

Disguising Religious Ideas in Secular Clothing:  
The Legitimation of Religious Ideology in the Same-Sex Marriage Debate

By

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# Introduction

Every weekday morning, religiosity fills the halls and classrooms of public schools across the country, as children and teens stand fixed before the flag and recite the Pledge of Allegiance. Its message is printed on our paper currency and has even found its way into our country's official motto. It is widely accepted as a part of American life. In many respects, religion's presence is inconspicuous and reasonably unobtrusive.

In general, these sorts of religious allusions are accommodated by Americans, and this insertion of religious rhetoric into everyday life falls short of surprising. It is no secret that religion informs the American identity, one that is deeply rooted in Christianity. And, since religiously guided adages appear to have only indirect influence on the nature of public policy, it is easy to overlook their significance. Perhaps the inclusion of "In God We Trust" on the dollar bill and the declaration that we are "one nation under God" represent harmless attempts to unify the country's citizens.

Nevertheless, it is important to keep these instances of religiosity in mind, especially considering the impact that religion has on political understandings of society. When examining the relationship between religious beliefs and legitimate political ideas, these cases look less like wordage hiccups or mishaps. Instead, they act as a point of access into the intricate world of connections between religion and politics.

However, recent dialogue might suggest that religiously driven ideology is more influential than one might expect. Religiously driven talk was even welcomed throughout the 2012 presidential campaign. In October 2012, Vice President Joe Biden and candidate Paul Ryan illuminated the distinct role that Christian values continue to play in the American political

arena. When asked to explain the function that his Catholic faith serves in regard to his view on abortion, Ryan candidly asserted that he fails to “see how a person can separate their public life from their private life or their faith.”<sup>1</sup>

Vice President Joe Biden responded to the same question, as he too is a lifelong devout Catholic. Although Biden recognized the Church’s stance on abortion, he was unwilling to hold the entirety of the American public to the standard set forth by the Catholic Church.<sup>2</sup> Interestingly enough, Biden intimated that the theoretical Romney-Ryan Supreme Court would have influenced the current state of abortion politics in the United States, insinuating that the Court may have attempted to redefine the current legal limits of abortion.

Paul Ryan’s comments are hardly anomalistic. Social conservatives and members of the Religious Right in particular take great pride in their firm positions on social issues, including the promotion of family values and the condemnation of abortion and gay rights. What is most striking about the Religious Right and other religiously motivated politicians is that their platform is carefully camouflaged in secular vestments. It becomes easy to dismiss the religious nature of these groups’ sentiments after they have been transformed into palatable political ideas.

The conversion of ideas from religious to politically feasible occurs through a process of legitimization. It is important to note that legitimization is not unique to the experience of actively religious politicians. Any number of ideas can move through this channel where legitimacy takes hold. It is my hope that examination of the series of actions that take place in order to produce a

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<sup>1</sup> Quinn, Sally. "Biden and Ryan debate abortion and role Catholicism plays in their positions." *Washington Post*, October 12, 2012. [http://www.washingtonpost.com/national/on-faith/biden-and-romney-debate-abortion-and-the-role-catholicism-plays-in-their-positions/2012/10/12/a420d200-1425-11e2-be82-c3411b7680a9\\_story.html](http://www.washingtonpost.com/national/on-faith/biden-and-romney-debate-abortion-and-the-role-catholicism-plays-in-their-positions/2012/10/12/a420d200-1425-11e2-be82-c3411b7680a9_story.html).

<sup>2</sup> Ibid.

passably valid argument will yield valuable insight into the inner facets of the legitimation process.

A topic of contention for the religiously inclined is gay marriage. Instead of spouting overtly religious claims that justify their positions on gay marriage, politicians and other influential members of the public defend their stances using a number of strategies. Whether they cite empirical evidence that suggests homosexuals are ill equipped to raise children or that same-sex marriage will destroy traditional family life, the anti-gay movement finds grounding in secular resources.<sup>3</sup>

This paper attempts to unpack the justifications of position against same-sex marriage in the hopes of revealing the process through which anti-gay rhetoric becomes acceptable. By examining the legal and political arguments against same-sex marriage, we can come to a fuller understanding of how and why ideas become legitimate. The findings will not only be applicable to the anti-gay movement, but to a number of relevant social and political issues, perhaps including abortion and even tax reform. By discovering the ways in which ideas are legitimated, we can come to a deeper appreciation of the mobilization and counter-mobilization efforts that advance and resist, respectively, new understandings of previously established social concepts.

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<sup>3</sup> Mitt Romney for President. "Values: Marriage, Family, Life." <http://www.mittromney.com/issues/values>.

# Chapter 1: Constitutional Legitimation

## I. A Review of the Literature

It is no secret that religious institutions affect the progression of the same-sex marriage movement. In fact, religiously affiliated organizations are visible and active in the private lives of Americans, as the majority of Americans associate themselves with some organized faith group.<sup>4</sup> However, religion's influence spreads far beyond dinner table political discussions and grounds itself firmly in public discourse over same-sex marriage. Politicians and social activists alike allude to religion on a regular basis. In this way, religiosity is deeply involved in the mainstream political sphere. Moreover, overtly religious organizations, as well as organizations loosely affiliated with religion, have tremendous impact on the proceedings of the American legal system. Religion's influence is palpable in the legal sphere, as religious organizations actively participate in court cases, oftentimes submitting amicus briefs on behalf of particular issues. Same-sex marriage is no exception, as numerous organizations offer various arguments in support of their opposition to same-sex marriage.

In order to break down the movement through which anti-gay sentiments gain momentum and, more importantly, credibility, it is essential to first focus attention on theories of legitimation. Ideas and values (or in this case, religious beliefs) not previously considered valid can become legitimate through a process of legitimation. The legitimation process can take on a series of forms, each with distinct characteristics. By becoming familiar with the literature on

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<sup>4</sup> Vedantam, Shankar, and Steve Inskeep. "What We Say About Our Religion, And What We Do." *NPR*, October 24, 2012. <http://www.npr.org/2012/10/24/163527979/what-we-say-about-religion-and-what-we-do>.

idea legitimization, we will build an analytical framework through which the anti-gay movement and the bases of its legal and political assertions can be assessed.

### **Law and Politics: A Symbiotic Relationship**

As a stepping stone into the world of legal and political legitimization, it is useful to consider the realm of constitutional politics. It may be helpful to note, since many pieces of scholarship concerning legitimization speak directly to the Constitution, that there oftentimes exists a hazy distinction between law and politics. This mutually dependent relationship is captured by the idea of “constitutional culture.” Constitutional culture embodies the association between the people and law that, in the United States, is characterized by an allegiance to the Constitution.<sup>5</sup> It is through constitutional culture that citizens accept a constitution as law as opposed to just words written on a page.<sup>6</sup> In other words, constitutional culture is the cement that binds all citizens to a common set of laws. In this way, since organizations intending to impact both the legal and political spheres build arguments on a common understanding of constitutional culture, parallels between the two spheres will be apparent.

Constitutional culture also refers to the realm of public life where citizens and lawmakers interact and communicate.<sup>7</sup> More specifically, constitutional culture “preserves and perpetually destabilizes the distinction between politics and law by providing citizens and officials the resources to question and to defend the legitimacy of government, institutions of civil society, and the Constitution itself”<sup>8</sup> and draws on “the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s

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<sup>5</sup> Mazzone, Jason. “The Creation of a Constitutional Culture.” *Tulsa Law Review* (2005): 672.

<sup>6</sup> Mazzone, Jason. “The Creation of a Constitutional Culture.” *Tulsa Law Review* (2005): 672.

<sup>7</sup> Siegel, Reva B. “Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA.” *California Law Review* (2006): 1325.

