup>97</sup> A government action endorsing "religion or a particular religious practice" is unconstitutional under her approach "because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"<sup>98</sup> The Court has adopted Justice O'Connor's endorsement analysis and applied it in various Establishment Clause decisions.<sup>99</sup>

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that the Establishment Clause prohibited an invocation and benediction at a middle school graduation ceremony. *Id.* As Justice Scalia explained,

In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing so — lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.

*Id.* As the dissenting opinion demonstrates, Rehnquist's nonpreferentialism would permit prayer at public events, even those involving schoolchildren.

95. i.e., Yahweh Elohim.

96. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

97. *Id.*

98. *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)).

99. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" ) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J.,

## 3. Coercion

Justice Kennedy, concurring and dissenting in *County of Allegheny v. ACLU*, argued that:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.”<sup>100</sup>

Kennedy applied his coercion analysis in *Lee v. Weisman*, where the Court held a graduation benediction unconstitutional on establishment grounds.<sup>101</sup> While Justice Kennedy utilized his coercion test as a rationale; *Weisman* did not overrule the *Lemon* test.<sup>102</sup>

D. Zelman: *Brave New World?*

One of the Supreme Court’s most recent establishment cases was *Zelman v. Simmons-Harris*.<sup>103</sup> At issue was an Ohio school voucher program designed to provide tuition aid for students in the Cleveland City School District to attend a participating public or private school of their parents’ choosing.<sup>104</sup> In holding that the program did not violate the Establishment Clause, the Court, in an opinion by Chief Justice Rehnquist, emphasized the neutrality of the Ohio law—students could attend religious or nonreligious schools—as well as the key fact that, as in *Everson*, the “primary beneficiaries” of the aid were children rather than sectarian schools.<sup>105</sup> Although Chief Justice Rehnquist relied on his nonpreferentialism standard in emphasizing the Ohio law’s neutrality, he refused to dispose of the *Lemon* test, citing it with approval and incorporating his standard into it.<sup>106</sup> To do so, he applied a “subtest” under the “effect” prong of *Lemon* applicable in the specific instance of an indirect aid case. Specifically, the Court held that courts must:

[C]onsider two factors [under the “effect” prong]: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether

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concurring)).

100. 492 U.S. 573, 659 (1989) (Kennedy, J., concurring and dissenting) (quoting *Lynch*, 465 U.S. at 678).

101. 505 U.S. 577, 592-97 (1992).

102. *Id.* at 587.

103. 536 U.S. 639 (2002).

104. *Id.* at 643-48.

105. *Id.* at 649-51.

106. *Id.* at 668-70.

beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid.<sup>107</sup>

Chief Justice Rehnquist supported his “subtest” by referencing *Everson*, in which the Supreme Court held that the “[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . .”<sup>108</sup>

### E. *Where Do We Go From Here?*

Despite the confusion that exists in the Supreme Court’s establishment jurisprudence, Chief Justice Rehnquist’s opinion in *Zelman* suggests an approach for future establishment cases. Given the Court’s inability to apply *Lemon* consistently, some may question its survival. The Court has shown no signs, however, that it intends to overrule that decision. Instead, the Court seems intent on modifying the basic standard through the other approaches discussed—nonpreferentialism, endorsement, and coercion. *Zelman* suggests these approaches need not compete with *Lemon*; instead, they can be incorporated into the test as “subtests” or “sub-prongs.” The Court’s inconsistent application of *Lemon*, while frustrating, may merely reflect the complexity of this area of the law. Context-specific “subtests” that guide *Lemon*’s application may be a more appropriate, stable guide for courts and lawyers that could eventually achieve equilibrium in establishment jurisprudence.

The situation of gays in the United States provides a perfect opportunity for the application of such a context-specific approach to *Lemon*. Although the Court already has asserted gays’ right to engage in homosexual conduct (at least in the privacy of their homes),<sup>109</sup> gays are denied full personhood in society and are unable to enjoy many of the rights granted their heterosexual counterparts. For example, marriage provides, by one estimate, 1,049 distinct rights, responsibilities, and benefits under federal law alone.<sup>110</sup> Only one state expressly permits gay marriage.<sup>111</sup> Thirty-seven states have

107. *Id.* at 669.

108. *Id.* (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947)) (quotations omitted).

109. *Lawrence v. Texas*, 539 U.S. 562, 579 (2003).

110. Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, A.B.A. J., July 2004, at 48.

111. In *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Court held that the state’s marriage licensing statute, forbidding same-sex couples from marrying, violated the Massachusetts Constitution. Specifically, the statute denied gays the protection of the constitution’s individual liberty and equality safeguards. In *Opinion of the*

enacted laws specifically prohibiting gay marriage.<sup>112</sup> Objections to such unions are invariably religiously motivated. In the wake of the Massachusetts Supreme Court decision approving gay marriage, President George W. Bush, at a White House Rose Garden news conference, used a question about his views on homosexuality to assert:

I am mindful that we're all sinners . . . [a]nd I caution those who may try to take the speck out of their neighbor's eye when they got a log in their own. I think it's very important for our society to respect each individual, to welcome those with good hearts, to be a welcoming country. . . . On the other hand, that does not mean that somebody like me needs to compromise on issues such as marriage. And that's really where the issue is headed here in Washington, and that is the definition of marriage. I believe marriage is between a man and a woman, and I believe we ought to codify that one way or the other and we have lawyers looking at the best way to do that.<sup>113</sup>

Wearing his religious beliefs on his sleeve, and paraphrasing Jesus's admonition in Matthew that begins, "[d]o not judge, so that you may not be judged,"<sup>114</sup> President Bush prefaced his staunchly antigay views with an expression of New Testament tolerance. The religiously-motivated nature of his Old Testament policy position, however, is difficult to ignore.

A day after the President's conference, the Vatican announced that support for gay marriage was "gravely immoral," and stated unequivocally that "[m]arriage is holy, while homosexual acts go against the natural moral law."<sup>115</sup> Several months earlier,

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*Justiccs to the Senate*, 802 N.E.2d 565, 570-71 (Mass. 2004), the Massachusetts Supreme Court held that only "marriage," as opposed to "civil unions," effectuates the requirements of the Massachusetts Constitution.

[T]he government [may not], under the guise of protecting 'traditional' values, even if they be the traditional values of the majority, enshrine in law an invidious discrimination that our Constitution . . . forbids.

. . . .

. . . The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.

*Id.* at 570.

112. Laurie Goodstein, *Gay Couples Seek Unions in God's Eyes*, N.Y. TIMES, Jan. 30, 2004, at A1.

113. Neil A. Lewis, *From the Rose Garden: Same-Sex Marriage; Bush Backs Bid to Block Gays From Marrying*, N.Y. TIMES, July 31, 2003, at A1.

114. *Matthew 7:1* (New Revised Standard Version).

