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SEPARATION OF CHURCH AND STATE: THE MARRIAGE EXCEPTION

by
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In the United States, civil marriage is a fundamental right.¹ When people speak of marriage, it often brings up pictures of men in tuxedos and women in white dresses standing in front of friends and family in a religious building or outside, with a religious officiant declaring that the couple is married before God and that, “by the power invested in me by the state of ‘x,’” they are married. In one single moment, they have been united in both religious and civil marriage. The term marriage is used interchangeably to mean the religious union, the civil union, or both. This understanding of marriage is perpetuated in the media and politics. Given the commingled status of religious and civil marriage, this paper suggests that the marriage system in the United States is unconstitutional under current Establishment Clause jurisprudence. It proposes a system that separates civil and religious marriage. The major benefit of such a system is its constitutionality.² Furthermore, it opens up possibilities in the same-sex marriage debate that are currently foreclosed because of religious commingling with civil marriage.³ Rather than using the equal protection arguments often employed to argue for same-sex marriage rights,⁴ this paper approaches a solution from an Establishment Clause perspective.

Part I discusses the current system of marriage in the United States. Part II evaluates the system under current Establishment Clause jurisprudence. Part III examines the German model of the separation of civil and religious marriage and proposes making the theoretical separation of religious and civil marriage in the United States more concrete. Part IV analyzes the constitutionality of the separation proposal. And, Part V discusses some of the implications the proposed separation would have on the same-sex marriage/Equal Protection arguments.

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

² See discussion *infra* Part IV.

³ See discussion *infra* Part V; see also, Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL’Y 561 (2007) (concluding that “if the Establishment Clause really means what it says, same-sex marriage bans impose and endorse one set of religious precepts regarding marriage, resulting in an unconstitutional establishment of religion.”).

⁴ See *e.g.*, *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003).

I. Current U.S. Marriage System

In the United States, each state legislature regulates marriage within its jurisdiction and sets forth the requirements for procuring a marriage license.⁵ Under the Full Faith and Credit Clause of the Constitution, states will recognize valid marriages from other states,⁶ unless “the marriage is repugnant to the public policy of the domicile of the parties or is contrary to its positive laws.”⁷ Most states require a couple to apply for and receive a marriage license for a valid marriage.⁸ County clerks are the ones who generally issue marriage licenses, but some states allow for licenses issued by judges.⁹ Each state statute sets forth which people are authorized to solemnize a marriage.¹⁰ In most cases, ordained clergy, judges, justices of the peace, and ship captains are all authorized to solemnize marriage.¹¹ While judges, justices of the peace and magistrates’ duty is mandatory, clergy authorization is generally permissive.¹² Absent a statute requiring otherwise, there is no required location for the solemnization of marriage¹³ and a civil ceremony or a religious ceremony is equally sufficient.¹⁴

Under the current system of marriage in the U.S., civil and religious marriages are, at least theoretically, separate:

Marriage in the United States is a civil institution. As such, it belongs to all citizens, regardless of their particular moral beliefs or religious creed. That’s why there is no requirement in law that marriage be approved by the church or any other religious community. The consent of the two parties is all it takes to enter a

⁵ *Stevens v. U.S.*, 146 F.2d 120, 123 (10th Cir. 1944).

⁶ U.S. Const. art. IV, § 1 (providing “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”)

⁷ 55 C.J.S. Marriage § 6.

⁸ 55 C.J.S. Marriage § 27.

⁹ *See, e.g.* Ala. Code 1975 § 30-1-9 (1998); Kan. Stat. Ann. § 23-106 (1995).

¹⁰ 55 C.J.S. Marriage § 31.

¹¹ *Id.*

¹² *Id.*

¹³ 55 C.J.S. Marriage § 33.

¹⁴ 33 C.J.S. Marriage § 34.

marriage. Beyond licensing requirements, no approval of the state or of any other authoritative body is necessary. Religious officials – whether priests, rabbis, ministers, imams, or others – may preside at weddings, but in no sense do religious communities define what counts as marriage in the civil arena. . . .¹⁵

Courts distinguish between the two types of marriage.¹⁶ The granting of a marriage license does not require that any religion recognize or perform a marriage service.¹⁷ In fact, our Constitution demands that it cannot be required.¹⁸ However, this theoretical separation is not as clear as it might seem. As the House Report on the Defense of Marriage Act (DOMA) states: “It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect.”¹⁹

A couple may obtain a marriage license, have a judge or justice of the peace perform the ceremony, invoke no religious traditions, and still be legally married. Such marriages need not be recognized by religious authorities.²⁰ Clergy may perform religious commitment ceremonies that have no legal authority, although the couple is considered wed in the eyes of the church.²¹ According to Yale law professor Stephen L. Carter, “if a marriage takes place in a religious context, it is not for the state to have anything to say about it.”²² One might believe that the free

¹⁵ WILLIAM STACY JOHNSON, *A TIME TO EMBRACE*, 196 (2006).

¹⁶ *See, e.g., Goodridge*, 798 N.E.2d at 954.

¹⁷ *Id.*

¹⁸ U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (“the State may not interfere . . . with the decision of any religion to refuse to perform religious marriages”).

¹⁹ H. R. Rep. No. 104-664, at 15 (1996).

²⁰ For example, Catholics may not recognize a valid civil marriage if a person was previously married and did not receive an annulment. *See discussion infra* Part V.

²¹ Protestant denominations including the Unitarian Universalists and the United Church of Christ both perform and religiously recognize such union or commitment ceremonies. Unitarian Universalist Association Social Justice Statements, <http://www.uua.org/actions/immediate/96same-sex.html> (last visited March 26, 2007) (resolution for Support of the Right to Marry for Same-Sex Couples); United Church of Christ Justice and Peace Marriage Resources, <http://www.ucc.org/justice/marriage.htm> (last visited March 26, 2007) (referencing adoption of the “Equal Marriage Rights for All” Resolution).

²² Stephen L. Carter, “*Defending*” *Marriage: A Modest Proposal*, 41 *How. L.J.* 215, 222 (1998). This does not, however, preclude a particular denomination from passing and enforcing laws about same-sex unions. Some clergy

exercise of religion would demand such a result. That is not the case. In many states it is unlawful to perform a marriage ceremony without a valid license.²³ “A man and woman who wish to be married in the eyes of their faith, but not the state, risk making criminals of clergy who accommodate their wish.”²⁴ Thus, religious unions are not free from state interference. The state can punish religious officiants for performing services that are valid under their religious tenants but have no civil force or effect.²⁵

As recently as January 2007, a New Hampshire representative sponsored a bill that “would permit religious officiants of any stripe to perform marriages according to custom, ‘provided that such marriages do not conflict with existing state law prohibiting marriage between persons of the same sex.’”²⁶ Some clergy believe that “the bill is a response to a growing sentiment in the liberal clerical community to stop asking for licenses from couples, gay or straight, seeking religious marriages.”²⁷ Ellen Musinsky, a family law specialist and professor at the Franklin Pierce Law Center, thinks the only intent behind the bill is interference with churches and religious officials’ right to decide what unions to religiously solemnize.²⁸

Thus, the U.S. marriage system has become a convoluted mess. Our courts recognize and distinguish between civil and religious marriage. Civil marriage is obtainable separate and apart

face ecclesiastical trials for violating church law if they perform same-sex unions. *See*, Gustav Niebuhr, *Methodist Pastor Faces Trial for Uniting 2 Men*, N.Y. TIMES, Mar. 25, 1999, at A20.

²³ Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1794 n.144 (2005).