<sup>8</sup> *Ibid.*, p. 1327

meaning.”<sup>9</sup> When it comes to establishing constitutional law, there is an implicit understanding, within the constitutional culture, of the appropriate functions served by both the general public and legal officials. The public is aware that they alone cannot make or interpret laws; that power is left to the legislative and judicial branches of government, respectively. However, just because the public does not participate in a direct democratic system that allows citizens to vote on specific pieces of legislation does not mean that the public, and the public’s politics, is entirely cut off from the legislative process. This understanding of constitutional culture is evident in the presence of *amici curiae*, friends of the court who are not directly associated with parties of the case. Their input is evidence of a partly open line of communication between members of the public and actors in the judicial system.

To maintain public involvement in the legislative process, a procedural course of action, in the form of public elections, ensures that the public has indirect influence over the construction of laws. For Dahl, “the right to participate in governmental decisions by casting a vote, the right to be represented, and the right of an organized opposition to appeal for votes against the government in elections”<sup>10</sup> serve as fundamental aspects of our democratic system. It is through the electoral process that politics interacts with law to form legislation that is informed by the public. By casting a vote, members of the public essentially communicate policy preferences to legislators. Representatives react accordingly by creating and supporting legislation that expresses the wants of the constituents in their district. This is because Representatives can only “maximize their preference for reelection as opposed to electoral

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<sup>9</sup> Ibid., p.1325

<sup>10</sup> In *Political Oppositions in Western Democracies*, Robert A. Dahl, xiii. N.p.: Yale University, 1966.



ouster” if they follow the guidelines set by their constituents. These circumstances mark the interconnected relationship between law and politics.<sup>11</sup>

But legitimation does not only occur through the literal acts of making and interpreting law, as “popular deliberation about constitutional questions guides officials in enforcing the Constitution and promotes citizen attachment to the Constitution.”<sup>12</sup> Public discourse draws attention to matters that are especially relevant and important to the public, sending a message to legal officials concerning the state of the public’s attitudes. As public sentiment informs officials’ actions, the public feels a greater sense of ownership and loyalty towards the Constitution. This, in turn, creates an environment that is conducive to communally shaping constitutional interpretations, as opposed to encouraging the “estrangement of a normatively divided polity” that might otherwise occur if the public is left out of discussion.<sup>13</sup>

As these interactions between members of the general public and legal officials occur, law and politics become virtually indistinguishable. A cyclical or give-and-take relationship forms between law and politics, as law guides politics and vice versa. Upon establishing this mutually dependent relationship between law and politics, literature that speaks to Constitutional legitimation will inform the formation of ideas in the legal and political spheres.

### **A Segue into Legal and Political Legitimation Processes**

Since our analyses and their accompanying conclusions will largely be based on legal legitimation, it is appropriate to begin by discussing the foundational basis of our legal system.

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<sup>11</sup> Epstein, Lee, and Jack Knight. "Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae." In *Supreme Court Decision-Making*, Cornell W. Clayton and Howard Gillman, 215. Chicago: The University of Chicago Press, 1999.

<sup>12</sup> Siegel, Reva B. "Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA." *California Law Review* (2006): 1328.

<sup>13</sup> Ibid., p.1328

Many scholars propose that laws in the United States, and in countries across the world, are built upon the theory of legal ‘positivism.’ Legal positivism suggests that law does not inherently address issues of injustice, failures of democracy, and the like.<sup>14</sup> Instead, law is guided by societal influences that may choose to emphasize a lack of social justice, accountability in democratic systems, etc. Along these lines, the legalization of same-sex marriage might be considered a social response to the growing acceptance of homosexuality in mainstream society.

For our analysis, one might consider the presence of a boundary between society and law, but it is best to “conceive of this boundary as wholly or largely porous,”<sup>15</sup> as social changes tend to permeate legal communities. Law is not “completely insular,”<sup>16</sup> as it consistently changes according to parameters set by social, political, and historical context. As such, following the guidelines of positivism, law is considered to be a social construct, so elites and members of the general public have a great deal of influence over the formation of laws. This means that religious beliefs held by members of the public can and do seep into the legal system. This relationship between law and its surroundings is relevant and applicable throughout legitimating processes and allows us to understand the dynamics through which ideas are legitimated.

As previously mentioned, “constitutional culture” encompasses this sharing of ideas between society and the legal community. Under the assumptions of positivism, the two entities are consistently working alongside one another to produce some sort of legal or political output.<sup>17</sup> This same exchange or interaction is present in the idea of “ideological drift,” which can be directly applied to our understanding of the Constitution and idea legitimation. According

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<sup>14</sup> Green, Leslie, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>>.

<sup>15</sup> Friedman, Lawrence. “Law, Lawyers, and Popular Culture.” *The Yale Law Journal* (1989): 1580.

<sup>16</sup> *Ibid.*, p. 1581

<sup>17</sup> Siegel, Reva B. "Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA." *California Law Review* (2006): 1338.

to Jack Balkin, law can and should be thought of as a social construction that is a product of ideological drift. Through the process of ideological drift, we can “imagine the content of the idea or symbol changing as the context surrounding it changes. It is to see the content and meaning of the idea as inextricably intertwined with the context in which it appears.”<sup>18</sup> In other words, legal and political actors are not necessarily changing the original idea in question. Instead, they are reinterpreting the idea given the social and political context. And, since the social and political contexts are consistently subject to change, so too are the interpretations of ideas.

To strengthen this point, Balkin notes that “internal norms of good legal argument are a moving target.”<sup>19</sup> This suggests that the credibility of an argument changes relative to the political, social, and historical environment. This notion conveys the idea that a legal and constitutional norm is dynamic and subject to continuous change.<sup>20</sup> As norms change based on the cultural context, so do the exchanges between the public and legal officials, potentially encouraging the expansion or contraction of acceptable constitutional interpretations.

In the case of same-sex marriage, ideological drift occurs when, in the view of social conservatives, progressives reinterpret the definition of marriage. The actual definition remains arguably intact (marriage is still a legally recognized union between two individuals), but its application changes under the new social context that is more accepting of homosexuality. In reaction to the seemingly extreme application of the idea of marriage to homosexual couples,

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<sup>18</sup> Balkin, Jack M. "Ideological Drift and the Struggle Over Meaning." *Connecticut Law Review* 25, no. 869 (1993).871.

<sup>19</sup> Balkin, Jack M. "Constitutional Hardball and Constitutional Crises." *QLR* 26 (2007): 579.

<sup>20</sup> Balkin, Jack M. "Ideological Drift and the Struggle Over Meaning." *Connecticut Law Review* 25, no. 869 (1993).870.

religious and social conservatives respond by requesting a return to the ‘original’ understanding of marriage.

In this vein, as gay rights advocacy groups become increasingly visible and accepted in mainstream society, their influence affects the public’s conception of marriage. The public’s openness to advancing advocacy objectives is communicated through the constitutional culture to legal officials. The Constitution could then be viewed in light of the changing public attitude toward gay rights. Since the public is more accepting of gay marriage, legal officials could respond by implementing legislation that supports the efforts of gay rights advocacy groups. The change in the cultural context shapes the legal-political interactions which inform what ideas are considered legitimate.

When discussing the process of legal legitimation, some also argue that adjudication, established by justices, sets precedents for understanding and later interpreting law. However, Duncan Kennedy suggests that law is in fact guided by “ideological choice carried on in a discourse with a strong convention denying choice,” as justices and legal representatives unintentionally bring their own political biases into the Court.<sup>21</sup> The legal system allows for this openness of interpretation since “legal rules contain gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, or unconscious ideological projects.”<sup>22</sup> Leniency of interpretation is also made possible by the Framers’ inclusion of constitutional provisions that are purposely “vague.”<sup>23</sup>

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<sup>21</sup> Kennedy, Duncan. “A Critique of Adjudication: Fin de Siecle.” Harvard University Press (1998): 4.