115. Frank Bruni, *Vatican Exhorts Legislators to Reject Same-Sex Unions*, N. Y. TIMES, Aug. 1, 2003, at A1 (quoting CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS, available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/ documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html)).

controversial United States Senator Rick Santorum, speaking to a reporter regarding the Supreme Court's holding in *Lawrence*, stated that if consensual gay sex is permissible, "then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."<sup>116</sup>

In January 2004, President Bush, after discussing the virtues of abstinence, announced during his State of the Union speech:

A strong America must also value the institution of marriage. I believe we should respect individuals as we take a principled stand for one of the most fundamental, enduring institutions of our civilization. Congress has already taken a stand on this issue by passing the Defense of Marriage Act, signed in 1996 by President Clinton. That statute protects marriage under federal law as the union of a man and a woman, and declares that one state may not redefine marriage for other states. Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the *sanctity* of marriage. The outcome of this debate is important—and so is the way we conduct it. The same *moral tradition* that defines marriage also teaches that each individual has dignity and value in *God's sight*.<sup>117</sup>

In light of President Bush's earlier comments, it came as no surprise when, on February 24, 2004, he announced his explicit support for a constitutional amendment banning gay marriage.<sup>118</sup>

Legal scholarship is not devoid of impassioned arguments for the divinely-ordained nature of marriage. Professor Kohm asserts:

I do sincerely believe that human kind can come to understand what the Divine Creator truly intended for our lives. . . . [M]arriage . . . is indeed not a state-established institution. . . . [B]efore any government graced the face of the earth, there was a . . . commitment to the intentional union of a man and a woman as one flesh — a marriage.<sup>119</sup>

Asserting that recourse to natural law is appropriate for those who have "a proper understanding of natural law, or a proper understanding of The Creator of that law," Professor Kohm went on to argue that "[t]here remains a correct truth, an absolute, a divine truth, that can be determined when individuals personally know and understand The Creator."<sup>120</sup>

116. Associated Press, *G.O.P. Senator's Remark on Gays Draws Fire*, N.Y. TIMES, Apr. 21, 2003, at A21.

117. *State of the Union; President's State of the Union Message to Congress and the Nation*, N.Y. TIMES, Jan. 21, 2004, at A18 (emphases added).

118. Elisabeth Bumiller, *Bush Backs Amendment to Ban Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

119. Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and The Realization that Principles Win Over Political Will*, 22 J. CONTEMP. L. 293, 312 (1996).

120. *Id.* at 313-14.

So-called natural law and corresponding Judeo-Christian traditions are not, however, an appropriate foundation upon which to rest the law. While Western morality inspired many of the rules and doctrines imported from England at the founding of the Republic, antigay laws reflect a particularly ethnocentric, religiously-based bias that is unacceptable as a matter of modern jurisprudence or governance. Laws targeting the personhood of gays are inexplicable unless considered in light of our nation's Christian tradition.

#### IV. THE ILLEGITIMACY OF JUDEO-CHRISTIAN MORALITY AS A BASIS FOR LAW

Traditional western morality provides at least part of the basis for many of our oldest legal prohibitions. At first glance, this reality appears to render untenable an argument that the Establishment Clause invalidates laws discriminating against gays, since those laws reflect Judeo-Christian values. Doesn't a law making murder a crime stem from the same tradition ("you shall not murder"<sup>121</sup>)?

Oliver Wendell Holmes famously declared, "The life of the law has not been logic; it has been experience."<sup>122</sup> Legal scholars have since debated the validity of Holmes's statement, as well as the desirability of a legal system so conceived. Such debates often raise very basic questions. What is the law? Where do rights come from? If they do not come from God (or Allah, or Nature, etc.), from where do they derive?

Humanity's basic questions regarding the nature of reality are best answered through application of the scientific method.<sup>123</sup> The scientific method cannot be applied to the law as such, of course; however, given the scientific understanding that nature is morally neutral,<sup>124</sup> the answers to our "source of law and rights" questions become plain. The complex relationship between the "is" of nature and the "ought" of morality must be mediated by human experience in crafting and interpreting the law.

121. *Exodus* 20:13 (New Revised Standard Version). The commandment forbids murder, not other forms of killing authorized for Israel, including war and capital punishment. *Id.* n. 13.

122. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Dover Publ'ns. 1991) (1881).

123. This proposition is so obvious as to be beyond question. Nevertheless, there are still those who argue for the superiority of divine revelation, astrology, or other forms of truth-seeking. For a discussion of the development of the scientific method and its rightful place as the primary means by which humanity should seek to answer its most basic questions, see generally RICHARD DAWKINS, *A DEVIL'S CHAPLAIN* (2003); MICHAEL SHERMER, *WHY PEOPLE BELIEVE WEIRD THINGS: PSEUDOSCIENCE, SUPERSTITION, AND OTHER CONFUSIONS OF OUR TIME* (1997).

124. RICHARD DAWKINS, *THE SELFISH GENE* 189-201 (Oxford Univ. Press 1989) (1976).

### A. *Where Do Rights Come From?*

Those who claim to speak in the name of God have often used natural law or natural rights arguments as a tactic to serve partisan, religious, or personal agendas. "Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature."<sup>125</sup>

Rights are not natural. An examination of the length and breadth and human history demonstrates that liberty is the exception, not the rule. The norm has been curtailment, corruption, arbitrariness, and authoritarianism.<sup>126</sup> Many nations today, including, until recently, Iraq, could be so characterized. What is needed, however, rather than reliance on natural law, is some other foundation upon which to decide what laws are "right" and what rights should be law. The vast majority of citizens, not to mention politicians and judges, would be opposed to a strict legal positivist approach.<sup>127</sup> Many scholars, perhaps most notably Ronald Dworkin, have attempted to establish a middle ground between traditional natural law arguments and the reductionism of legal positivism.<sup>128</sup> While Dworkin agrees with natural law advocates that rights must be "discovered," rather than "invented," he argues such rights are part of a "constructive model" which society builds, with the core principle being that governments must treat all their citizens equally.<sup>129</sup> This idea is a fundamental "postulate of political morality" from which all basic rights flow.<sup>130</sup>

### B. *Rights Come From Wrongs*<sup>131</sup>

Human experience provides the best argument for why society should value certain rights. The difficulty is learning from the lessons

125. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 163 (1983) (quoting ALF ROSS, *ON LAW AND JUSTICE* (1958)).

126. See DERSHOWITZ, *supra* note 2, at 11-12 ("The history of mankind has been a history in which the norm has almost always been authoritarianism, elitism, censorship, arbitrariness, and denial of what he have come to call due process of law.")

127. See *generally* JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM (Tom Campbell & Jeffrey Goldworthy eds., 2000) (offering a general critique of the theory of legal positivism).

128. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 177-84 (1977).

129. *Id.* at 160, 177, 184.

130. *Id.* at 177.

131. See, e.g., DERSHOWITZ, *supra* note 2, at 33-34 ("Rights Come From Wrongs" is the title of Chapter Two of Dershowitz's book. In this chapter, he posits, "[W]e can learn a considerable amount about rights from the world's entirely untheoretical experiences of injustices.")

of history with an eye towards the future. Judeo-Christian morality suggests a top-down legal model: God says to do or not do something, and we obey. Experiential morality represents, by contrast, a bottom-up approach.<sup>132</sup> Building on the negative experiences of injustice and the insights of science, we can advocate laws that have been shown to serve as a check on injustice and arbitrariness while reflecting sound public policy in terms of current scientific understanding.<sup>133</sup> This bottom-up approach, then, has as its starting point a baseline consensus (i.e., forcing others to hold certain religious beliefs or follow certain religious practices is bad), based in the experiences of injustice, while still leaving room for debate beyond that consensus based in the truth-seeking mechanisms of the scientific method.