²⁴ *Id.* Because the prohibition is against marriage ceremonies and not commitment ceremonies, this may be less of a problem for denominations that have the ability to create and perform a different ceremony than a “marriage” ceremony. But for religions that only have one service in their faith that unifies a couple, those clergy are prohibited from performing services completely consistent with their religion (or at least at risk of criminal sanctions if they choose to perform such services).

²⁵ This appears to be a Free Exercise violation, but no one seems to have challenged it as such. But *see*, *People v. Greenleaf*, 780 N.Y.S. 2d 899, 902 (2004) (Under an Equal protection argument, two ministers arrested for performing same-sex marriage ceremonies without marriage licenses had charges dismissed on the theory that if it was unconstitutional to deny the marriage licenses to the couples, then it was unconstitutional to charge the ministers with a crime for performing the ceremonies without one.)

²⁶ Beverley Wang, *Rep. Seeks Change to Marriage Law*, (Jan. 22, 2007), http://www.boston.com/news/local/new_hampshire/articles/2007/01/22/rep_seeks_change_to_marriage_law/ (last visited February 1, 2007).

²⁷ *Id.*

²⁸ *Id.*

from any religious pretext. But, religious marriage without civil marriage is generally unavailable, given the criminal risk to clergy who would perform them. For those (opposite sex couples) who do choose to have a religious ceremony, they may have their religious officiant certify their civil marriage at the same time. Thus, although the U.S. system is designed to separate religious and civil marriage, and indeed recognizes that such a separation exists, in truth the two forms of marriage have become conflated. This conflation runs afoul of Establishment Clause jurisprudence.

II. Establishment Clause

Under current Supreme Court jurisprudence, when there is a claim that the Establishment Clause has been violated, there are four tests, or lenses, through which the challenged action or statute may be evaluated: the *Lemon* test, the endorsement test, the coercion test, and the tradition test.²⁹ Evaluating the current U.S. marital framework under these four tests, it is clear that the lack of separation between civil and religious marriage is unconstitutional, regardless of which test is used.

The *Lemon* test is so named because it was set forth in *Lemon v. Kurtzman*.³⁰ Under the *Lemon* test, there must be a secular legislative purpose; the primary effect of the statute or action must not result in the advancement or prohibition of religion; and it must not result in excessive government entanglement.³¹ If any one of these three prongs is violated, the statute or action is unconstitutional.

²⁹ Rather than evaluate the accuracy or sustainability of each test and decide which is the most appropriate for the situation, I have chosen to evaluate the current marriage system under all four commonly utilized Establishment Clause tests. The reason being that it is difficult, especially with the recent changes to the Court, to determine which test each justice finds persuasive.

³⁰ 403 U.S. 603 (1971).

³¹ *Id.* at 612-13.

Under the *Lemon* test, both the primary effects and entanglement prongs are violated.³² Because religious officiants are unable to validate marriage certificates for same-sex couples the way they can for heterosexual couples, they are unable to give equal validation to the same-sex couple, even though their religion treats them equally. The inability to give equal treatment to marriages that the religion holds equal, resulting from the commingling of religious and civil marriage, establishes the position of inequality at the expense of those faiths that believe same-sex couples should be allowed to marry. That there is only one service which provides both the civil and religious recognition of the marriage exacerbates this problem. The system creates the illusion that the religious service confers the benefits of civil marriage. To hold a religious service that does not result in the creation of a civil marriage creates the illusion that the relationship is religiously inadequate because the clergy did not give it civil validation. The theory being that if the marriages were equal under the religious tenets, the outcomes would be the same. Moreover, the fact that clergy may risk criminal penalties in order to perform such a religious service makes clergy even less likely to perform such a service, even though their faith would allow it. By advancing the religion of those faiths that believe same-sex marriage is

³² There is an argument that allowing clergy to officiate civil marriages violates the secular purpose prong. “[T]he State acts unconstitutionally if it . . . uses religious means to serve secular ends where secular means would suffice.” *Sch. Dist. of Abington Twshp. v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring). Allowing clergy to validate civil marriage certificates uses a religious means, i.e. religious officiants, to achieve a secular purpose, i.e. the validation of civil marriage. Secular means already exist because civil marriages may be officiated by Justices of the Peace or judges. If clergy cannot officiate civil marriage, the Justices of the Peace and judges have an increased burden. Thus, the state benefits from this system of interchangeable officiants for civil marriage. Although a plausible theoretical argument, in actuality the benefit is to the marrying couple who does not have to have the hassle and cost of two ceremonies in order to achieve both religious and civil recognition of their marriage. Also, some have argued that the current system is constitutional because the Free Exercise and Establishment Clauses require clergy to be able to perform civil marriages. Amy Gutmann, *Religious Freedom and Civic Responsibility*, 56 WASH. & LEE L. REV. 907, 914-15 (1999) (arguing that the Establishment and Free Exercise Clauses require separation of church and state, not church and politics, and thus “[c]lergy of all churches should be able to marry couples in a religion and also in the eyes of the civil law. So as not to coerce any citizens into a religious marriage, governmental officials also should be able to marry couples solely in the eyes of the law.”).

wrong, and prohibiting the religion of those faiths that would perform such services, the current marriage system violates the primary effects prong of the *Lemon* test.³³

The commingling of religious and civil marriage also results in excessive entanglement. In order for the state to determine whether a clergy member may solemnize civil marriage licenses, the state must make a determination as to whether the religion is sufficient under the state statute. In order for the state to examine a religion and decide whether it can confer the benefits of marriage the state must impermissibly take a stance on whether the religion is valid.³⁴ This evaluation results in the state being entangled in a determination of what is a valid religion. Additionally, there is the potential for excessive entanglement in states with laws prohibiting clergy from performing marriage ceremonies without a civil marriage license. In those cases, the state must make a determination about whether the service the clergy performed was a “marriage ceremony.” For religions with more than one union or commitment service, the government would be making a determination about whether a particular service conferred religious marriage and, therefore, violated the law. Making such a determination would require the government to make an impermissible foray into the realm of religious beliefs and requirements of a particular congregation, denomination, or religion in violation of the excessive entanglement prong.

Having violated both the excessive entanglement and the primary effects prongs, the current marriage system is unconstitutional under the *Lemon* test.³⁵ However, some justices have

³³ Wilson, *supra* note 3, at 674 (linking the government’s “decidedly sectarian action” of banning same-sex marriage to Establishment Clause violations because religions who support same-sex marriage “are finding themselves told that their beliefs are less valuable to society because they are more inclusive of same-sex couples”).

³⁴ See, *O’Neill v. Hubbard*, 40 N.Y.S.2d 202, 204-05 (Sup. Ct. 1943) (holding unconstitutional a statute limiting clergy members qualified to solemnize marriages to the federal census of religious bodies because “the right to have a marriage solemnized by a minister of one’s own faith is an incident of that guarantee [of Free Exercise].”).

³⁵ For a similar discussion and conclusion addressing the ban on same-sex marriage, see Amelia A. Miller, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2212 (2005).

questioned the utility of the *Lemon* test.³⁶ It is important, therefore, to continue to examine the constitutionality of the U.S. marriage system under the other Establishment Clause tests since there is no agreement that the *Lemon* test's outcome would be controlling.

The endorsement test comes from Justice O'Connor's concurring opinion in *Lynch v. Donnelly*,³⁷ and is so named from her statement that "[e]ndorsement sends a message to nonadherents that they are outsiders . . . and an accompanying message to adherents that they are insiders."³⁸ Thus, the crux of the examination under this test is whether a governmental action makes people feel they are favored or disfavored in the political community based on their religion. If it does, it is unconstitutional.