<sup>22</sup> Ibid., p. 14

<sup>23</sup> Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.

Additionally, it is accepted among scholars that justices favor policy initiatives that resemble their own preferences.<sup>24</sup> Scholars do not suggest that justices drop their own political identifications as soon as they become members of the Court.<sup>25</sup> Justices are not disconnected from the world that they live in. They are very much in tune with the state of national politics, as portrayed by the media and other information outlets, and understand that it is valuable to respect the force of public opinion.<sup>26</sup> Further, information provided by amici curiae “helps the justices to formulate more accurate beliefs about the context in which they are operating.”<sup>27</sup>

This characterization of justices can help us to understand the influence of religious organizations in the legal and political spheres, especially when religious organizations present amicus briefs to inform the court. Like justices who carry their own political biases onto the bench, religious organizations enter the legal and political arenas with pre-established religious biases. Regardless of the religious group that an organization is associated with, objectivity might be tainted by religious dispositions. This is especially dangerous in the legal sphere. Religious organizations offering amicus briefs must engage in secular argumentation; however, like justices who unintentionally stray from impartial rulings, religious organizations may be inadvertently focused on their own religious interests.

Members of a constituency can also legitimate ideas through public elections and ballot propositions. However, for the purposes of this discussion, ballot propositions are most relevant.

Ballot propositions put power into the hands of the public, as voters have direct influence on the

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<sup>24</sup> Epstein, Lee, and Jack Knight. "Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae." In *Supreme Court Decision-Making*, Cornell W. Clayton and Howard Gillman, 215. Chicago: The University of Chicago Press, 1999.

<sup>25</sup> Ibid., p. 220

<sup>26</sup> Friedman, Barry. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus, and Giroux, 2009. p. 17.

<sup>27</sup> Epstein, Lee, and Jack Knight. "Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae." In *Supreme Court Decision-Making*, Cornell W. Clayton and Howard Gillman, 222. Chicago: The University of Chicago Press, 1999.

passage of legislation. In this way, the voices of the public legitimate ideas and make them into law. In an attempt to legitimize opposition to same-sex marriage, a coalition of religiously affiliated organizations proposed Proposition 8, a legal initiative to ban same-sex marriage and solidify the definition of traditional marriage.

Additionally, the concept of “constitutional hardball” can help us to describe a situation in which elected elites have greater authority over idea legitimation. Constitutional hardball “involves attempts to change the constitutional order or to extend and further entrench it.”<sup>28</sup> It is important to first note that constitutional hardball speaks to any *attempt* to modify constitutional understandings and norms, whether it be through the legislature or the Court. Since it is only an attempt, it does not have to be successful, meaning that the interpretation of the issue at hand does not necessarily need to change. For example, if a group of Representatives proposes a law that defines marriage as being a commitment between any two consenting adults, the law does not have to pass in order for constitutional hardball to occur. The mere suggestion of defining marriage in this way will affect the interpretation of marriage, even though it may not be legally defined under these terms. Not all proposed laws pass, but that does not make the propositions themselves any less influential.<sup>29</sup>

Moreover, social movements have profound impact on the development of legitimacy. Social movements, in effect, “reshape constitutional common sense, moving the boundaries of what is plausible and implausible in the world of constitutional interpretation, what is a thinkable legal argument and what is constitutionally ‘off the wall.’”<sup>30</sup> In a sense, ideas that are initially

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<sup>28</sup> Balkin, Jack M. "Constitutional Hardball and Constitutional Crises." *QLR* 26 (2007): 590.

<sup>29</sup> Siegel, Reva B. "Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA." *California Law Review* (2006): 1328.

<sup>30</sup> Balkin, Jack. "How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure." *Public Law Working Paper* 112 (2005).p. 28.

beyond the possibility of acceptance, or even discussion, can become imaginable through the work of social movements or some other appeal to the general public.

In order for a political idea to hold its ground and gain legitimacy, the social movement that is proposing the idea must adhere to two conditions. More specifically, the proposition should fall in line with the *consent* and *public value* conditions.<sup>31</sup> The consent condition forces one to speak about the new interpretation (in this case a constitutional interpretation) in light of a shared and respected constitutional past. This encourages the use of persuasion as a tactic, as opposed to coercion. Similarly, the public value condition ensures that proponents of the new interpretation are suggesting this interpretation with respect to “vindicating principles and memories of a shared tradition.”<sup>32</sup> Advocates for the new understanding of a constitutional argument have to appeal to the elite and public sense of a common past and present. Once a common tradition is established, the two sides of an argument react to one another in a mobilization-counter mobilization effort. Through this process, each side internalizes aspects of the opposing argument and makes the necessary adjustments in an effort to streamline their own argument. This process is applicable to the anti-gay marriage movement, as opponents to same-sex marriage rely on a commonly understood traditional conception of marriage to advance their arguments.

However, it is important to note that it is not always easy to agree upon a shared past and present that is necessary to move onto the mobilization-counter mobilization process. This leads us to the discussion of a method that is entailed to legitimate a stance or idea. Facts or information can be manipulated in order to present an argument or idea in a desirable way. In the

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<sup>31</sup> Siegel, Reva B. "Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA." *California Law Review* (2006): 1352.

<sup>32</sup> *Ibid.*, p. 1358

realm of constitutional politics, it is not uncommon for arguments based on historical fact to be disputed. This is because facts can be interpreted and used in different ways, depending on the perspective of the user. On numerous occasions, justices are in disagreement over the original intentions of the Framers which, in large part, are based upon historical understandings of events.<sup>33</sup> If historical facts are not interpreted uniformly, it opens the door for numerous interpretations of the same event or information. If our shared tradition is based on facts, actors from opposing sides of an argument may utilize facts in ways that enhance their respective arguments.

Furthermore, elites and members of the public can choose to ignore entire aspects of a given issue. In respect to the Second Amendment, Levinson suggests that the liberal-left's "lack of response to the Second Amendment was a statement in itself. They didn't talk about it because they didn't want to have to deal with the counterargument that they might lose to."<sup>34</sup> By refusing to acknowledge the existence of a disagreeable aspect of the Constitution, leftist elites were able to avoid the threat of the opposition while maintaining their stance that the Second Amendment is somewhat insignificant relative to other amendments. This phenomenon is related to the same-sex marriage movement in that both sides of the argument propose different facts to support their claims.

In another technique that enhances idea legitimation, elites depend almost entirely on the public's attitudes in order to accelerate a particular objective. In some instances, elites make use

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<sup>33</sup> George, Robert P. "Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution." *Loy. LAL Rev.* 32 (1998): 29.

<sup>34</sup> Levinson, Sanford. The Embarrassing Second Amendment. *The Yale Law Journal*, Vol. 99, No. 3 (Dec., 1989) p.642.



of “moral politics.”<sup>35</sup> By separating ideas or people into absolute measures of ‘good’ and ‘bad,’ or ‘us’ versus ‘them,’ elites can easily manipulate the public into accepting an otherwise demeaning or belittling argument.<sup>36</sup> If the public can be persuaded to view an issue through a moral lens, it can then vote through that lens. Collections of people in certain constituencies can legitimate an idea by making it law. For example, states that support the maintenance of traditional marriage and refuse to acknowledge same-sex marriages are, in effect, legitimizing anti-gay rhetoric.

## Conclusion

The processes of constitutional legitimation help us to build a framework to understand the legitimation processes in both the legal and political spheres. We can apply these criteria to the same-sex marriage debate and track the legitimation of ideas found in the mainstream legal and political arenas. Through the examination of the anti-gay marriage movement and rhetoric, we will come to a fuller understanding of the specific processes that the movement uses in order to legitimize its claims.