The following Section contains an examination of the current scientific understanding of homosexuality, drawing from biology (and its various subdisciplines), psychology, and sociology. This examination provides support for an acknowledgement of gay personhood rooted in our understanding of the reality of homosexual behavior, absent ideology. Specialized areas of knowledge often inform legal scholarship, and as such, the discussion that follows is fairly technical.

## V. HOMOSEXUAL BEHAVIOR AS EVOLUTIONARY ADAPTATION

Sex provides for the continuation of life and is the means through which “higher” organisms, such as humans, pass on their genetic material, the raw material for evolution.<sup>134</sup> Yet research focusing upon human sexuality is difficult to obtain.<sup>135</sup> Indeed, “the scientific literature contains more articles on the genetics of eye color in fruit flies than on the biology of human sexuality.”<sup>136</sup> Moral concerns, taboos, discomfort with the topic, and above all, politics, have made research difficult.<sup>137</sup> Yet at the outset of the twenty-first century, enough research into the origins of homosexuality exists for an informed review.

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132. *Id.*

133. *Id.* at 34.

134. DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 13 (1994).

135. *See id.* (“There are no federally supported sexuality research centers. Scientists and academics who try to make a career out of analyzing sexuality find their way blocked by funding sources and tenure committees.”).

136. *Id.*

137. *Id.* at 13-14.

Even in the literature that does address human sexuality, however, biases are hard to overcome. For example, the traditional concern with sex's reproductive function ignores the possible value of nonconceptive sex. A rejection of the traditional gay-straight dichotomy, coupled with a careful examination of homosexual behavior among both humans and nonhuman primates, our close genetic relatives, allows a more balanced view of the development of sexual behavior in our species supported by empirical results and not simply "armchair science." This Section will show that both exclusive homosexuality and exclusive heterosexuality are culturally constructed; while an exclusive homosexual *orientation* is maladaptive in terms of reproductive success,<sup>138</sup> homosexual *behavior* is adaptive in that it has enhanced social interactions and served to decrease conflict in the environment of evolutionary adaptation (EEA).<sup>139</sup>

A review of earlier conceptualizations of sexual orientation is in order before presenting a detailed consideration of more modern research into homosexual behavior. Even before scientists began to question homosexual behavior in terms of its apparent reproductive uselessness, various individuals developed explanations for its existence. Perhaps surprisingly, early hypotheses regarding homosexual orientation, while obviously flawed, provide some important insights, especially in that early researchers were less interested than many later scientists in explaining homosexual behavior in terms of a gay-straight dichotomy.

### A. *Psychoanalytic Theory*

Since Freud believed sex to be "the primary motivating force behind human behavior," it should be no surprise that he wrote about homosexuality and its development.<sup>140</sup> Freud's theory, while of limited value today, is in some ways an important exception to the general Western tendency to categorize sexual behavior as homosexual versus heterosexual, although he still saw homosexual

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138. This is true except with regard to kin selection theory. See discussion *infra* Part V.E.

139. The EEA refers to the statistical composite of selection pressures that occurred during an adaptation's period of evolution responsible for producing the adaptation. See, e.g., John Tooby & Leda Cosmides, *The Psychological Foundations of Culture*, in *THE ADAPTED MIND* 20, 51, 55 (John Barkow et al. eds., 1992). Given the relatively recent transition, in evolutionary terms, to a settled, agriculturally-based way of life, researchers, in contemplating the potential adaptiveness of various traits or psychological mechanisms, look to the selection pressures acting on our species in terms of a nomadic, hunting and gathering existence. *Id.*

140. See, e.g., JANET SHIBLEY HYDE & JOHN D. DELAMATER, *UNDERSTANDING HUMAN SEXUALITY* 403 (7th ed. 2000) (discussing Freud).

behavior in terms of a “disordered” orientation.<sup>141</sup> According to Freud, an infant is “polymorphous perverse,” meaning that the infant’s sexuality is “totally undifferentiated” and is directed at many different objects, both “appropriate” and “inappropriate.”<sup>142</sup> As a child matures, sexuality is increasingly directed toward more “appropriate” objects (i.e., members of the opposite gender) while the desire for “inappropriate” objects (i.e., members of the same gender) is repressed.<sup>143</sup> According to Freud, a gay or lesbian individual is fixated on an immature stage of development.<sup>144</sup>

Freud also discussed how homosexuality might stem from the negative Oedipus complex, wherein a child “loves the parent of the same gender and identifies with the parent of the opposite gender.”<sup>145</sup> In the process of maturation, a healthy individual will repress the negative Oedipus complex. A gay or lesbian individual, however, “fails to repress it and, again, remains fixated on it.”<sup>146</sup>

It is important to note that, “consistent with Freud’s belief that an infant is polymorphous perverse was his belief that all individuals are inherently bisexual,” at least as children.<sup>147</sup> His Victorian understanding of biology, however, prevented him from fully exploring the ramifications of this idea.

### B. Learning Theory

Traditional learning theories in psychology share with psychoanalytic theories a belief that the development of a homosexual orientation is the result of experience; learning theorists simply take the idea further.<sup>148</sup> Like Freud, however, learning theorists, also called Behaviorists, failed to realize that the “multidirectional” sexuality they recognized as inherent in our species is not simply representative of an immature stage of development (to be supplanted by a gay or straight sexual orientation), but characterizes our species throughout life.

141. Sigmund Freud, *The Psychogenesis of a Case of Homosexuality in a Woman*, in 2 THE COLLECTED PAPERS 202-31 (1948).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Freud, *supra* note 141.

147. HYDE & DELAMATER, *supra* note 140, at 404.

148. *Id.*

Behaviorists emphasized the importance of learning in the development of an individual's sexual orientation.<sup>149</sup> They noted the prevalence of bisexual behavior both in other species and in humans, and they argued that rewards and punishments shape the individual's behavior into predominant homosexuality or predominant heterosexuality.<sup>150</sup> This argument rests on an assumption that humans possess an amorphous, undifferentiated pool of sex drive which, depending on circumstances, may be channeled in any of several directions.<sup>151</sup>

This process could operate through either punishments or rewards. For example, a person who has early heterosexual experiences that are extremely unpleasant might develop toward homosexuality.<sup>152</sup> Likewise, if a person has early homosexual experiences that are pleasant, the individual may become a gay or lesbian individual.<sup>153</sup>

Of course, the rewards in Western society go overwhelmingly to heterosexuality. Indeed, society gives very few rewards to homosexuality and often punishes it. While human sexual behavior is no doubt determined in part by aspects of the environment, therefore, the learning approach fails to adequately explain homosexual behavior.<sup>154</sup> In fact, research has indicated that children who grow up with a homosexual parent are not themselves likely to become gay.<sup>155</sup> In this sense, homosexuality is not "learned" from parents.

### C. *Biological Theories*

In recent years, many researchers have hypothesized that homosexuality may be caused by certain biological factors. This research falls under behavior genetics and sociobiology more than evolutionary psychology. While offering a potentially important focus

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 405.

153. *Id.*

154. See generally Frederick L. Whitam, *The Homosexual Role: A Reconsideration*, 13 J. SEX RESEARCH 1, 1-11 (1977) (postulating that "homosexuality is neither a pathological condition nor a role, but rather a sexual orientation").