In 2004, President George W. Bush, in his State of the Union Address, said that "[o]ur nation must defend the sanctity of marriage" in promotion of a constitutional ban against same-sex marriage. Those religions which allow same-sex unions and believe same-sex marriage should be available are made to feel disfavored in the political community based on their religious beliefs of marriage equality. The problem with such a presidential pronouncement is that:

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it 'transforms rational debate into theological decree.' Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.³⁹

³⁶ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 889-90 (2005) (Scalia, J. dissenting) (compiling cases to support the proposition that the *Lemon* test is "discredited, to begin with, because a majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'").

³⁷ 465 U.S. 668 (1984).

³⁸ *Id.* at 688 (O'Connor, J., concurring).

³⁹ *Lee*, 505 U.S. at 607 (Blackmun, concurring) (internal cites omitted).

When the President and Congressional leaders consistently present their convictions on the immorality of homosexuality and, therefore, same-sex marriage, based on their religious beliefs, a marriage system that enforces those religious beliefs endorses that religion over those that believe in marriage equality.⁴⁰ In doing so, the political system marginalizes those who hold different religious beliefs. This is exactly the type of situation the Establishment Clause was designed to prevent. This simultaneous marginalization of those who support same-sex marriage and endorsement of those who do not under the current U.S. marriage system is a clear violation of the endorsement test. “When the government takes sides in a serious theological dispute, it has effectively endorsed the religion with which it sides.”⁴¹ Some opponents of same-sex marriage argue that homosexuality is immoral without expressing it in religious terms so as to claim a secular purpose. However, marriage “[p]reservationism, stripped of its idiosyncrasies, is nothing but bare animus--an illegitimate and irrational basis for public policy.”⁴² In either case, the position is unsustainable. It is either a firmly held religious belief being unconstitutionally endorsed by the government, or a personal moral belief that is unable to support policy against even a rational basis.

The coercion test first appeared in *Lee v. Weisman*⁴³ in the context of graduation prayer. There are two forms of coercion, direct and indirect. Direct coercion results from any situation where the government *de facto* coerces people into a religious practice. Indirect coercion results

⁴⁰ For an in depth discussion of why same-sex marriage bans and the proposed Federal Marriage Amendment violate both the *Lemon* and establishment tests, see Wilson, *supra* note 3.

⁴¹ Wilson, *supra* note 3, at 674. See also, Miller, *supra* note 35, at 2212 (giving an endorsement test analysis to the banning of same-sex marriage).

⁴² *Id.* at 667; *Lawrence v. Texas*, 539 U.S. 558, 583 (2003). See also, *Romer v. Evans*, 517 U.S. 620, 634 (1996) (the “desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” emphasis in original).

⁴³ 505 U.S. 577 (1992).

when the government directs a formal religious exercise in such a way as to oblige the participation of objectors.⁴⁴

The government is arguably coercing people into a religious practice under the current marriage system.⁴⁵ Whether it is indirect or direct is not completely clear. But, the fact that some couples may feel required to go through a religious ceremony in order to feel that their marriage is valid because civil marriage is given second-rate status, suggests coercion. This may be direct because the state machinery of marriage coerces people into a religious practice – the religious ceremony. It is potentially indirect because the state has mixed religious and civil marriage by allowing a single service to confer both legal and religious status simultaneously, in such a way that even people with no religious affiliation request to have their marriage in a church performed by clergy. Whether it is direct or indirect, there is arguably enough governmental coercion to violate this test.

The tradition test comes from *Marsh v. Chambers*.⁴⁶ Although there is no specific rule to follow, generally whether something is unconstitutional depends on whether it is “deeply embedded in the history and tradition of his country.”⁴⁷ Most people’s initial response is that marriage is a longstanding American tradition. The problem becomes how far back into the history of marriage does one look. Religious communities and the state have almost never agreed about marriage. Marriage has not always been seen as “ordained by God” in the Christian community. Ancient Christianity rejected sex and marriage as “[p]romoting the corrupt secular world” because it was part of Roman culture.⁴⁸ Moving forward in time, when

⁴⁴ *Id.* at 592-94.

⁴⁵ For the view that the coercion test “is not suited to the issues involved in an analysis of marriage,” see Miller, *supra* note 35, at 2213.

⁴⁶ 463 U.S. 783 (1983).

⁴⁷ *Id.* at 786 (In this particular case, applying the test in the context of legislative prayer).

⁴⁸ E.J. GRAFF, WHAT IS MARRIAGE FOR? 59 (1999).

the Protestants split from the Catholics, they considered marriage a secular ceremony as opposed to the Catholics' view of marriage as a sacrament.⁴⁹ This was in part because the creation of private marriage had created such a legal mess.⁵⁰ The Protestants left regulation of marriage to the rising nation-states.⁵¹ The abrogation of control came because the Protestants did not have the power to control the public recognition of marriage and did not want to take the time to build it.⁵² Significantly, even the Catholic Church did not recognize marriage as a sacrament until 1215.⁵³

Assuming that such history is too far removed from a consideration of whether something is an American tradition, both England and the early colonies treated marriage as civil in nature. By 1753, England had transformed marriage “from a private sacrament to a publicly authorized contract.”⁵⁴ In the colonies, each region had its own definition of marriage.⁵⁵ Judges and legislatures used the “common-law marriage” invention to create a system where it was neither vows nor civil registration that created marriage, but the actions of the couples themselves.⁵⁶ By the 1870s, the marriage reform movement required formal ceremonies and registration, and by the end of the nineteenth century, marriage was a public, state-regulated status.⁵⁷

It would be fair to argue that America has always recognized marriage and, therefore, marriage is a tradition. But to say marriage is a longstanding American tradition is one thing; to say that the current commingling of religious and civil marriage is a longstanding American tradition is something else entirely. Even looking just at American colonial history, the

⁴⁹ *Id.* at 66, 201.

⁵⁰ *Id.* at 199-200.

⁵¹ *Id.* at 201.

⁵² *Id.*

⁵³ *Id.* at 196.

⁵⁴ *Id.* at 203.

⁵⁵ *Id.*

⁵⁶ *Id.* at 204.

⁵⁷ *Id.* at 205.

common-law system allowed the couple themselves to create a marriage that was later recognized by the law.⁵⁸ The idea that the American civil system has always recognized the religious definition of marriage is unsupported by the history. Marriage, in its current hybrid civil/religious form, is not a longstanding American tradition. As such, the current system fails the tradition test.

The Court has examined some Establishment Clause cases under a theory of neutrality and private choice.⁵⁹ Although the neutrality argument to this point have been contained to school-funding cases, it could be applied in this case and thus should be examined. In *Zelman v. Simmons-Harris*, the Supreme Court held that a school voucher program did not violate the Establishment Clause even though “96% of scholarship recipients enrolled in religious schools,” because the receipt of that governmental money by religious institutions was the result of “genuine and independent private choice.”⁶⁰ Using this argument, under the current marriage system it should not matter if 96% of all civil marriages are performed by clergy because the law merely allows people the independent choice of having clergy or public officials perform the service. It is through a genuine and independent private choice by the couple that their civil marriage is officiated by religious clergy.⁶¹ This could be a strong argument, but neutrality is not as easily applicable to the marriage context as it was in the school-funding context because of *Larkin v. Grendel’s Den*.⁶²

⁵⁸ *Id.* at 204.

⁵⁹ *See, Zelman v. Simmons-Harris*, 536 U.S. 639 (2002);

⁶⁰ *Id.* at 652, 658.