## II. Methods

Following the 2012 election cycle, gay Americans are certainly breathing a sigh of relief. Not only was President Obama, who is sympathetic to their equal rights cause, reelected, but provisions recognizing same-sex marriage were passed. However, the fight for equality is far from over. In more states than not, same-sex marriage is banned. There is no question that some of the resistance to marriage equality is the result of the political and legal legitimation of anti-

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<sup>35</sup> James A. Morone, *Hellfire Nation: The Politics of Sin in American History*. Yale University Press.(2003)p. 3.

<sup>36</sup> Eskridge Jr, William N. "Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion." *Fla. L. Rev.* 57 (2005): 1020.

gay assertions, like claiming that homosexuality is unnatural. It can be argued that some of these are grounded in religious beliefs.

To come to a more complete understanding of the political and legal legitimization of religious ideas as they pertain to same-sex marriage, we will begin by analyzing legal documentation of the same-sex marriage movement. By looking at a case presented to the California State Supreme Court, *In re Marriage Cases*, we will find a wide range of qualitative data that explains the supporting arguments of the anti-gay movement. The case is a compilation of six appeals to the California Supreme Court in which couples fought to legalize same-sex marriage. Fifteen amicus briefs were filed on behalf of the opposition to same-sex marriage. We will follow the arguments presented in each brief and pay special attention to the sources of those arguments. This will enable us to compile a group of organizations and scholars who have worked to defeat the progressive acceptance of homosexuality, as well as gain a clearer understanding of the arguments at hand. *In re Marriage Cases* will help us to characterize legal argumentation.

In order to evaluate the participants and arguments involved in the political sphere, a thorough examination of California's Proposition 8 campaign will be conducted. A number of groups invested time and financial resources into advancing the statewide ban on same-sex marriage. Many of these institutes are religiously affiliated, but most supplement their biblical evidence with the use of empirical data which support their claims about the dangers of homosexuality. These groups include Focus on the Family, National Organization for Marriage, American Family Association, and Family Research Institute, among others. Some of these groups aim at advancing a Christian agenda, as combating homosexuality falls in line with traditional Christian doctrine. However, not every group is devoted strictly to protecting

traditional marriage. Focus on the Family, for example, also provides resources to families that are struggling with divorce or just simply want to incorporate biblical values into everyday life. Regardless of the groups' plurality of objectives, these groups seek to support and actively participate in the fight against same-sex marriage.

More important than the main objective of a particular interest group is the research that the group cites as supporting evidence to its claims. Some groups rely on research from institutions or individuals, while others conduct independent research projects. Analysis of the empirical studies presented by these interest groups will provide us with a deeper understanding of the anti-gay movement's arguments. Additionally, by taking a closer look at the studies themselves, we might find that the study was inherently biased or that the conclusions drawn by the researcher were flawed. These types of findings would damage the credibility of anti-gay claims, and perhaps delegitimize the argument.

Tracing the anti-gay argument back to its place of origin will help us to determine who is encouraging the movement and why. Understanding the sources of legitimacy behind the anti-gay marriage movement will shed light on the true scope of the movement. Perhaps we will find that empirical data supporting anti-gay rhetoric comes from only a handful of sources, limiting the findings' applicability to a broader population. Or, the movement might be fueled by a small minority of scholars, public figures, and interests groups, again placing boundaries on anti-gay advocates' claims that the movement encompasses the sentiments of the general American public. Also, understanding the tactics used by the movement will aid gay rights advocates in developing strategies to advance their cause. Examination of relevant court cases and political initiatives will create a clearer picture of the true depth of influence of religiously affiliated organizations.

### III. Chapter Outline

The preceding chapter described the significance of understanding the anti-gay movement, and further, how anti-gay sentiments have become legitimate in the eyes of some members of the American public. This issue falls in line with similar questions about political and legal legitimation, as discussed by scholars like Reva Siegel, Jack Balkin, and Sanford Levinson. In outlining the literature on political and legal legitimation, it is clear that law and politics are involved in a mutually dependent relationship, as one informs or guides the other. This relationship speaks to the considerable involvement of intellectuals, political elites, and members of the general society in the formation of political and legal ideas. This notion is relevant to the rise of opposition to same-sex marriage, which is informed by members of the elite sphere and the public. Additionally, the first chapter outlined the methodology that guides this research.

Chapters 2 and 3 both address legal and political legitimation, respectively. Chapter 2 focuses directly on legal legitimation as it pertains to the issue of same-sex marriage. By examining *In re Marriage Cases* and amicus briefs in particular, we identify the actors involved, as well as any relevant religious connections. Further, the presented arguments are characterized as religious or secular, and the sources of these arguments are examined. Chapter 3 follows a similar structure, but examines the evidence provided by organizations involved in the Proposition 8 campaign. Participating organizations are identified and any relevant religious affiliations are addressed.

Chapter 4 summarizes the research findings and relates them to the relevant literature. In doing so, we gain a better understanding of the limits of argumentation in the legal and political

spheres. Chapter 5 concludes the discussion and describes the implications of the findings, as well as suggestions for further research.

## Chapter 2: Legal Legitimation- *In re Marriage Cases*

### I. Introduction

When determining the role that religious organizations play in the same-sex marriage debate, *In re Marriage Cases* gives a clear view of the apparent intersection between religion and law. In this case, a clear majority of the organizations offering amicus briefs on behalf of the defendants (those who oppose same-sex marriage) are religiously affiliated. However, due to the establishment clause and a tradition of the separation of church and state in the United States, it is quite unlikely that arguments suggesting purely religious intention would be considered legitimate in a court of law. This case is no exception, as the arguments presented in opposition to same-sex marriage are entirely secular. However, in order to preserve the wall of separation between church and state, it is important to identify religious organizations that have influence on legislation and the extended legal environment. That being said, *In re Marriage Cases* provides insight into the identity of these actors, their respective arguments, and the influence they have on our legal system.

As thirteen of the fifteen organizations that offered amicus briefs in opposition to same-sex marriage are religiously affiliated, it is evident that a variety of secular arguments can indeed be proposed on behalf of religious organizations. A number of briefs rest on the assertion that same-sex marriage inevitably destroys the institution of traditional marriage, thereby endangering the welfare of children. Others argue that the court displays an overextension of authority by ruling in a same-sex marriage case. In this view, laws concerning marriage are better left in the hands of the public. A number of briefs also suggest that because marriage

predates legal systems, it is not in the power of the government to regulate a traditionally established institution. Also a popular argument is the refutation of the comparison of same-sex marriage to interracial marriage. Because the nature of the apparent discrimination towards same-sex couples is entirely different from that which encompassed interracial marriage, it is argued that the two scenarios are dissimilar. Finally, the legalization of same-sex marriage is said to endanger the freedoms of religious institutions that would potentially be forced to recognize same-sex unions which they deem inappropriate and invalid.

These strings of arguments touch upon similar secular principles. First, the welfare of children is of great interest to the state, therefore legitimizing state intervention in the establishment of same-sex marriage. Second, unrestricted state power to regulate social institutions threatens a democratic system that receives its power from the electorate. State power must be controlled and monitored to avoid the creation of a government-centered society. Third, it is critical that the state be mindful of the types of discrimination that are present in the legal sphere. The perception of inequality does not justify state disturbance of a traditionally established institution. Lastly, protection of the free exercise clause is vital to the maintenance of a truly democratic society. These concerns are important to the protection of a healthy democracy, and so it is not surprising that they would be acceptable in a court of law. The following section will outline the details of *In re Marriage Cases* in an attempt to understand the content of secular arguments presented by opponents to same-sex marriage and further solidify the presence of religious institutions in the legal sphere.