155. See J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVELOPMENTAL PSYCHOL. 124, 124-129 (1995) (discussing a study of fifty-five gay or bisexual men who supplied information about eighty-two sons aged seventeen years or older. The study determined that over 90 percent of the sons with discernable sexual orientations were heterosexual).

for research, these biological theories have suffered more than their predecessors from an assumption that an individual must follow one of two paths: heterosexuality or homosexuality.

### 1. Heterozygotic fitness theory

In terms of a genetic argument, researchers have suggested that homosexuality might be analogous to sickle-cell anemia, which results from a mutation in a pair of genes.<sup>156</sup> The condition affects 1 in 500 individuals of African descent and causes many health problems, as well as premature death.<sup>157</sup> Heterozygous individuals, however, who have only one sickle-cell gene (rather than two), are well adapted in that their specific genetic makeup allows them to combat malaria more effectively than individuals who lack the sickle-cell gene.<sup>158</sup> Homosexuality, then, could be a consequence of being homozygous for some sort of “gay” gene pair, a maladaptive result that contrasts with an adaptive heterozygous combination.<sup>159</sup> According to this explanation, homosexuals would simply be the unfortunate inheritors of the “wrong” genes, with no chance for successful reproduction.

### 2. Genetic variation theory

Research *has* shown that homosexuality has a genetic basis.<sup>160</sup> A higher incidence of homosexuality has been found among relatives of male homosexuals than in the general population.<sup>161</sup> Indeed, although rates of homosexuality in the general population have been estimated at 2 to 7 percent, about 25 percent of brothers of male homosexuals have been found to be themselves homosexual.<sup>162</sup> The most convincing evidence concerns twin studies. Concordance rates for homosexuality are much higher among monozygotic (identical)

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156. HYDE & DELAMATER, *supra* note 140, at 401.

157. *Id.*

158. Allison Ashley-Koch et al., *Sickle Hemoglobin (Hb S) Allele and Sickle Cell Disease*, 151 AM. J. EPIDEMIOLOGY 839, 842-43 (2000), available at <http://www.cdc.gov/genomics/hugenet/reviews/sickle.htm>.

159. HYDE & DELAMATER, *supra* note 140, at 401.

160. *See, e.g.*, DREW WESTEN, *PSYCHOLOGY: MIND, BRAIN AND CULTURE* 468-469 (2d ed. 1999).

161. *Id.*

162. *Id.* at 469.

than dizygotic (fraternal) twins and adoptive brothers.<sup>163</sup> This means that if one monozygotic twin is homosexual, the other has a high probability of being homosexual. Concordance for homosexuality has been found to be 52 percent for monozygotic twins, 22 percent for dizygotic twins, and 11 percent for adoptive brothers.<sup>164</sup> Studies regarding homosexual women confirm this research; concordance for homosexuality is 48 percent for monozygotic twins, 16 percent for dizygotic twins, and 6 percent for adoptive sisters.<sup>165</sup>

That the homosexuality concordance rate is substantially higher for monozygotic than for dizygotic twins indicates there is a genetic contribution to an individual's sexual orientation. Clearly, however, genetics cannot be the only factor involved in the expression of homosexuality. If genetic factors determined sexual orientation, there would be a 100 percent concordance rate for monozygotic twin pairs. These results cast doubt on the sickle-cell analogy explanation, but are limited in their explanatory power in that individual differences across members of a given species are the rule rather than the exception. These findings could very well represent a natural variation in an adaptive behavior.

### 3. Prenatal factors

Another area of research concerning a possible biological cause of homosexuality suggests that homosexuality develops as a result of certain factors during prenatal development. According to the most recent theory, homosexuality is caused by a variation in development.<sup>166</sup> There is a critical time, from the middle of the second month to the middle of the fifth month of fetal development, during which the hypothalamus differentiates and sexual orientation is determined.<sup>167</sup> Under this theory, any of several different biological variations during this period will produce homosexuality.<sup>168</sup>

Some evidence has been found to support this theory; severe stress to a mother during pregnancy does tend to produce homosexual

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163. *Id.* *Monozygotic* and *dizygotic* describe what are commonly referred to as identical and fraternal twins, respectively.

164. *Id.* (citing J.M. Bailey & R.C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089, 1089-96 (1991)).

165. *Id.*

166. HYDE & DELAMATER, *supra* note 140, at 383.

167. Lee Ellis & Ashley M. Ames, *Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality*, 101 PSYCHOL. BULL. 233, 233-58 (1987).

168. *Id.*

offspring.<sup>169</sup> Exposing pregnant female rats to stress produces male offspring that assume the female mating posture, although their ejaculatory behavior is normal.<sup>170</sup> The stress to the mother reduces the amount of testosterone in the fetus, which is thought to produce homosexual rats.<sup>171</sup>

Research with humans, however, has produced mixed results. No conclusive evidence has been found documenting the effect of prenatal stress on sexual orientation for either males or females.<sup>172</sup> Furthermore, the explanation based on prenatal factors is informed by the American conception of a rigid separation between heterosexual and homosexual individuals and may be limited in this manner.

#### 4. Anatomical factors

Simon LeVay theorized that there are anatomical differences between the brains of gay and straight individuals, and that these differences result in different sexual orientations.<sup>173</sup> After studying nonhuman primates, LeVay suggested that two specific nuclei in the anterior hypothalamus<sup>174</sup> would be larger in individuals attracted to women than in individuals attracted to men.<sup>175</sup> After examining the brains of homosexual men and women presumed to be heterosexual, he found significant differences between gay men and straight men in certain cells in one of the two nuclei of interest in the anterior portion of the hypothalamus—it was twice as large in heterosexual men as in women and homosexual men.<sup>176</sup> Anatomically, then, the hypothalamic cells of gay men were more similar to those of women than to those of straight men.<sup>177</sup>

169. HYDE & DELAMATER, *supra* note 140, at 402.

170. *Id.*

171. *Id.*

172. *Id.* (citing J.M. Bailey et al., *A Test of the Maternal Stress Theory of Human Male Homosexuality*, 20 ARCHIVES SEXUAL BEHAV. 277, 277-94 (1991)).

173. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034, 1034-37 (1991).

174. That is, two sets of neurons in the front portion of the hypothalamus; this part of the brain is responsible for the functioning of the parasympathetic nervous system. The parasympathetic nervous system supports what might be considered the more mundane activities that maintain the body's store of energy, i.e., regulating blood-sugar levels, eliminating waste, and regulating heart rate. The parasympathetic nervous system also regulates sexual arousal in both male and females. WESTEN, *supra* note 160, at 96.

175. LeVay, *supra* note 173, at 1035.

176. *Id.*

177. *Id.*

LeVay's study has several flaws, however, that call his results into question. First, the sample size was extremely small: nineteen gay men, sixteen straight men, and six straight women.<sup>178</sup> This small sample size was necessary because the brains had to be dissected in order to examine the hypothalamus, so living individuals could not be studied. Secondly, all of the gay men in the sample, but only six of the straight men and one of the straight women, had died of AIDS, making the groups incomparable in that brain differences could be due to the neurological effects of AIDS.<sup>179</sup> Also, the gay men studied were known to have been gay based on records at the time of death, but LeVay simply assumed that the other subjects were heterosexual<sup>180</sup>—an obvious methodological problem. Finally, lesbian women were omitted from the study,<sup>181</sup> decreasing its generalizability.