⁶¹ This is not necessarily a genuine and independent private choice, however. The only two choices are public official or religious clergy. Unlike in the school context where the choice is between public school and private school of any flavor, whether religious or not, the only non-state officials allowed to solemnize marriage are clergy. Thus, the “choice” in this case is between government and religion, not between private religion and private non-religion. If a statute authorizes ship captains, there is another non-public official choice, but because they are not authorized in all cases where as clergy generally are, this does not really refute the argument.

⁶² 459 U.S. 116 (1982).

In *Larkin*, the Massachusetts legislature gave churches veto power regarding liquor license applications where the applicant was located within 500 feet of the church.⁶³ In ruling the statute was unconstitutional, the Court held that “the challenged statute [] enmeshes churches in the processes of government and creates the danger of ‘[p]olitical fragmentation and divisiveness along religious lines.’”⁶⁴ Just as the Massachusetts law “delegated to or shared with religious institutions” the zoning power,⁶⁵ current marriage statutes have either delegated to or share with clergy the ability to confer civil marriage. “[D]elegating a governmental power to religious institutions inescapably implicates the Establishment Clause.”⁶⁶ Moreover, the Court in *Larkin* noted that “the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbol benefit to religion on the minds of some by reason of the power conferred.”⁶⁷ Thus, a neutrality and private choice argument is inapplicable in the marriage context because the state has impermissibly granted religion, through clergy, the ability to “exercise [] substantial governmental powers contrary to [the Court’s] consistent interpretation of the Establishment Clause.”⁶⁸

Having determined that the current marriage system violates the Establishment Clause under all four tests, the next step is to look at potential solutions. Looking back at the history of marriage, at various times it has been conferred by the church, the state, or the couple themselves, and regulated by the church, the state, or both. The only consistency in this history is that the power to confer marriage has consistently changed hands. This convoluted history makes it easy to understand why the current marriage system is such a mess. It has never been

⁶³ *Id.* at 117-20.

⁶⁴ *Id.* at 127.

⁶⁵ *Id.*

⁶⁶ *Id.* at 123.

⁶⁷ *Id.* at 125-26.

⁶⁸ *Id.* at 126.

clear whether marriage is religious in nature, civil in nature, or some combination of the two. One solution, then, is creating clearer boundaries between civil and religious marriage.⁶⁹

III. Separating Civil and Religious Marriage

When considering creating such boundaries, it is helpful to examine how other countries with similar religious diversity have set up their marriage systems and what boundaries they utilize. Although no country can provide a perfect example, Germany provides a particularly useful model. As one of the starting places of the Protestant Reformation, it has dealt with similar religious/civil marital history to the United States. It currently has a diverse religious population, including Muslims, Jews, Buddhists, and Christians.⁷⁰ And, although Germany is perhaps not as religiously diverse as the United States, under Article 4 of the German Constitution, the government provides for freedom of faith, conscience, and creed⁷¹ – a necessity if a model is to have utility in a country founded on religious independence.

In Germany, it is the law that specifically keeps civil and religious marriage separate. Civil marriage is governed by the German Civil Code.⁷² Section 1588 states that “[t]he obligations to the church with regard to marriage are not affected by the provisions of this chapter.”⁷³ Religious clergy may not officiate a civil wedding; it may only be performed a civil registrar.⁷⁴ Furthermore, a couple must have a civil ceremony at the Registry Office before a

⁶⁹ See, Wilson, *supra* note 3, at 659 (arguing that a bright-line separation of religious marriage and civil marriage “would add certainty and stability to the law”).

⁷⁰ See, Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT’L & COMP. L. 405, 489 (2000) (noting that “religious diversity in Germany has greatly increased over the past twenty years”); see also, World Religion Day Statistics of Religion, <http://www.worldreligionday.org/statistics.html> (last visited March 24, 2007) (listing the religious breakdown in Germany as “Protestant 38%, Roman Catholic 34%, Muslim 1.7%, Unaffiliated or other 26.3%”).

⁷¹ Art. 4 *Grundgesetz* (Basic Law, the German Constitution) BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 14 (2001) available at http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf.

⁷² German Civil Code §§ 1297-1588; THE GERMAN CIVIL CODE (AS AMENDED JANUARY 1, 1992) 280 (Simon L. Goren trans., Fred B. Rothman & Co. 1994).

⁷³ German Civil Code § 1588.

⁷⁴ Case, *supra* note 23, at 1793-1794.

religious wedding can be performed.⁷⁵ “Civil wedding ceremonies are only possible inside the Registry office, and religious weddings can normally only be celebrated inside churches.”⁷⁶ Although couples may have clergy perform a separate religious ceremony, it has “no legal effect under German law.”⁷⁷ Under the German system, for a couple to receive both civil and religious recognition of marriage, they must have two ceremonies at different times and places.

The next issue, then, is what such a system would look like, and how would it differ from what already exists. Currently, couples apply for a marriage license which must then be signed and witnessed and returned to the state before the civil marriage is valid. This is often done by the religious officiant performing the service, but is also done by judges and justices of the peace for those not having a religious service.⁷⁸ Some clergy have expressed a preference for two different marriage services performed in two different places to separate civil and religious marriage, as occurs in Germany, and other parts of Europe and South America.⁷⁹ Given the potential animosity toward this change because of the additional time, expense, and hassle it would require to have two separate ceremonies compared to the current one-stop system, there is another more practical solution that still effectively separates civil and religious marriage.

⁷⁵ WeddingDetails.com, German Lore & Tradition: A Civil Ceremony, <http://www.weddingdetails.com/lore/german.cfm> (last visited February 1, 2007). Because Muslims, Jews, and atheists also marry at the Registry, it avoids things like organ music or stained-glass windows that some might find “too Christian.” HowToGermany.com, Getting Married, <http://www.howtogermany.com/pages/marriage.html> (last visited February 1, 2007).

⁷⁶ WeddingDetails.com, *supra* note 75; Suite 101, Getting Married...German Style, http://www.suite101.com/article.cfm/german_interest/114872 (“If a religious wedding is desired, it will take place either later in the afternoon, or a few days later. At that time the couple will enter the church together and walk down the aisle together since, under the law, they are already married.”); World Wedding Traditions, German Wedding Traditions, http://www.worldweddingtraditions.com/locations/west_europe_traditions/german_traditions.html (noting that the first service is a civil ceremony at the civic center and later a religious service); Topics Online Magazine, Marriage in Germany, <http://www.topics-mag.com/internatl/weddings/german-wedding.htm> (“the civil wedding may take place in the city hall”).

⁷⁷ Case, *supra* note 23, at 1794, quoting FAMILY LAW IN EUROPE 297 (Carolyn Hammond & Alison Perry eds., 2d ed. 2002).

⁷⁸ See discussion *infra*, Part I.

⁷⁹ Fr. Paul Sretenovic, Problems and Solutions Regarding Natural Marriage and Civil Marriage, <http://www.traditioninaction.org/religious/k002rpMarriage.html>.

The solution is having the marriage license from the county be effective upon receipt by the couple; essentially making the license the marriage certificate. There are very few licenses that one receives from the state that require additional validation before usage. When one receives a driver's license or fishing or hunting license, it is valid upon receipt. One makes application and supplies the required information to the appropriate state agency and ultimately receives a valid license. Couples would make application for the marriage license and supply the agency with information regarding eligibility to marry and include required items such as documents regarding previous marriages, blood test results, etc. By the time the couple receives the license, the state has already given its approval for the civil marriage. Rather than require the marriage license then be validated through ceremony, the license would be the certification of marriage. It would certify that the state finds that the couple meets the requirements and, therefore, is civilly married. Under such a system, couples who intend both religious and civil marriage receive each independently, without having to have two ceremonies. Couples who do not seek civil marriage may have any type of commitment service they desire – religious or otherwise. This ceremony is then no different for them than it is for those couples who have chosen to be civilly married because in neither case does the religious ceremony pronounce the couple civilly married. All services, regardless of whether they are religious, would now confer only religious marriage or public commitment. They are all equally removed from the state. For couples who wish to have only one “anniversary,” the state could certify that the couple is certified as married as of “x” date and allow the couple to have the civil marriage certified as of the date of their religious or commitment service.