## II. The Case in Question

Over the last decade, California has served as one of many battlegrounds for the dispute over same-sex marriage. Fueling the debate and sparking a passionate fight for marriage equality was then-mayor of San Francisco, Gavin Newsom, who in 2004 ordered city officials to issue marriage licenses to thousands of same-sex couples.<sup>37</sup> Newsom's actions hardly went unnoticed. San Francisco found itself in the national spotlight as the marriage equality spree sent the country into a whirlwind of political activity. Americans struggled to come to agreement on the proper place of same-sex marriage in private and public life. While some states, like Massachusetts, responded by taking progressive steps toward establishing marriage equality, others solidified their stance on traditional marriage by banning same-sex marriage.<sup>38</sup>

California was no exception to this trend, as the state followed the example set by the more conservative end of the movement. Within months of issuing the first marriage licenses, the state Supreme Court issued a stay on the case, urging San Francisco officials to cease the issuance of marriage licenses to same-sex couples until further notice.<sup>39</sup> After careful consideration by the court, the justices decided that Newsom violated state law by issuing marriage licenses to same-sex couples.<sup>40</sup> All licenses issued to same-sex couples were subsequently rendered null and void.<sup>41</sup>

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<sup>37</sup> "Mayor defends same-sex marriages." *CNN Justice*, February 22, 2004. [http://articles.cnn.com/2004-02-22/justice/same.sex\\_1\\_marriage-licenses-couples-political-career?\\_s=PM:LAW](http://articles.cnn.com/2004-02-22/justice/same.sex_1_marriage-licenses-couples-political-career?_s=PM:LAW).

<sup>38</sup> Marech, Rona. "The Battle over Same-Sex Marriage: One Year Later." *San Francisco Chronicle*, February 12, 2005. <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-One-Year-Later-2731442.php>.

<sup>39</sup> "Same-Sex Marriage Timeline." *San Francisco Chronicle*, May 18, 2008. <http://www.sfgate.com/news/article/SAME-SEX-MARRIAGE-TIMELINE-3214219.php>.

<sup>40</sup> *Ibid.*

<sup>41</sup> Marech, Rona. "The Battle over Same-Sex Marriage: One Year Later." *San Francisco Chronicle*, February 12, 2005. <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-One-Year-Later-2731442.php>.



However, the fight against marriage discrimination was far from over. In 2008, *In re Marriage Cases* was brought before the Supreme Court of California. A consolidation of six appeals, the case challenged the constitutionality of the same-sex marriage ban. The plaintiffs, including the city of San Francisco, gay and lesbian couples, as well as gay and civil rights advocacy groups, asserted that the California Attorney General acted unlawfully by depriving same-sex couples the right to engage in legally recognized marital relationships.<sup>42</sup> The defendants included various figures in opposition to gay marriage, including the state Attorney General, the Governor, the Proposition 22 Legal Defense and Education Fund, and the Campaign for California Families.<sup>43</sup> Chief Justice Ronald M. George presided over the hearings.

On May 15, 2008, the court ruled in favor of same-sex couples, striking down a ban on same-sex marriage.<sup>44</sup> The court held that statutes concerning sexual orientation are subject to strict scrutiny, and more specifically, suspect classification. Since the state could not provide sufficient evidence that restricting marriage to only opposite-sex couples served a direct interest of the state, the court concluded that provisions excluding same-sex couples from the institution of civil marriage are unconstitutional.<sup>45</sup>

### **III. The Arguments**

#### **Proponents of Same-Sex Marriage**

Through a number of arguments, plaintiffs successfully articulated their support for same-sex marriage. Assertions are substantiated primarily by both the equal protection clause

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<sup>42</sup>*In re Marriage Cases*. California Supreme Court. 15 May 2008. *California Courts*. Judicial Council of California, n.d. Web. 7 Feb. 2013. <<http://www.courts.ca.gov/documents/S147999.pdf>>.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

and considerations of strict scrutiny (suspect classification, more specifically). First, they argue that the right to marry, although not explicitly afforded to same-sex couples in the state Constitution, was previously established in court decisions that upheld the protection of the right to privacy (in *People v. Belous* and *Hill v. National Collegiate Athletic Assn.*, specifically).<sup>46</sup> Also, in citing the decision of *Perez v. Sharp*, plaintiffs compare the current case to *Perez* which challenged the constitutionality of restricting interracial marriage. In this way, the plaintiffs suggest that placing restrictions on gender is equivalent to forbidding the marriage of people of different races, both of which should be protected by the right to privacy.<sup>47</sup>

Additionally, plaintiffs respond to the assertion that allowing same-sex couples to marry would ultimately redefine the institution of marriage. Instead of creating an entirely new constitutional right, proponents of same-sex marriage merely aim to establish legal recognition for “the right of an individual to enter into a consensual relationship with another person,” both of whom might wish to start a family together.<sup>48</sup> In fact, the plaintiffs elaborate on a point made by the opposition, that allowing same-sex couples to enter into the institution of marriage would undoubtedly destroy the institution and negatively impact both children and the family. The defendants cite John Rawls, who expands on the idea that family is at the very core of society, but also suggests that “no particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is arranged to fulfill these tasks effectively and does not run afoul of other political values.”<sup>49</sup> Just as Rawls establishes the importance of family, he suggests that the specific characteristics of an effective family structure are not to be disputed by the government.

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<sup>46</sup> Ibid., p. 49

<sup>47</sup> Ibid., p. 52

<sup>48</sup> Ibid., p. 53

<sup>49</sup> Ibid., p. 79 from Rawls, John. *Justice as Fairness: A Restatement*. 2001.

Finally, and potentially of most importance, plaintiffs acknowledge the importance of raising children in two-parent homes, a point that is oftentimes raised by opponents to same-sex marriage. However, branching away from the traditional conception of a two-parent household, the plaintiffs argue that married same-sex couples can provide sufficient stability and support to children.<sup>50</sup> Further, the proponents distance themselves from the argument that marriage is established for the sole purpose of having and raising children, acknowledging that not all opposite-sex couples have or want children.<sup>51</sup>

### **Opponents of Same-Sex Marriage**

The opponents to same-sex marriage begin their case by explaining their resistance to same-sex marriage. The Attorney General notes that state statutes, excluding same-sex couples from marriage, do not violate the rights of homosexuals since “all of the personal and dignity interests that have traditionally informed the right to marry have been given to same-sex couples through the Domestic Partner Act.”<sup>52</sup> In effect, the only substantive difference between a domestic partnership and a marriage is the title.

Secondly, defendants argue that it is not in the place of the judicial system to intervene in an issue that has been clearly rejected by the public.<sup>53</sup> In this view, any initiative to settle disputes over same-sex marriage should be handled through the appropriate democratic processes, namely legislative action or referendum. From the defendant’s perspective, the court

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<sup>50</sup> Ibid., p. 78

<sup>51</sup> Ibid., p. 74

<sup>52</sup> Ibid., p. 80

<sup>53</sup> Concurring and Dissenting Opinion by Baxter, J., p. 1. *In re Marriage Cases*. California Supreme Court. 15 May 2008. *California Courts*. Judicial Council of California, n.d. Web. 7 Feb. 2013. <<http://www.courts.ca.gov/documents/S147999.pdf>>.

is forcing personal social preferences on the public in reaction to blatant public opposition to same-sex marriage.<sup>54</sup>

The defendants continue by challenging the plaintiffs' assertion that the right of same-sex couples to marry is protected by the state Constitution. According to the defendants, the original California Constitution, "effective from the moment of statehood, evidenced an assumption that marriage was between partners of the opposite sex."<sup>55</sup> Aside from state statute, precedent and tradition have established that marriage is in fact a union between a man and a woman. Further, nationwide consensus verifies the historical understanding of marriage as a relationship between a man and a woman, and California is even more progressive than most states by recognizing the rights of same-sex couples to enter into domestic partnerships.<sup>56</sup>

Similarly, defendants address the plaintiffs' insistence that a parallel exists between *Perez v. Sharp* and the case in question. Although the racial restrictions placed upon marriage were subsequently shattered, there is nothing in the ruling of *Perez* that "suggests an intent to alter the definition of marriage as a union of opposite-sex partners."<sup>57</sup> Moreover, *Perez* spoke to the unconstitutionality of limiting access to marriages based on inherited unchangeable characteristics, like race. Defendants suggest that the origin of homosexuality is unclear, and it has not yet been determined if it is hereditary.