### 5. Hormonal imbalance

One final line of biological research has examined the link between hormonal imbalances and homosexuality. Researchers have worked to determine whether the testosterone levels of gay men differ from those of straight men. These studies have not found any significant hormonal differences, however.<sup>182</sup>

Despite these results, some clinicians continue to try and "cure" homosexuality by administering testosterone therapy.<sup>183</sup> This therapy invariably fails, and in fact seems to result in an increase in homosexual behavior.<sup>184</sup> This probably occurs because androgen levels are related to sexual responsiveness.<sup>185</sup>

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178. *Id.*

179. *Id.* at 1036.

180. *Id.*

181. *Id.*

182. HYDE & DELAMATER, *supra* note 140, at 383.

183. See Amy Banks & Nanette K. Gartrell, *Hormones and Sexual Orientation: A Questionable Link*, 28 *J. HOMOSEXUALITY* 247, 249-51 (1995) (reviewing the history of research on the connection between homosexuality and hormones). This article cites the Glass & Johnson (1944) and Meyer-Bahlburg (1977) tests that attempted to "masculinize" homosexual men with testosterone treatments. *Id.*

184. *Id.* at 249

185. *Id.* "Androgens" are a class of hormones that promote male sex characteristics. Testosterone, androstenedione, and DHEA are examples.

## D. A New Direction

Of all the biological research that has been done regarding sexual orientation, the research in genetics has been the most promising. What is needed to understand homosexual behavior, however, is a paradigm that entirely rejects the concept of sexual orientation altogether. Homosexuality and heterosexuality as categories are constructions, not necessarily accurate reflections of reality. The use of these rigid dichotomies, into which modern Western culture places individuals with regard to their sexual orientation, is *the* major problem with much of the work that has been done in this field.

Fortunately, researchers have increasingly focused on bisexuals, those individuals whose sexual orientation is directed toward both men and women. Bisexuality is not rare; indeed, it is more common than exclusive homosexuality.<sup>186</sup> Ironically, the gay and lesbian community has traditionally viewed bisexuals with suspicion or downright hostility.<sup>187</sup> Radical lesbians refer to bisexual women as “fence sitters,” saying that they betray the lesbian cause because they act straight or lesbian depending on whether it is convenient.<sup>188</sup> Some gays and lesbians even argue that there is no such thing as a true bisexual.<sup>189</sup> Thinking in such a rigid manner, however, has been counterproductive. The categorization of individuals as bisexual is limiting, but only because it implies the existence of other categories (such as homosexual and heterosexual). Instead, we should conceive of human sexuality as having moved beyond its procreative component at some point in our evolutionary history. This evolution can be understood as a result of increased behavioral flexibility, which led to adaptive *sociosexual* behavior that both shapes and is shaped by culture.

Despite American cultural assumptions, it is clear that sexual orientation has not been viewed as a clear-cut matter (or even a recognizable concept) across space and time. In seventeenth century Japan, homosexual liaisons among samurai warriors were extremely

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186. HYDE & DELAMATER, *supra* note 140, at 390.

187. *Overview in*, BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT 3 (Loraine Hutchins & Lani Kaahumanu eds., 1991) [hereinafter BI ANY OTHER NAME]; Sharon Forman Sumpter, *Myths/realities of Bisexuality*, in BI ANY OTHER NAME, *supra*, at 12-13.

188. Forman, *supra* note 187, at 12-13.

189. *Overview in*, BI ANY OTHER NAME, *supra* note 187, at 6.

common (and served to enhance status).<sup>190</sup> Homosexuality was also a normal part of life for educated men in ancient Athens and for warriors fighting for Sparta.<sup>191</sup> Even today among several different cultures in Melanesia, homosexual behavior is viewed not only as natural and normal, but necessary.<sup>192</sup>

The Sambia, a warrior tribe in the southeastern highlands of Papua New Guinea, provide the most famous example.<sup>193</sup> They do not believe that the male body is capable of manufacturing semen, necessitating its external acquisition.<sup>194</sup> Oral ingestion of semen by young male initiates during the course of a decade is therefore considered essential to mature development.<sup>195</sup> Throughout adolescence Sambian males engage only in homosexual behavior.<sup>196</sup> Once they reach maturity, however, they are required to engage only in heterosexual sex. This practice emphasizes the important contrast between sexual identity and sexual behavior; although Sambian men engage in homosexual behavior for a period in their lives, these men do not form any sort of homosexual identity. The same could be said of much of the United States' prison population, among whom homosexual behavior is famously prevalent.<sup>197</sup> What is important to note here is that none of the above examples describe *exclusively* homosexual behavior; heterosexual *and* homosexual behavior are the norm in these cultures. This evidence points to the fact that sexuality as it is conceived of in the United States today is merely the product of cultural influences.

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190. See, e.g., GARY LEUPP, *MALE COLORS: THE CONSTRUCTION OF HOMOSEXUALITY IN TOKUGAWA JAPAN* 52 (1995) ("The list of shoguns, hegemony, and principal daimyo thought to have been sexually involved with boys reads like a *Who's Who* of military and political history . . .").

191. Paul Cartledge, *The Politics of Spartan Pederasty*, in *HOMOSEXUALITY IN THE ANCIENT WORLD* 84 (Wayne R. Dynes & Stephen Donaldson eds., 1992).

192. GILBERT H. HERDT & ROBERT J. STOLLER, *INTIMATE COMMUNICATIONS: EROTICS AND THE STUDY OF CULTURE* 55-84 (1990).

193. *Id.* at 53-54.

194. *Id.* at 58-61.

195. *Id.* at 56, 65-66 (describing how "men require inseminations and magical ritual treatments over many years to catch up with females and become strong, manly men").

196. *Id.* at 57-58.

197. See, e.g., Wikipedia, *Prison Sexuality*, at [http://en.wikipedia.org/wiki/Prison\\_sexuality](http://en.wikipedia.org/wiki/Prison_sexuality) (last visited June 27, 2005). There is a similar lack of homosexual identity formation among African American males who engage in homosexual behavior "on the down low." See, e.g., Wikipedia, *Down Low*, at [http://en.wikipedia.org/wiki/Down\\_low](http://en.wikipedia.org/wiki/Down_low) (last visited June 27, 2005).

### E. Evolutionary Explanations

Most of the work that has been done from an evolutionary perspective continues to operate on the same assumption that to a somewhat lesser extent guided earlier psychoanalytic, learning, or biological theories: that one is either straight or gay. The evolutionary byproduct theory, for example, simply maintains that a homosexual orientation is a “vestige” of human evolutionary processes, or an “also ran” category that continues to pop up.<sup>198</sup> The continuously occurring mutation theory posits that gays and lesbians carry a mutation, leading to a “defective” sexual orientation that leaves them chasing inappropriate sexual partners.<sup>199</sup>

As early as 1959, however, evolutionary biologist George Evelyn Hutchinson became the first to suggest that homosexual behavior must serve a useful evolutionary function.<sup>200</sup> Hutchinson argued that because homosexual behavior appears to be a biological constant, manifesting itself in generation after generation in both human and nonhuman species, and at a rate that far exceeds that of biological “mistakes,” it must serve some useful function.<sup>201</sup> He did not suggest what that function might be, however, and he conceptualized homosexual behavior in terms of an either/or position.<sup>202</sup>

Somewhat later, controversial biologist Edward O. Wilson proposed in the groundbreaking work *Sociobiology* the theory that kin selection<sup>203</sup> has shaped homosexuality.<sup>204</sup> Again, however, he applied the theory in such a way that an individual must be either straight or gay, not anywhere in between:

198. Paul Vasey, *Homosexual Behavior in Primates: A Review of Evidence and Theory*, 16 INT'L J. PRIMATOLOGY 173, 173-203 (1995).