Under this system, the change to the state mechanism is minimal. Indeed, the burden on the states is lessened. Rather than hand out the license and then record the marriage certificate if

and when it is returned, the state need only issue the certificate and record the marriage based on the initial application. This change results in one step rather than two, and removes problems of something getting “lost in the mail,” or the officiant forgetting to send it. Furthermore, the couple may still have the religious or nonreligious commitment or marriage ceremony of choice. The state has no control over what, if any, service the couple chooses to have. And, a religious officiant no longer certifies or witnesses the civil marriage, but merely presides over that which is within his or her domain - a religious service.

There are additional benefits to such a system beyond simplicity and separation. In an age where there is a great deal of concern about people jumping into marriage too quickly, this separated system also requires couples be more cognizant of the commitment they are making because there is no second step. Successful application would create the civil marriage, not just the potential for one. Furthermore, because the application would result in creating the marriage, the state is likely to require some type of waiting period while it reviews the paperwork to make certain the couple is eligible for civil marriage. That waiting period could cut down on the rash, drunken marriages typified in the media by Britney Spears’ 24-hour Las Vegas wedding.⁸⁰

For couples who need the “thinking period” created under the current system by the second step of having a service officiated, this system can be modified to have a similar period. After the state complete its certification process during the waiting period, the couple must return and both members sign the certification of marriage. If the couple does not come back in to sign for and pick-up their certification, then they are not civilly married. There could be a 30-day window for couples to pick-up their certification, after which time the file would be closed and the couple would not be civilly married. After that time, they would have to reapply if they still

⁸⁰ See, Pete Alfano, *Wedding Bells Still A'peal, Despite Stats*, FORT WORTH STAR-TELEGRAM, June 30, 2004, at F1 (“Pro-marriage groups cringe at the example being set by Britney Spears, who married a childhood friend in Las Vegas and then untied the knot barely 24 hours later.”)

wanted to be married. This change does not really add any extra work for the state. The state would already need a way to mark its files regarding their dispositions. By requiring the couple to come in and sign for the certification to make the transaction complete, the state receives signature proof that a couple was notified of their civil marriage.

This “simple” separation of religious and civil marriage is not without complications. One of the larger complications is the difficulty that arises when one attempts to distinguish between the two types of marriage while allowing them both to retain the same title. Indeed, many of the issues surrounding the commingling of religious and civil marriage come from the fact that both use the same term.⁸¹ This is a direct result of the convoluted history of the power of marriage being passed back and forth between religion and the state.⁸² According to David Kirp, a professor of public policy at UC Berkeley, “we’d do well to unpack the double meaning of marriage as a word that carries both secular and sacred connotation. The logical way to accomplish this would be to call state-sanctioned marriage, whatever the gender of the partners, what it really is: a civil union.”⁸³ This is not a new idea. In 2005, one scholar noted that “the proper solution would simply be to convert all ‘civil’ marriages (which . . . are really religious marriages with civil contractual benefits) into civil unions. Such an act would leave the legal contractual agreements in place, unchanged. All that would change would be the name (‘marriage’ to ‘union’).”⁸⁴

The problem with this proposal is that labels matter. If labels were unimportant, there would be no argument over whether to call the rights of marriage given to same-sex couples

⁸¹ Wilson, *supra* note 3, at 562 (“America is suffering from a definitional crisis regarding the term ‘marriage’”).

⁸² See discussion *infra*, Part II.

⁸³ David L. Kirp, *A Marriage, Gay or Strait, is First a Civil Union*, Mar. 2, 2004, http://www.berkeley.edu/news/media/releases/2004/03/02_kirp.shtml.

⁸⁴ Miller, *supra* note 35, at 2215.

“unions” or “marriages.”⁸⁵ Married couples are unlikely to want the state recognizing their relationship as a civil union.⁸⁶ Churches are equally unlikely to give up the marriage label. Indeed, it is often declared that marriage is ordained by God. It also seems less romantic to send invitations for a religious union.⁸⁷ The word marriage is deeply ingrained in American culture.⁸⁸ Its use conjures up mental images of couples surrounded by friends and family, often dressed in formal wear, joining their lives together.⁸⁹

There are additional benefits to the label of marriage, not the least of which is the right to use the term “spouse.” The ability to use the marital term “spouse” conveys all types of legal rights and economic benefits that “partner” does not carry.⁹⁰ There are business partners, same-sex couple partners, and legal civil-union partners. Walking into a hospital and telling the staff that you are trying to see your partner does not carry the same weight as trying to see your spouse. Without the term marriage, one cannot use the term spouse⁹¹ - a term that provides both greater clarity and security. Although Kirp is correct that what the state conveys is a civil union, and it would be simpler to have separate terms, given the attachment to the term marriage, the more likely solution is to differentiate using the labels “civil” and “religious” before “marriage” to distinguish which type is being referenced.

⁸⁵ See generally, EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 123-44 (2004) (discussing why use of another term other than marriage is both inadequate and unnecessary); see also, Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (holding that use of the term “civil union” rather than “civil marriage” denoted second-class status).

⁸⁶ WOLFSON, *supra* note 85, at 134 (discussing the differences in the words civil union and marriage, noting that “civil union doesn’t even have a verb”).

⁸⁷ See, *Marriage It Is Not; Same-Sex Couples Are Not Flocking To Civil Unions*, THE REC., MAR. 22, 2007, at L08 (Noting that heterosexual couples are not going to want to say “I love you. Let’s get unionized.”).

⁸⁸ See, e.g., Leonard Greene, *Shades of Gay in N.J. Nups Ruling*, N.Y. POST, Oct. 26, 2006, at 2 (“When you say the word ‘marriage’ in our society, it has a meaning you can’t replace with another word or set of words.”); Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN’S L.J. 189, 190 (2005) (“[M]arriage enjoys a social meaning distinct from simple cohabitation”).

⁸⁹ WOLFSON, *supra* note 85, at 105.

⁹⁰ WILLS, TRUSTS, AND ESTATES 437 (Jesse Dukeminier et al. eds., 7th ed. 2005).

⁹¹ For example, DOMA defines spouse for federal purposes to exclude those in civil unions because the “word spouse refers only to a person of the opposite sex who is a husband or a wife.” Defense of Marriage Act § 3 (codified at 1 U.S.C. § 7 (2000)).

Having determined that it is feasible to separate religious and civil marriage because other countries have successfully done so, offered a simple mechanism that simplifies the work of the state and reduces the hassle of a two-ceremony system, and recognized that, at least in the short term, the issue of labels for the different marriages is unlikely to be resolved, there is a larger issue yet to consider. Substituting one unconstitutional marriage system for another is unwise and wasteful of time and resources. Before switching to a separation model, that model must be determined to be constitutional.