It is clear that the opponents of same-sex marriage ground their arguments in secular claims. These claims, and the supporters of these claims, will be examined in greater detail in the next section.

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<sup>54</sup> Ibid., p. 5

<sup>55</sup> Ibid., p. 8

<sup>56</sup> Ibid., p. 11

<sup>57</sup> Ibid., p. 16

## IV. The Players: Friends of the Court

Amicus briefs provide valuable insight into the arguments proposed by the opponents to same-sex marriage. In this case, thorough examination of the amicus briefs filed in support of the defendants gives us a better understanding of the process through which secular arguments against gay marriage are constructed. It is important to note that religious ties were identified in thirteen of fifteen briefs filed in favor of the defendants. Upon identifying secular arguments, we will discuss the sources of these arguments and any relevant ties to religion.

### Religiously Connected Amici

#### *African-American Pastors of California*

African-American Pastors of California, represented by Senior Pastors of congregations from across the state, discredits the plaintiffs' claim that denying members of the same gender the right to marry corresponds to forbidding interracial marriage. They consider this comparison to be highly offensive, and assert that "to hold that the male-female definition of marriage is just as legally and morally repugnant as laws forbidding interracial marriage is unsupported by the law, the facts, the long and tortured history of institutionalized racial discrimination in this country, and by common sense."<sup>58</sup> The brief cites numerous cases and statutes to support its stance on the inaccuracy of the interracial marriage analogy, claiming that various states have mistakenly accepted this analogy in court. The falsities of the analogy are best summarized in the opinion of the New York Court of Appeals in *Hernandez v. Robles*, which states that "Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely

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<sup>58</sup> African-American Pastors of California. "Brief *Amici Curiae* in Support of Respondents," p. 24. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/African-American\\_Pastors\\_in\\_CA\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/African-American_Pastors_in_CA_Amicus_Curiae_Brief.pdf).

on ignorance and prejudice against homosexuals.”<sup>59</sup> By addressing a technicality, namely the duration and nature of the discrimination, the analogy seems to lose its credibility, and can therefore not be used to claim a breach of the equal protection clause.

African-American Pastors of California also put forth the claim that accepting this comparison to interracial marriage will ultimately inhibit religious freedoms. Religious organizations that wish to preach about the immoral nature of homosexuality will be pressured by society to renounce their beliefs.<sup>60</sup> However, the brief offers little scholarship that speaks directly to the alleged interruption of religious rights upon state recognition of same-sex marriage. Instead, the scholarship cited actually highlights the importance of recognizing and accepting same-sex couples in society. These arguments are then manipulated by African-American Pastors of California, who make it appear as though this stressed openness to same-sex marriage will be met with an evenly matched fight to oppress religious organizations.

African-American Pastors of California openly admit that their interest in the case, at least to an extent, is religiously motivated. In their opening statements, they explain that their “sermons and outreach ministries affirm the sanctity of marriage, and each of us teaches that marriage is, and must remain exclusively, the union of one man and one woman.”<sup>61</sup> However, they are likely aware that these overtly religious accounts of justification will not hold in a court of law. Instead, they justify their stance on same-sex marriage by exposing the falsehoods of the interracial marriage comparison. By taking a respected secular argument, that discrimination on the basis of race is unacceptable and unlawful, and establishing that same-sex marriage is not

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<sup>59</sup> Ibid., p. 8

<sup>60</sup> Ibid., p. 21

<sup>61</sup> Ibid., p. 1

comparable, the African-American Pastors of California formulate an opinion that is not at all related to religion.

### *American Center for Law & Justice*

The American Center for Law & Justice (ACLJ) is an organization that seeks to promote freedom and liberty to people in the United States and the international community. They provide legal services to those affected by human rights injustices and litigate on behalf of “God-given and inalienable rights that must be protected.”<sup>62</sup> Further, ACLJ provides its services free of charge as it is “dependent upon God and the resources He provides”<sup>63</sup> to allow the organization to function.

Interestingly, ACLJ does not openly address the organization’s founding on its website. Pat Robertson, an active member of the Christian Coalition, is responsible for establishing the organization.<sup>64</sup> It is also worth noting that the organization’s Chief Counsel, Jay Sekulow, has been a vocal advocate for religious liberties for decades and his ties to religion stretch slightly beyond the realm of protecting religious freedom. Sekulow received Bachelors and Masters Degrees from Mercer University, an institution known for “affirming values that arise from a Judeo-Christian understanding of the world,”<sup>65</sup> and a Ph. D. from Regent University, “one of the nation’s leading academic centers for Christian thought and action.”<sup>66</sup> In 2005, he was named

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<sup>62</sup>American Center for Law & Justice. Accessed February 19, 2013. <http://aclj.org/our-mission>.

<sup>63</sup> Ibid.

<sup>64</sup> The Official Site of Pat Robertson. Accessed February 19, 2013. <http://www.patrobertson.com/Biography/index.asp>

<sup>65</sup> Mercer University. Accessed February 19, 2013. <http://about.mercer.edu/>.

<sup>66</sup> Regent University. Accessed February 19, 2013. [http://www.regent.edu/about\\_us/](http://www.regent.edu/about_us/).

one of Time Magazine's "25 Most Influential Evangelicals in America."<sup>67</sup> These findings are suspect, especially considering ACLJ's unwavering commitment to religious liberty.

ACLJ bases its arguments on the notion that family is the foundation of society. As such, the law must protect the family; law can accomplish this through the defense of traditional marriage. By allowing same-sex couples to take part in what has been historically recognized as a union exclusive to a man and a woman, the entire institution of marriage is put at risk.<sup>68</sup> Along these lines, including same-sex couples in marriage will mask the importance of biological parents raising their own child together.<sup>69</sup> Further, legalizing same-sex marriage sends the message that there is no need for children to be raised by parents of opposite sexes, devaluing the roles that both male and female parents play in raising a child.<sup>70</sup> As their final assertion, ACLJ argues that opening marriage to same-sex couples only encourages future manipulation of the understanding of a marital union, paving the way for legal recognition of polygamy and potentially even long-term friendships.<sup>71</sup>

In line with the claim that same-sex marriage will destroy the institution of traditional marriage, a study conducted in the Netherlands concluded that the legalization of gay marriage was actually correlated to deteriorating numbers of heterosexual marriages performed in the country.<sup>72</sup> This study serves to solidify the claim that opposite-sex marriage is in danger.

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<sup>67</sup>"The 25 Most Influential Evangelicals in America." *Time Magazine*, February 7, 2005.

[http://www.time.com/time/specials/packages/article/0,28804,1993235\\_1993243\\_1993317,00.html](http://www.time.com/time/specials/packages/article/0,28804,1993235_1993243_1993317,00.html).

<sup>68</sup> American Center for Law & Justice. "Brief *Amicus Curiae* of The American Center for Law & Justice In Support of Respondent Proposition 22 Legal Defense and Education Fund," p. 2. Accessed February 19, 2013.

[http://www.courts.ca.gov/documents/Amer\\_Ctr\\_Law\\_Justice\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Amer_Ctr_Law_Justice_Amicus_Curiae_Brief.pdf).