199. JIM MCKNIGHT, STRAIGHT SCIENCE?: HOMOSEXUALITY, EVOLUTION AND ADAPTATION 116 (1997).

200. George E. Hutchinson, *A Speculative Consideration of Certain Possible Forms of Sexual Selection in Man*, 93 AM. NATURALIST 81, 81-91 (1959).

201. *Id.*

202. BRUCE BAGEMIHLE, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY 168-69 (1999).

203. “Kin selection” describes how a particular set of nonreproductive behaviors, namely, altruistic acts that increase the survival prospects for relatives, could prove evolutionarily adaptive in terms of reproductive success for the “helper” individual since the relative carries some proportion of the “helper’s” genes. See ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 156-188 (Vintage Books 1995) (1994) (providing a thorough discussion of the kin selection theory).

204. EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* 554-55 (1975).

The homosexual members of primitive societies may have functioned as helpers, either while hunting in company with other men or in domestic occupations at the dwelling sites. Freed from the special obligations of parental duties, they could have operated with special efficiency in assisting close relatives. Genes favoring homosexuality could then be sustained at a high equilibrium by kin selection alone.<sup>205</sup>

### 1. Primate Research

Things are not so simple, however. Although generally ignored by psychology, studies of our closest evolutionary relatives, other primates, have yielded important clues regarding the origins of homosexual behavior. Indeed, the widespread nature of primate homosexual behavior, in both human and nonhuman primate species, demonstrates definitively that homosexual behavior is not a historically recent phenomenon. In fact, this behavior can be traced back to the Oligocene,<sup>206</sup> during the evolutionary diversification of the Anthropoids.<sup>207</sup> Because prosimians, a more primitive offshoot of the Primate order,<sup>208</sup> do not demonstrate any homosexual behaviors, in contrast to anthropoids, one can infer that increasing behavioral flexibility characterized the Oligocene anthropoid primates and led to evolved homosexual behavior.<sup>209</sup>

Although no member of any nonhuman primate species has been known to exhibit an exclusive homosexual orientation, many species do engage in some homosexual behavior.<sup>210</sup> Primatologists have examined several different explanations for the existence of homosexual behavior in primates and have received varying levels of support for their theories. Each of these explanations will be reviewed in turn for the sake of completeness, although some of these hypotheses reflect a gay-straight dichotomy bias.

205. *Id.* at 555.

206. The Oligocene epoch is part of the Tertiary Period in the Cenozoic Era, and lasted from about 33.7 to 23.8 million years ago.

207. Vasey, *supra* note 198, at 195. Anthropoidea (from the latin "human-like") is the suborder of the order Primates that includes New World Monkeys, Old World monkeys, apes, and humans. See, e.g., Callum F. Ross, *Into the Light: The Origin of Anthropoidea*, 29 ANN. REV. ANTHROPOLOGY 147, 147-49 (2000) (describing anthropoidea).

208. Prosimians, a more primitive offshoot of the Primate order, are generally characterized by less sophisticated behavioral repertoires and relatively limited cognitive complexity. For an interesting discussion, see Willem De Winter & Charles E. Oxnard, *Evolutionary Radiations and Convergences in the Structural Organization of Mammalian Brains*, 409 NATURE 710, 710-14 (2001).

209. Vasey, *supra* note 198, at 195.

210. See, e.g., BAGEMIHL, *supra* note 202, at 269-338.

a. *Abnormal Adult Hormone Hypothesis / Prenatal Hormonal Hypothesis*

Homosexual behavior has long been characterized as a sex-role atypical for the actor, and therefore the result of the developmental processes of the opposite sex, as mentioned in the discussion of human prenatal factors.<sup>211</sup> Studies of *Macaca fuscata* and *M. mulatta*,<sup>212</sup> however, have not demonstrated any consistent link between either prenatal or adult hormone levels and sexual behavior.<sup>213</sup>

b. *Proceptivity-Enhancing and Receptivity-Reducing Hypotheses*

Two sociobiological hypotheses have been proposed to explain the functional significance of female-female mounting among primates.<sup>214</sup> The proceptivity-enhancing hypothesis proposes that female homosexual mounting functions to increase the reproductive success of the mounting female.<sup>215</sup> The receptivity-reducing hypothesis states that females' homosexual mounting represents a form of "intrasexual competition that minimizes the probability that rivals are inseminated."<sup>216</sup> Neither of these hypotheses has been supported by observations of nonhuman primates.<sup>217</sup>

c. *Dominance-Assertion Hypothesis*

Homosexual interaction between primates has long been interpreted as reflecting dominance interactions.<sup>218</sup> Mounting has been viewed as a display of dominance, while being mounted is a

211. See, e.g., BAGEMIHL, *supra* note 202, at 145-47 (debunking this theory with regard to ring-billed gulls exhibiting homosexual behavior).

212. *Fuscata* and *M. mulatta* are different species of monkeys. Vasey, *supra* note 198, at 181, 185-86.

213. Vasey, *supra* note 198, at 182-88.

214. Mounting is the most common form of sexual behavior found among animals in homosexual contexts. One animal climbs on top of another in a position approximating heterosexual intercourse, usually from behind in a front-to-back position. Nonhuman primates, however, often use a face-to-face position—interestingly, this is more common in homosexual contexts than in heterosexual ones. BAGEMIHL, *supra* note 202, at 18-19; Vasey, *supra* note 198, at 189.

215. Vasey, *supra* note 198, at 189-190.

216. *Id.*

217. *Id.*

218. BAGEMIHL, *supra* note 202, at 107-15; c.f. DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 213 (1994) (discussing common human attitudes towards animals engaging in homosexual behavior).

display of submission.<sup>219</sup> Observations of nonhuman primates, however, show that while dominant individuals mounted more often, the mounting of a dominant by a subordinate individual is not uncommon.<sup>220</sup>

*d. Practice for Heterosexual Copulation Hypothesis*

Researchers have suggested that homosexual behavior expressed during play interactions may serve as practice for future adult heterosexual sex.<sup>221</sup> Some laboratory evidence supports this conclusion; however, this hypothesis is flawed in that, in many nonhuman primates, homosexual behavior continues to be expressed outside of the play context in adult individuals.<sup>222</sup> In addition, it is illogical to assume that juveniles engage in sexual behavior in order to prepare for future adult sexual behavior:

Selection does not act on future outcomes; it acts on aspects of the phenotype that, on average, have acceptable consequences at the time of selection. The future can never be an effective cause of the past, and although significant consequences of behavior can be felt in the future, these future effects are not proximate causes for the action that happened long before.<sup>223</sup>

Three other hypotheses have been proposed and, unlike those considered above, are supported by studies of various primate species. Much of this work has focused on bonobos,<sup>224</sup> who engage in a great deal of nonconceptive sex as well as homosexual behavior.<sup>225</sup>

*e. Tension-Regulation Hypothesis*

Several researchers have shown that a relationship exists between social tension and anthropoid homosexual behavior. For

219. BAGEMIHL, *supra* note 202, at 18-19, 107-15.

220. Vasey, *supra* note 198, at 190; *see also* BAGEMIHL, *supra* note 202, at 107-108 (noting that dominance has "little, if any, explanatory power").