IV. Constitutionality

Allowing religious marriage to be commingled with civil marriage has created tension between people's religious beliefs and the laws of the state. Creating clearer boundaries between religious and civil marriage not only relieves that tension, but is more consistent with the jurisprudential history of the Establishment Clause. "[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"⁹² The intention was "not only to keep the states' hands out of religion, but to keep religion's hands off the state"⁹³ In *Engel v. Vitale*,⁹⁴ the Court stated that "[the Establishment Clause's] first and immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."⁹⁵ Such separation is vitally important because "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."⁹⁶ Thus, separating religious marriage from civil marriage is as much to protect the religious beliefs of those who disagree with the state as it is to protect the rights of equality and religious freedom from religious beliefs.

⁹² *Everson v. Bd. of Ed.* 330 U.S. 1, 16 (1947) citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁹³ *Everson*, 330 U.S. at 26-27 (Jackson, J., dissenting)

⁹⁴ 370 U.S. 421 (1962).

⁹⁵ *Id.* at 431.

⁹⁶ *Id.* at 432.

The Court's reliance on a theory of separation in Establishment Clause jurisprudence had been eroded or at least changed. In light of the Court's more recent decisions, some scholars believe that "the traditional theory of separation is giving way to a theory of equality (or more accurately, protection for religious choice)."⁹⁷ But, they think that whatever replaces separationism will still involve principles of equality or neutrality.⁹⁸ Others argue that separationism and neutrality are not inconsistent or incompatible, and thus the Court need not get rid of separation to use neutrality.⁹⁹ Still others argue "that neutrality, whether formal or substantive, does not exist."¹⁰⁰ With the principal of separation in question and scholars presenting so many different academic positions on the utility and longevity of neutrality with or without separation, it is difficult to know what arguments will influence the Court. Therefore, it is appropriate to evaluate the separation system under the same tests that were used to establish the current system's unconstitutionality.

Where the current system fails the four Establishment Clause tests, the separation of religious and civil marriage satisfies them all. Under the *Lemon* test, the separation satisfies the first prong because it removes any religious purpose from civil marriage.¹⁰¹ With no religious purpose, there remains only a secular purpose to the marriage. Separation also creates neither an enhancement nor a prohibition of religion. Religions are free to perform religious marriages wholly consistent with their doctrine and need not consider any governmental considerations such as whether enough time has passed since the license has been issued for the ceremony to be

⁹⁷ John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75, 75 (1997).

⁹⁸ *Id.*

⁹⁹ Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) (arguing that separation and neutrality are not inconsistent positions.)

¹⁰⁰ Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489 (2004).

¹⁰¹ The separation of religious and civil marriage also addresses the theoretical argument, discussed *infra* note 32, about secular purposes achieved through religious means because under this proposal, there would be separate civil and religious officiants for the different types of marriage.

performed. Making them totally separate also means there can be no entanglement. Thus, all three prongs of the *Lemon* test are satisfied by separating religious and civil marriage.

Similarly, separation satisfies the endorsement test. There can be no religious preference if civil marriages are wholly distinguished from religious marriage. No religion is preferred, because each can perform services consistent with its doctrine. It is possible to argue that those whose religious beliefs disagree with same-sex marriage would be made to feel like political outsiders if the state chooses to allow same-sex civil marriage. The governmental system does not, in fact, make them political outsiders. Under the separation doctrine, their beliefs are not challenged. They are entitled to deny religious marriage to anyone their beliefs command. Indeed, all religions are treated equally because each can establish and enforce religious marriage according to its own religious tenets. Furthermore, the government cannot endorse any particular religion when civil marriage is wholly secular.

In like manner, the separation satisfies the coercion test. As noted above, religious communities are not coerced to perform marriages they disagree with. A community may continue to deny a same-sex couple a religious marriage ceremony if it is against the community's beliefs. The converse is also true. The non-religious are not coerced into have a religious ceremony just to feel that their marriages are considered valid. Rather, their civil marriage is equal to any other civil marriage, without regard to whether they have also obtained a religious marriage. Should they so choose, a separate religious ceremony is always available. But, having separated the religious marriage service from the civil marriage service, couples may no longer feel a need to find a religious building and/or clergy member to perform the civil service. They are no longer coerced.

Finally, there is a question of tradition. To evaluate a separated marriage system under the tradition test would be illogical. The whole point is that it is a new system; something new by definition cannot be a tradition. Some have argued that tradition “cannot overpower rights so fundamental to an individual as marriage” and thus the test is inapplicable in such a context.¹⁰² Alternatively, and perhaps more persuasive, is the argument that changing marriage to remove outdated and unsubstantiated moral arguments, when they infringe on fundamental rights, is a tradition. The most analogous example is *Loving v. Virginia*.¹⁰³ In ruling that the Lovings’ interracial marriage was criminal, the trial judge wrote an opinion that included:

Almighty God created the races white, black, yellow, maley, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix. . . .¹⁰⁴

Resting the decision on such a religious basis was seen as appropriate. The U.S. had a long tradition of anti-miscegenation that was propagated by the belief that God made white people better than the others. No matter what moral and religious arguments were set forth by the opponents, the understanding of the equality of races that society was beginning to embrace, with strong help from the Fourteenth Amendment, required the elimination of anti-miscegenation laws.¹⁰⁵ Today, the decision in *Loving* seems ridiculously obvious. But 40 years ago when it was made, it was extremely controversial. In a similar manner, 40 years from now, marriage may be available to all, regardless of their sexual orientation, and that result will seem obvious. Marriage, as a legal concept, has changed as society has changed. The U.S. has a tradition, deeply embedded, of changing marriage when it is discovered that the current system infringes on fundamental rights. In *Loving*, it was the fundamental right of marriage. Here, it is the

¹⁰² Miller, *supra* note 35, at 2213-14.

¹⁰³ 388 U.S. 1, 12 (1967)

¹⁰⁴ *Id.* at 3.

¹⁰⁵ *Id.* at 11-12.

freedom from the establishment of religion. As such, the separation of civil marriage from religious marriage satisfies the tradition test.

Separating religious and civil marriage passes the neutrality test because it would treat all religions equally. The laws would be truly neutral toward religion because all religious aspects would be removed from civil marriage. Moreover, the separation of religious and civil marriage removes the *Larkin* problem of having given governmental functions over to religion. Separation is a simple solution that satisfies the requirements of all current tests under Establishment Clause jurisprudence and fixes the violations inherent in the current marriage system.

V. Potential Implications for Same-Sex Marriages

During the drafting and debate of the Constitution, Jefferson was in favor of the Establishment Clause because he “worried that individuals would defer to their church’s clergy and creed in a way that would render them subservient to a hierarchy and would deprive them of intellectual independence.”¹⁰⁶ This is precisely what has occurred in the debates over marriage. Rather than being led by the dictates of equality and tolerance found in the Constitution, people have pointed to their religious ideals as the reason why marriages laws should not be changed – whether the arguments related to divorce, interracial marriage, or same-sex marriage.¹⁰⁷ By separating civil marriage from religious marriage, moral arguments based upon religious beliefs continue to apply with full force on religious marriage, but no longer carry such great weight in the argument over who is entitled to civil marriage.¹⁰⁸

¹⁰⁶ PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 485 (2002).

¹⁰⁷ See, GRAFF, *supra* note 48, at 238-39.

¹⁰⁸ See generally, Wilson, *supra* note 3, at 564-65 (noting that “[t]he overwhelming majority of support for bans on same-sex civil marriage has come from religious believers, and the so-called ‘secular justifications’ for these bans are mere pretexts for religious beliefs that homosexuality, homosexuals, and same-sex couples are evil or sinful”); see also, Miller, *supra* note 35, at 2215-16 (noting that having civil unions and religious marriages protects the positions of both sides because “A civil union would confer all the benefits and protections that marriage has

Some might argue that having different civil and religious marital statuses would be confusing or unworkable. But, the U.S. already recognizes differences between civil and religious marriages, which provide support for the idea that a clearer separation between the two types of marriage is a tenable position.