<sup>69</sup> *Ibid.*, p. 10

<sup>70</sup> *Ibid.*, p. 12

<sup>71</sup> *Ibid.*, p. 14

<sup>72</sup> Letter of Professors. van Mourik, M., A. Nuytinck, R. Kuiper, J. Van Loon PhD, & H. Wels PhD (August 8, 2004), in American Center for Law & Justice. "Brief *Amicus Curiae* of The American Center for Law & Justice In Support of Respondent Proposition 22 Legal Defense and Education Fund," p. 5. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Amer\\_Ctr\\_Law\\_Justice\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Amer_Ctr_Law_Justice_Amicus_Curiae_Brief.pdf).



Additionally, the arguments related to the wellbeing of children are largely supported by data that discuss the effects of raising children in fatherless or single parent households. The cited studies propose that “family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage.”<sup>73</sup> Various empirical studies performed by other cited sources support this assertion. Others claim that removing procreation as the object of marriage will lead to “nothing more than sex as a purely sensory experience,”<sup>74</sup> further detaching meaningful family relationships from the center of society.

ACLJ pushes an anti-gay marriage agenda through claims that speak to the health of marriage as an institution, and subsequently, the wellbeing of children. Children are undoubtedly an interest of the state, and regulating an institution to promote their health and welfare seems to be a noble cause. ACLJ has successfully disguised what could be religiously motivated opposition to same-sex marriage by speaking to an issue that is largely free from debate: ensuring the safety of our children.

### *Becket Fund*

The Becket Fund is a non-profit organization that supports religious freedom of expression through legal and educational endeavors. The organization was founded by Kevin J.

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<sup>73</sup>Moore, et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?" *Child Trends Research Brief* (June 2002). <http://www.childtrends.org/files/marriagerb602.pdf>, in American Center for Law & Justice. "Brief *Amicus Curiae* of The American Center for Law & Justice In Support of Respondent Proposition 22 Legal Defense and Education Fund," p. 11. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Amer\\_Ctr\\_Law\\_Justice\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Amer_Ctr_Law_Justice_Amicus_Curiae_Brief.pdf).

<sup>74</sup>Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage* (2003-2004) 16 Regent U. L. Rev. 12, in American Center for Law & Justice. "Brief *Amicus Curiae* of The American Center for Law & Justice In Support of Respondent Proposition 22 Legal Defense and Education Fund," p. 18. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Amer\\_Ctr\\_Law\\_Justice\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Amer_Ctr_Law_Justice_Amicus_Curiae_Brief.pdf).

“Seamus” Hasson, who is also on the Board of Directors for the Bible Literacy Project.<sup>75</sup> This initiative aims to “encourage and facilitate the academic study of the Bible in public schools.”<sup>76</sup> This may be mere coincidence, but it is worth noting that there is a religious foundation to the work that is done by the Becket Fund.

In relation to the case at hand, the Becket Fund claims that permitting same-sex marriage will effectively destroy religious freedoms. The general argument outlines the idea that legalization of same-sex marriage will spark a streak of civil lawsuits against religious institutions that do not recognize same-sex marriages as valid, and therefore do not afford the same benefits to same-sex couples that would normally be extended to traditional couples.<sup>77</sup>

The brief cites a number of court cases and statutes that support its claim that religious freedoms could be disturbed. Consequently, the Becket Fund denies marriage rights to same-sex couples by suggesting that its own fundamental rights to religious freedom are at risk. No mention of religious values is necessary to make their point clear. By theorizing about the negative impact that same-sex marriage could have on constitutionally guaranteed religious freedoms, the Fund transforms what could be religiously driven motives to a secular claim.

### *California Ethnic Religious Organization for Marriage*

California Ethnic Religious Organization for Marriage (CEROM) is a group of religious organizations and ethnic churches that have unified in support of the defense of traditional marriage. CEROM proposes that the question of most importance is not whether same-sex

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<sup>75</sup> Becket Fund. "Our Founder." <http://www.becketfund.org/our-founder/>.

<sup>76</sup> Bible Literacy Project. Accessed February 19, 2013. <http://www.bibleliteracy.org/site/Case/index.htm>.

<sup>77</sup> Becket Fund. "Application and Proposed Brief *Amicus Curiae* of The Best Fund for Religious Liberty in Support of State Defendants," pg. 9. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Becket\\_Fund\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Becket_Fund_Amicus_Curiae_Brief.pdf).

couples can be married. In fact, they argue that same-sex couples can marry in their own private ceremonies. Rather, the question at hand is whether the state or individuals who do not support same-sex marriage should be forced to recognize a same-sex marriage.<sup>78</sup>

If the state legally recognizes same-sex marriage, a union of individuals considered outside the traditional conception of marriage, marriage will be effectively stripped of its historical understanding. Diluting marriage down to a mere legal contract between individuals puts excessive power at the hands of the state, as the state will theoretically have the authority to define and enforce other types of relationships between individuals.<sup>79</sup>

CEROM substantiates these claims with scholarship that confirms the historical place of marriage in society. Marriage is historically recognized as a union between one man and one woman not only in the United States, but worldwide. This conception of marriage has transcended political boundaries and is quite universal.<sup>80</sup> By utilizing these arguments that are legitimately supported, CEROM turns an argument against same-sex marriage into an issue of state power. The role that government intervention should play in everyday life is debated consistently, and CEROM has found its way into that argument, while defending the continuation of traditional marriage.

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<sup>78</sup> California Ethnic Religious Organizations for Marriage. “Brief Amicus Curiae of California Ethnic Religious Organizations for Marriage (“CEROM”) In Support of Appellees,” p. 4. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Cal\\_Ethnic\\_Religious\\_Organization\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Cal_Ethnic_Religious_Organization_Amicus_Brief.pdf)

<sup>79</sup> DeCoste, F.C. and Richard Garnett, in California Ethnic Religious Organizations for Marriage. “Brief Amicus Curiae of California Ethnic Religious Organizations for Marriage (“CEROM”) In Support of Appellees,” p. 8. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Cal\\_Ethnic\\_Religious\\_Organization\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Cal_Ethnic_Religious_Organization_Amicus_Brief.pdf).

<sup>80</sup> Lubin, Peter and Dwight Duncan, in California Ethnic Religious Organizations for Marriage. “Brief Amicus Curiae of California Ethnic Religious Organizations for Marriage (“CEROM”) In Support of Appellees,” p. 6. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Cal\\_Ethnic\\_Religious\\_Organization\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Cal_Ethnic_Religious_Organization_Amicus_Brief.pdf).

### *Church of Jesus Christ of Latter-day Saints*

The Church of Jesus Christ of Latter-day Saints (hereafter, CJCLS) begins by directly addressing advocates of same-sex marriage. CJCLS confronts the idea that opposition to same-sex marriage is inherently religious. Instead, CJCLS affirms that challenges to same-sex marriage are clearly and firmly rooted in “historical and sociological facts” about the meaning of marriage throughout time.<sup>81</sup> In this vein, CJCLS defends marriage as a union between a man and a woman, the traditional relationship that serves the purpose of procreation.

CJCLS maintains that decisions concerning same-sex marriage should be left to the public which has consistently confirmed belief in the traditional characterization of marriage. Exclusion of same-sex couples from the institution of marriage is simply the result of the democratic process at work. It is not in the authority of the court to redefine marriage, especially considering the intensity with which the public has defended traditional marriage.

Proponents of same-sex marriage argue that court intervention is necessary, since strict scrutiny applies to the case. However, CJCLS claims that strict scrutiny is not applicable since the gay and lesbian communities have profound access to the political process and do not experience invidious discrimination.