221. BAGEMIHL, *supra* note 202, at 183-84.

222. Vasey, *supra* note 198, at 191.

223. Phyllis Dolinkhow, *Play: A Critical Process in the Developmental System*, in *THE NONHUMAN PRIMATES* 233 (Phyllis Dolinkhow & Augustin Fuentes eds., 1999).

224. *Pan paniscus*, sometimes referred to as pygmy chimpanzees, live in groups composed of mixed-sex and mixed-age members containing 60 or more individuals. BAGEMIHL, *supra* note 202, at 269-75. Such groups often separate into smaller, temporary subgroups with more fluid membership. *Id.* Relative to other species, bonobos possess perhaps the broadest and most variable repertoire of homosexual behaviors. *Id.*

225. *Id.* at 269-73. Homosexual activity is almost as common as heterosexual activity among bonobos, although no bonobo has ever been observed to engage in homosexual behavior exclusively. *Id.* at 273.

example, work with *Papio cynocephalus*, *Macaca nemestrina*, and *M. nigra* demonstrates a close temporal association among homosexual behavior, increased inter-individual tolerance, and reduced aggression during periods of tension or excitement.<sup>226</sup> Richard Wrangham's work with bonobos is the most important in this area. He describes genito-genital (GG) rubbing between females and male-male genital rubbing as being utilized to "defuse" tense situations.<sup>227</sup> These behaviors "appear affiliative rather than sexual because they are relaxed and casual, like grooming."<sup>228</sup>

#### f. Reconciliation Hypothesis

Wrangham, as well as several other researchers, has shown that among bonobos (and chimpanzees) "social relationships after aggression remain tense until affiliative contact has occurred."<sup>229</sup> Among bonobos, this kind of reconciliation often involves sexual contact, including "rump-rump rubbing" and genital massage between adult and adolescent males.<sup>230</sup> In addition, researchers have found that homosexual mounts among captive *Pan paniscus* increase significantly within a fifteen minute period following an agonistic conflict unrelated to food.<sup>231</sup> This evidence seems to highlight a clear link between sex and reconciliation in bonobos.

#### g. Alliance-Formation Hypothesis

A rather large body of data suggests evidence of a relationship between homosexual behavior and the formation of alliances. Again, *Pan paniscus* (bonobos) provides the best example. In Wamba and Lomako in Africa, homosexual interactions between females occur regularly; these interactions, which consist of GG rubbing, involve females with sexual swellings but not necessarily in maximal tumescence.<sup>232</sup> When a young (recently immigrant) female is involved, she usually solicits another, perhaps by extending her hand, peering, or holding the other's knees and shaking.<sup>233</sup> If the other, usually older

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226. Vasey, *supra* note 198, at 192-93.

227. Richard Wrangham, *The Evolution of Sexuality in Chimpanzees and Bonobos*, 4 HUMAN NATURE 47, 66 (1993).

228. *Id.*

229. *Id.*

230. *Id.*

231. Vasey, *supra* note 198, at 193.

232. Wrangham, *supra* note 227, at 66.

233. *Id.* at 65.

female is willing, she rolls onto her back and spreads her legs.<sup>234</sup> The two individuals then embrace, thrust their hips forward, and rub their clitorises against each other rapidly.<sup>235</sup> They commonly make facial expressions, screams, and clutching movements, suggesting that they are having an orgasm.<sup>236</sup> The use of GG rubbing in the development of social relationships is very clear when a female solicits a particular older female as a sexual partner; she eventually develops a relaxed social relationship with this individual.<sup>237</sup>

One should note that homosexual sex is also present among male bonobos, though female examples are more frequent.<sup>238</sup> Manson and his colleagues suggest that this male homosexual contact serves a bonding function, noting that "two subordinate males, which engaged in more mounts than any other male-male dyad, may have been trying to form an enduring alliance against the alpha male."<sup>239</sup>

It is important to note that the three hypotheses that have received empirical support (the tension-regulation hypothesis, the reconciliation hypothesis, and the alliance-formation hypothesis) all describe sociosexual behavior that works to increase the reproductive success of an individual in terms of what might be called "social relationship enhancement." Indeed, the presence of homosexual behavior as tool for alliance formation is hard to deny in light of the evidence across time and space discussed above. Just as among bonobos, in ancient Greece and Japan, as well as among the Sambia in the twentieth century, homosexual liaisons led to an increase in prestige and status—a factor clearly linked to reproductive success.

Although bonobos are the very best model we have among primates for sociosexual behavior and homosexuality in general, many other species use similar behaviors.<sup>240</sup> For example, male olive baboons engage in sex-derived greeting behaviors—mounting and genital manipulation—that seem to function to communicate commitment to form aggressive coalitions.<sup>241</sup> Additionally, female Japanese macaques engage in homosexual mounting quite frequently,

234. *Id.*

235. *Id.*; BAGEMIHL, *supra* note 202, at 270-71.

236. BAGEMIHL, *supra* note 202, at 270.

237. Wrangham, *supra* note 227, at 65.

238. BAGEMIHL, *supra* note 202, at 272-73.

239. Joseph H. Manson et al., *Nonconceptive Sexual Behavior in Bonobos and Capuchins*, 18 INT'L J. PRIMATOLOGY 767, 782 (1997).

240. See generally BAGEMIHL, *supra* note 202 (describing the sexual behavior of hundreds of species).

241. Manson et al., *supra* note 239, at 783.

and no less than eight different types of homosexual mounts have been identified.<sup>242</sup> This homosexual behavior among macaques is interesting in that the sexual relationship between two females is exclusive throughout its duration, though the relationship lasts for a few days at most.<sup>243</sup>

## 2. Research Implications

Homosexual behavior has evolved in various primate species, including humans, to facilitate the formation and maintenance of social relationships, especially alliances. By breaking out of the predominant mode of Western (and especially American) thought that conceives of homosexuality and heterosexuality as rigid categories, the “psychological genesis” of homosexual behavior becomes clear. Rather than “intrinsically disordered,” homosexual behaviors appear to be adaptive tools aimed toward increasing reproductive success, however distally. Indeed, the evidence indicates that all members of the species *Homo sapiens sapiens* are capable of directing sexual attention to individuals of either sex, though to varying degrees. Because the increased behavioral flexibility that has evolved in humans has resulted in the decoupling of sexual behavior from reproduction, creating sociosexual behavior, the Pope’s assertion that homosexuality is “contrary to natural law” can be easily dismissed. Homosexual behavior is nothing more or less than one facet of humanity’s sociosexual repertoire.

## VI. WHERE WE GO FROM HERE: GAY PERSONHOOD AS A FUNCTION OF ESTABLISHMENT RATHER THAN SUBSTANTIVE DUE PROCESS

Even in states where gays are explicitly prohibited from marrying, many gays who are able to find willing churches and synagogues are bypassing any legal debate and focusing on the aspect of marriage that matters to them—its spiritual component.<sup>244</sup> These religiously observant gay couples have in common with President Bush and Professor Kohm a view that marriage is primarily a union in the eyes of God.