Religions have long been able to refuse both to recognize civil marriages and divorces and to perform religious marriages. The Catholic Church maintains a position that civil divorce is not recognized as the dissolution of religious marriage. Thus, although civil law allows for divorce in all 50 states, Catholic churches are not required to recognize them. People who have not received an annulment or been widowed are not allowed to remarry in the church. But, the church's prohibition on religious remarriage does not prevent them from being able to obtain a civil marriage – or even a religious marriage outside the Catholic Church.¹⁰⁹ In similar fashion, couples can be civilly married but not have their marriage recognized under Orthodox Judaism.¹¹⁰ And under Islamic law, religious divorce is distinct from civil divorce because the religion has specific divorce procedures adherents must follow,¹¹¹ and Muslim women cannot marry non-Muslim men.¹¹² But again, the religion cannot prevent the couple from being civilly married or divorced. It is the delicate balance of the Free Exercise and Establishment Clauses

traditionally provided, but would not be limited to heterosexual couples. Of course, churches, synagogues, mosques, and other religious institutions could restrict marriage to heterosexual couples if they wish. Marriage, as a religious sacrament, would thus be preserved in whatever form a particular sect deems holy.”)

¹⁰⁹ See, e.g., *Hames v. Hames*, 316 A.2d 379, 386 (Conn. 1972); see also, Josh Friedes, *Can Same-Sex Marriages Coexist with Religion*, 38 NEW ENG. L. REV. 533, 537 (2004); Amelia Craig Cramer, *The Freedom to Marry Must Not be Denied*, ARIZONA ATTORNEY, Mar. 2004, at 14, n.1.

¹¹⁰ Friedes, *supra* note 109 at 537; Cramer, *supra* note 109 at 14, n.1. A popular culture reference for this position is the marriage of Tevye's youngest daughter Chava to someone outside of the faith in the musical *Fiddler on the Roof*.

¹¹¹ Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 413 (2000).

¹¹² Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction With Secular Courts*, 75 FORDHAM L. REV. 427, 460 (2006) citing Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, in ISLAMIC FAMILY LAW 147, 160 (Chibli Mallat & Jane Connors eds., 1990).

that allows religion to ignore civil marriage and divorce, but prevents the state from being bound by religious dictates.

If same-sex couples are given the right to civil marriage, it will not affect religious communities' ability to deny them a religious service. In Massachusetts where same-sex marriage already exists, the court made clear that the civil marriage right has no effect on religious marriage.¹¹³ That is because the Free Exercise provision of the First Amendment protects them.¹¹⁴ Because the Constitution allows for and the U.S. system already recognizes differences between civil and religious marriage and divorce, there is simply no evidence that allowing same-sex couples access to civil marriage would require religions to perform or even recognize such civil marriages.¹¹⁵

By removing religion from civil marriage, the separation helps clean up the same-sex marriage debate. “[B]egin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage.”¹¹⁶ Because the government creates civil marriage, civil marriage laws must conform to the federal and state constitutions. It becomes simpler to examine equal protection arguments when the foundations of people’s faiths are not wrapped up in the outcome. People find it difficult to listen to logical and legal arguments if they feel their core beliefs are being ignored or denied. “What may seem obvious and reasonable to those advocating gay rights often triggers a deep emotional and religious response in those opposed.”¹¹⁷ By separating religious and civil marriage, religious arguments are acknowledged,

¹¹³ *Opinion of the Justices*, 802 N.E.2d at 570 (“the State may not interfere . . . with the decision of any religion to refuse to perform religious marriages”).

¹¹⁴ U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”)

¹¹⁵ The separation of civil and religious marriage also does not prevent clergy being held accountable to their own denominations if they perform a same-sex marriage against religious policy; but that is an internal matter for each denomination. See, Niebuhr, *supra* note 22, at A20.

¹¹⁶ *Goodridge*, 798 N.E.2d at 954.

¹¹⁷ JOHNSON, *supra* note 15, at 199.

but can be recognized as applicable to religious marriage as opposed to civil marriage which is governed by the laws of the state. As eloquently stated by Rabbi Michael Namath,

[T]his national debate has nothing to do with religious wedding ceremonies. Regardless of what our politicians decide, some religions will continue to sanctify same-sex marriages, and some never will. Civil marriage must be differentiated from religious marriage - because religious marriage is an institution and a religious concept that must remain the domain of religion, but civil marriage is a set of legal protections and benefits that the government grants based on the possession of a civil marriage license. We do not believe that all religions should have to recognize same-sex religious marriage, but we do believe that the government must give equal protection to all its citizens and equal respect to all its religions.¹¹⁸

Once viewed as a purely secular institution, there is nothing within the structure and content of civil marriage that inherently prohibits access to same-sex couples.¹¹⁹ A change in the definition of civil marriage by removing the religious elements does not and cannot stop those who define religious marriage differently.¹²⁰ What it will do is prevent the exclusion of same-sex couples “from constitutional protection under the guise of ‘traditional’ values that are not necessarily held by all.”¹²¹ Indeed, the general public seems less opposed to granting same-sex couples the rights of marriage through civil unions. It is the marriage terminology that causes problems.¹²² Once the Vermont legislature adopted civil unions, “the political furor died down, showing that it is simply not as easy for interest groups to whip up popular opposition to civil unions as it is to gay marriage.”¹²³ If people are already willing to grant the benefits of civil

¹¹⁸ Rabbi Michael Namath, Statement Opposing Federal Marriage Amendment before The Coalition Against Discrimination in the Constitution (May 9, 2006), [http:// rac.org/Articles/index.cfm?id=1594&pge_prg_id=7864](http://rac.org/Articles/index.cfm?id=1594&pge_prg_id=7864).

¹¹⁹ JOHNSON, *supra* note 15, at 196.

¹²⁰ *Id.* at 187.

¹²¹ *Id.*

¹²² For instance, in 2006 when the New Jersey Supreme Court “ordered the Legislature to create a law providing the same rights and benefits to same-sex couples . . . [t]he Legislature responded by expanding the state’s existing domestic partnership rights, [but] stopped short of calling the unions marriage.” John Holl, *Civil Union Door Opens to Same-Sex Couples*, N.Y. TIMES, Feb. 25, 2007, at 14NJ2. And in Massachusetts, after the Massachusetts Supreme Court required same-sex couples be granted marriage rights in *Goodridge*, 798 N.E.2d 941, (Mass. 2003), the legislature attempted to create civil unions as an alternative. Although in Massachusetts, the courts held the difference in terminology was unequal. *Opinion of the Justices*, 802 N.E.2d at 570.

¹²³ JOHNSON, *supra* note 15, at 219.

marriage to same-sex couples without the label, clearly delineating religious marriage from civil marriage may allow for forward movement in this area.

The same-sex marriage debates also bring up discussions of “family values.” Those opposed generally state that being for family values means being against same-sex marriage, but there is little in the way of substantive argument as to why one cannot stand for both.¹²⁴ Advocates of same-sex marriage believe that expanding civil marriage to include same-sex couples reinforces society’s concept of marriage as the norm.¹²⁵ Denying same-sex couples the right to marry makes their families less secure by denying them financial and medical benefits, testamentary rights, and legal custody of children they are raising.¹²⁶ Given the stabilizing effects of marriage that “family values” proponents have claimed it to have, the circular argument of denying same-sex couples those stabilizing forces because they have been unable to “match the outcomes of opposite-sex married couples” who receive the stabilizing forces is “irrational” and “impenetrable.”¹²⁷

By removing religious beliefs from the debate, the question of family values may be able to focus on those values that are important for the state. Whether those focused on the morality and religious issues involved in same-sex relationships ever agree with the idea that same-sex marriage promotes family values, pragmatically, it solidifies and secures family units in ways beneficial to the states. A simple example: A same-sex couple that cannot marry has a child. One partner is the biological parent or the legal adoptive parent. The other partner is not allowed to adopt the child to become a legal parent. Should something happen to the legal parent, the

¹²⁴ See, Anna Dubrovsky, *Same-Sex Marriage: A Struggle for Equal Rights*, PITTSBURGH POST-GAZETTE, Sept. 10, 1996, at A1 (describing debates about the Defense of Marriage Act sponsored by Pennsylvania State Representative C. Allan Egolf, declaring that same-sex marriages are “repugnant to traditional family values”).

¹²⁵ JOHNSON, *supra* note 15, at 214.

¹²⁶ See, William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1432 (1993).

¹²⁷ See, Wilson, *supra* note 3, at 665.

child and surviving partner may be left without income and end up on state welfare. The surviving partner may not even be recognized as the child's parent and the child could lose both parents in one traumatic event. Recognition of the unit as a family would have provided the surviving partner and child with security by being recognized as a family. The child could not be removed because the surviving partner would be a legal parent, and inheritance rules and the availability of social security benefits would allow them to sustain themselves without state welfare. It is difficult to imagine a context in which allowing same-sex couples to marry is not in the state's best interests. There may be areas where this is not in the state's interest, but those issues will not even begin to appear while the debate is cluttered with objections based on religious morality. Removing religion from the debate can allow these issues and questions to reach the forefront and actually be debated.

The issue of same-sex marriage also raises questions about the free exercise of religion. As discussed above, allowing civil marriage will not interfere with a religion's right to deny religious marriage or refuse to recognize a civil marriage. Because some states allow for civil unions and civil marriage, other Free Exercise issues have arisen. In Vermont, the town clerks filed suit alleging that being required to issue civil union licenses created a substantial burden on their religious beliefs under the Vermont Constitution.¹²⁸ The Vermont Supreme Court held that there was no free exercise violation because the law allowed for the assistant town clerk to perform the duty and, thus, created no substantial burden.¹²⁹ In New Jersey, the Attorney General ruled that public officials may refuse to perform civil unions so long as they also refuse to perform marriages.¹³⁰ To date, it is estimated that of New Jersey's 566 mayors, 30 of have

¹²⁸ *Brady v. Dean*, 790 A.2d 428 (Vt. 2001).

¹²⁹ *Id.* at 434-35.

¹³⁰ Op. N.J. Att'y Gen. 1-2007, Jan. 10, 2007, available at <http://www.nj.gov/oag/newsreleases07/pr20070111a-letter.html>.

decided to refuse to perform both civil unions and civil marriages.¹³¹ Consistent with the Free Exercise clause, religious officials may refuse to solemnize civil unions while still performing marriages.¹³²

If civil marriage is separated from religious marriage, there is still a potential argument that granting civil marriage to same-sex couples infringes on the free exercise rights of those who feel it is immoral or wrong. Under *Employment Division v. Smith*,¹³³ the Court noted that “free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”¹³⁴ Thus, so long as there is a neutral law of general applicability, it is not required (although it is permissible) to make a free exercise exception.¹³⁵ A civil marriage law allowing people to marry regardless of their spouse’s gender would be neutral and generally applicable, thus no free exercise exception would be required under *Smith*. Of course, just as New Jersey gave its mayors the option of performing both marriages and civil unions, or performing neither, governments are allowed to make free exercise exceptions if they so choose; they just are not required to.¹³⁶

Given that the separation model has such potential for advancing same-sex marriage debates and ultimately receiving such rights, it is important to recognize that a separation model does not always result in same-sex marriage being granted. A strict use of the previously discussed German model for example is problematic. The largest set back of this model is that Germany uses civil unions and does not allow gay marriage. The German Constitution requires

¹³¹ *Warren Mayor Says First Civil Union Was His Last*, REC. N. N.J., Mar. 7, 2007, at A3.

¹³² Op. N.J. Att’y Gen. 1-2007, *supra* note 130.

¹³³ 494 U.S. 872 (1990).

¹³⁴ *Id.* at 879 (citations omitted).

¹³⁵ *Id.*

¹³⁶ *Id.*

that marriage enjoy special state protection.¹³⁷ “In 1979, the *Bundesverfassungsgericht* [the federal constitutional court] defined marriage in this sense as “the union of a man and a woman.”¹³⁸ Unless there is a Constitutional amendment, that provision prohibits same-sex marriages because they would violate the special state protection.¹³⁹ Legal challenges were brought, arguing “that allowing same-sex partnerships would damage the legal fundamentals of marriage.”¹⁴⁰ The court disagreed, finding that marriage’s legal foundation was unchanged by partnership law.¹⁴¹ As a result, in 2005, new partnership law abolished many of the remaining distinctions between marriage and partnerships, allowing for marital property, alimony, divorce, pension rights and step-child adoption.¹⁴² Thus, it was not the German separation of civil and religious marriage that resulted in rights for same-sex couples, but the ability to create partnerships that give the rights of marriage without the terminology. Because the label of marriage is so important,¹⁴³ the German model of separation is limited because it does not extend civil marriage to same-sex couples.¹⁴⁴

¹³⁷ Karin M. Linhart, *Decriminalization of Homosexuality and Its Effects on Family Rights: A German-US-American Comparison*, 6 GERMAN L.J. 943, 955 (2005), available at http://www.germanlawjournal.com/pdf/Vol106No06/PDF_Vol_06_No_06_Articles_943-966_Linhart.pdf.

¹³⁸ *Id.*

¹³⁹ *Id.* There are supporters of an American Constitutional Amendment to define marriage as between a man and a woman. Interestingly, in Germany the existence of such a definition did not stop it from granting Same-Sex Partnerships. *Id.* Moreover, on December 1, 2005, the Constitutional Court of South Africa ruled that even though the common law definition of marriage was a union of one man with one woman, it was inconsistent with the Constitution because same-sex couples were not permitted the same status and benefits as heterosexual couples. *Minister of Home Affairs v. Fourie & Bonthuys*, 102 (2005) available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>. Thus, a Constitutional Amendment is not necessarily protection from recognition of same-sex marriage.

¹⁴⁰ Linhart, *supra* note 137, at 956.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See discussion *infra* Part III.

¹⁴⁴ However, several countries with stronger religious ties have recognized same-sex marriage, including Spain in 2005. Other countries which recognize same-sex marriages include Canada, the Netherlands and Belgium. IGLA Europe, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country; Equal Marriage for Same-Sex Couples, <http://www.samesexmarriage.ca> (last visited April 5, 2007).

VI. Conclusion

Separation of religious and civil marriage could be difficult. Separating church and state usually is, especially considering how much influence religion has on many people's everyday life. One need only look at the history of law and religion in this country and the convoluted state of Establishment Clause and Free Exercise jurisprudence to see how difficult it has been to walk the line between the establishment of religion and limitations on the free exercise of religion. What often appears as establishment to one feels like free exercise to another. The tension between establishment and free exercise exists in the very language of the Constitution. But, regardless of how difficult finding the line is, the language requires the judiciary to find one. The current United States marriage system violates the First Amendment. There are potentially many solutions. This proposal is merely one which addresses and rectifies the Establishment Clause violation without creating Free Exercise issues. Change is rarely easy. But in this case, it is required.