And yet marriage is a legal institution as well. Any straight individual may be married and reap the benefits associated with that

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242. Paul Vasey, *Intimate Sexual Relations in Prehistory: Lessons from the Japanese Macaques*, 29 *WORLD ARCHAEOLOGY* 407, 413 (1998).

243. *Id.*

244. Goodstein, *supra* note 112, at A1.

union. These benefits are legal, psychological, and economic, as well as religious. Even among those for whom marriage is primarily a spiritual union, the stigma of their coupling's illegitimacy in the eyes of the law strikes at the heart of their rights as citizens under the Constitution.

"Sexual orientation is one area where the extra-human sources of authority of God and/or Nature are often taken to have spoken, authoritatively declaring heterosexuality normative and homosexuality deviant."<sup>245</sup> But as highlighted in detail above, the biological reality of our species' complex, sociosexual existence means that humanity's sexual expression cannot be confined to a narrow set of "acceptable" behaviors; nor can antigay advocates claim that their view is supported by the "law of nature." If anything, natural observation demonstrates the illegitimacy of such artificially-constructed dichotomies.

*Lawrence v. Texas* deemed private, consensual sexual activity by homosexuals to be protected by the Constitution. While representing an important step towards gay personhood, *Lawrence* was just that—a step. Gay personhood under the law will continue to remain uncertain in the face of antigay advocates motivated by religious and cultural biases. Because religion is the "purpose" behind statutes that, among other things, prohibit gay marriage, such laws must be presumed unconstitutional. Other public policy concerns, of course, may justify various continuing restrictions on individuals' sexual behavior—incest or sex with minors, for example, present dangers unassociated with religion, such as a concern for genetic defects or an absence of consent, respectively. But to deny individuals the right to enter into committed relationships with other consenting adults has no purpose beyond establishing religiously-based moral values as law.

In *Zelman*, Chief Justice Rehnquist provided two specific factors for courts to consider under the effect prong of *Lemon* in indirect aid cases.<sup>246</sup> Recall that, to be constitutional under *Lemon*, a statute must have (1) a secular legislative purpose; (2) a principal or

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245. David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1012 (2002).

246. In *Zelmon v. Simmons-Harris*, 536 U.S. 639, 669 (2002), Justice O'Connor explains in her concurrence that under the majority's approach,

Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid.

primary effect that neither advances nor inhibits religion; and (3) no fostering of an excessive entanglement with religion.<sup>247</sup> Chief Justice Rehnquist's "subtest" incorporated his nonpreferentialism standard, which, applied in the context of indirect aid cases, requires courts to consider (1) whether the program at issue provides aid neutrally with respect to religion, and (2) whether the beneficiaries have an actual choice between religious and nonreligious groups.<sup>248</sup>

A similar nonpreferentialism modification should be made in terms of gay marriage or other gay rights. Specifically, under the "purpose" prong of *Lemon*, courts should ask in the context of marriage or sexuality whether (1) the statute's sole or primary motivation rests in advancing traditional majoritarian religious views with regard to personal sexual conduct, and (2) whether other compelling public policy objectives support the legislation's enactment. The first "sub-prong" articulates a context-specific effectuation of a modified nonpreferential *Lemon* standard, while the second, using familiar language from the Court's substantive due process jurisprudence, provides for the continued validity of laws outlawing, for example, incest, polygamy, or bestiality.

Even if the Court eventually decides to eliminate the *Lemon* test, the application of a robust version of Justice Rehnquist's nonpreferentialism alone should be sufficient to render any law that discriminates against gays unconstitutional. Such laws would be similarly problematic under Justice Kennedy's coercion standard, in that coercing conduct is, in some respects, more serious than coercing belief (which is much more difficult to regulate). O'Connor's endorsement standard also points towards the unconstitutionality of any religiously-motivated law that results in discrimination against gays.

Until the Court indicates otherwise, *Lemon* will control, although it will no doubt continue to be applied in a modified, context-specific form. Such a test, as applied to gays, is in many ways superior to the Court's judicially-constructed substantive due process doctrine. Of course, over the years, the Supreme Court has sought to protect personal conduct related to sex, marriage, child-bearing, and child-rearing by developing a "right to privacy," which may be more accurately described as a right to personal autonomy. This "right to privacy" could be seen as encompassing gay marriage as well; however, given that any discussion by the Court concerning gay

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

248. *Zelman*, 536 U.S. at 669 (O'Connor, J., concurring).

marriage must, as in *Lawrence*, analyze a law motivated solely or primarily by Judeo-Christian-inspired beliefs, the Establishment Clause may serve as a more stable platform for review.

At the very least, the Establishment Clause could serve to complement the Court's substantive due process jurisprudence, and vice versa. The establishment theory advanced in this Note, however, is superior to the substantive due process approach if only because it depends on the text of the Constitution, rather than principles outside it.<sup>249</sup> Indeed, under the theory of this Note, much of the Supreme Court's "privacy" jurisprudence, beginning with *Griswold v. Connecticut*, could be supplanted by the Establishment Clause. Realistically, the Court is unlikely to abandon its substantive due process jurisprudence, but the concern for morally-inspired legislation that has so often faced the Court of late is more easily addressed under an establishment standard.

## VII. CONCLUSION

A context-specific modification of the *Lemon* test applied in the face of legislation motivated solely or primarily by moral concerns serves as a more legitimate grounds for judicial consideration than substantive due process. Although faced with "morality-based" legislation in *Lawrence*, the Supreme Court relied on substantive due process to declare invalid the Texas statute outlawing sodomy. The Establishment Clause provides a more logical and stable platform for review in gay rights cases, however, in that its core concern, preventing religious establishment, applies to issues of gay personhood directly rather than peripherally, as is the case with substantive due process. Research regarding homosexual behavior, both in our species and in others, points to the illegitimacy of rigid dichotomies with respect to sexual orientation as well as the fundamental errors inherent in much popular Judeo-Christian thought concerning what comprises "natural" sexual expression. Because American jurisprudence does not operate in a vacuum—it is based in the real concerns of real individuals in a world governed by

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249. Another weakness of the substantive due process approach is that it tends to articulate a right "to be free from" governmental interference with personal autonomy, rather than a right "to," for example, abortion or contraceptives. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326-27 (1980) (finding no right to Medicaid reimbursement for abortions); *Maher v. Roe*, 432 U.S. 464, 478-79 (1977) (same). If the debate over gay marriage is conceptualized as a "right to" such unions, substantive due process may serve, analytically at least, as a particularly suspect rationale.

distinct, observable phenomena—such empirical research should inform any legal discussion. An empirically-based establishment theory, in addition to improving upon the Court's substantive due process approach, would bring further stability to the Court's confused establishment jurisprudence.

Our Republic was founded upon the principles of freedom and self-determination. As the world changes, and human knowledge and experience evolve, it is incumbent upon courts to protect those principles by combating the tyrannical imposition of ancient prejudices by a majority of often well-meaning, but uninformed, citizens. Such are the Constitution's requirements, requirements we ignore at risk not only to a subjugated minority, but to all Americans.

*Jeffrey A. Kershaw\**

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