Also, laws permitting same-sex marriage, which redefine the original institution of marriage, are “adult-centric”<sup>82</sup> and focus solely on satisfying the needs of individuals as opposed

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<sup>81</sup> Church of Jesus Christ of Latter-day Saints. “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California,” footnote on p. 3. Accessed February 19, 2013.  
<http://www.courts.ca.gov/documents/calcatconfamicus.pdf>.

<sup>82</sup> Institute for American Values. Marriage and the Law: A Statement of Principles,(2006), p. 18, in Church of Jesus Christ of Latter-day Saints. “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California,” footnote on p. 11. Accessed February 19, 2013.  
<http://www.courts.ca.gov/documents/calcatconfamicus.pdf>.

to families. This can lead to the destruction of the family unit, a major societal concern. Following this argument, CJCLS holds that state intervention in the protection of traditional marriage is necessary in order to promote and protect the welfare of children.

These arguments are validated through a number of mediums. First, the claim that the court is exercising unlawful authority is defended by the mention of numerous states statutes which ban same-sex marriage.<sup>83</sup> Then, evidence is provided to support the notion that legalizing same-sex marriage will destroy traditional marriage. Numerous scholars are cited who confirm the importance of maintaining traditional family structures.<sup>84</sup> Also, scholars challenge the validity of studies that conclude that same-sex parents are as effective as opposite-sex parents.<sup>85</sup> Problems with sampling pools and experimental controls may have skewed results, causing researchers to draw biased or inaccurate conclusions.

CJCLS deflects attention from the issue at hand by making same-sex marriage about overextension of judicial power and respect for the democratic process. Further, by appealing to the welfare of children, CJCLS touches upon an issue that is of valid state interest. However, CJCLS even states within its brief that “because parenting by same-sex couples is relatively new, social science has not determined exactly how it differs from parenting by two biological parents.”<sup>86</sup> They continue on, stating that despite the lack of research on the effectiveness of same-sex parents, children are best suited when raised by both biological parents. By addressing

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<sup>83</sup> Church of Jesus Christ of Latter-day Saints. “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California,” footnote on p. 22 lists all states that have amended their constitutions or enacted statutes to defend traditional marriage. Accessed February 19, 2013.  
<http://www.courts.ca.gov/documents/calcatconfamicus.pdf>.

<sup>84</sup> Blankenhorn, Cere, Doherty, Moore et al., Manning & Lamb, The Witherspoon Institute in “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California”

<sup>85</sup> Lerner & Nagai, Stacey, in “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California”

<sup>86</sup> Church of Jesus Christ of Latter-day Saints. “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California,” p. 36. Accessed February 19, 2013.  
<http://www.courts.ca.gov/documents/calcatconfamicus.pdf>.

issues that are of valid concern to the public-drawing attention to an interruption of the democratic process and potential threats to child welfare- CJCLS has spun a secular argument out of potentially religious threads.

*Coverdale et al.*

John Coverdale, a law professor at Seton Hall, is a noted member of Opus Dei.<sup>87</sup> Opus Dei, a Catholic organization, encourages lay members of the church to serve God through all aspects of life.<sup>88</sup> It is possible, but not absolutely certain, that Coverdale has some interest in advancing the teachings of Catholic doctrine.

However, the argument put forth by Coverdale et al. is distinct from those of the other briefs, as they insist that interstate conflicts should be of utmost consideration when arguing against same-sex marriage. They suggest that extending marriage to same-sex couples will create unnecessary confusion over the rights of married same-sex couples that choose to cross the borders of California.<sup>89</sup> After all, the definition of marriage in California, if the court were to support the legalization of marriage, would not match the almost universal definition of marriage applied throughout the United States. Instead, they propose that an entirely separate name should be afforded to same-sex unions. By identifying same-sex unions as “domestic partnerships,” couples recognize the limitations of their unions beyond state borders.

Coverdale et al. distance themselves from other arguments against same-sex marriage. In fact, it appears that Coverdale et al. are actually working in the interest of same-sex couples. The

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<sup>87</sup> Opus Dei. Accessed February 19, 2013. <http://www.opusdei.us/art.php?p=11401>.

<sup>88</sup> Ibid.

<sup>89</sup> Coverdale et al. “Brief of Amici Curiae of John Coverdale, Scott Fitzgibbon, Martin R. Gardner, Kris W. Kobach, Earl M. Maltz, Laurence C. Nolan, and John Randall Trahan, Professors of Law in Support of Appellees,” p.12-13. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Coverdale\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Coverdale_Amicus_Curiae_Brief.pdf).

argument that designating same-sex unions as marriages will only create excess confusion over the status of these legal relationships appears to be highly practical and reasonable, especially considering that Coverdale et al. are in support of domestic partnerships. Although this argument is entirely secular in nature, it is also possible that Coverdale et al. are religiously motivated. They can try to protect the integrity of traditional marriage by supporting domestic partnerships. It may be that the argument for interstate conflict just appears to be far more inherently secular than others that have been proposed.

### *Jews Offering New Alternatives to Homosexuality*<sup>90</sup>

Jews Offering New Alternatives to Homosexuality (JONAH) claims that the origins of homosexuality are not universally accepted. The definitions of homosexuality, and the characteristics that define someone as a homosexual, vary greatly throughout the scholarly community. As a result, strict scrutiny cannot apply to the case of same-sex marriage. Unlike race or gender, both of which are identified without tremendous difficulty, homosexuality does not fit a distinct set of characteristics. As such, homosexuality cannot meet the criteria that qualify a statute to be subject to strict scrutiny. Additionally, JONAH claims that human sexuality is dynamic and subject to change throughout an individual's life. Therefore, same-sex couples must make the conscious decision to adopt a homosexual lifestyle.

JONAH supports these claims with empirical research that suggests that there is no definitive link between homosexuality and heredity.<sup>91</sup> Since there is a lack of undisputed

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<sup>90</sup>Jews Offering New Alternatives to Homosexuality has since changed its name. The organization is now referred to as Jews Offering New Alternatives for Healing.

<sup>91</sup> Bailey et al., Bearmann & Bruckner, Friedman and Downey, Jakobsen & Pelligrini Peplau & Garnets, Veniegas & Conley, in Jews Offering New Alternatives to Homosexuality. "Brief of Amici Curiae Jews Offering New Alternatives to Homosexuality ("JONAH"), Parents and Friends of Ex-Gays & Gays ("PFOX"), and Evergreen International, in Support of Proposition 22 Legal Defense and Education Fund." Accessed

evidence that homosexuality is innate or inherited, same-sex couples cannot argue that they are experiencing discrimination based on biologically determined characteristics. Also, JONAH makes use of an interview with David Benkof, a journalist and author who claims to have renounced his homosexuality for a heterosexual lifestyle.<sup>92</sup> This reinforces JONAH's point that homosexuality is a choice and is therefore not subject to strict scrutiny.

Questioning the nature of homosexuality deflects attention away from JONAH's opposition to same-sex marriage. By suggesting that homosexuality is a lifestyle choice as opposed to a biologically determined characteristic, it can be deduced that homosexuals are not excluded from the institution of marriage. Instead, through intensive psychological therapy, homosexuals can learn to live as heterosexuals and have open access to the institution of marriage.

*Kmiec et al.*

Douglas Kmiec, a law professor at Pepperdine University, argues that same-sex couples are not at all excluded from the institution of marriage, and that current statutes do not discriminate against same-sex couples.<sup>93</sup> This is because homosexuals have equal access to the institution of marriage. Unfortunately, entrance into the institution of marriage is dependent upon

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February 19, 2013.

[http://www.courts.ca.gov/documents/Jews\\_Offering\\_New\\_Alternatives\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Jews_Offering_New_Alternatives_Amicus_Curiae_Brief.pdf).

<sup>92</sup> Institute for Marriage and Public Policy. Email interview by Maggie Gallagher with David Benkof, (June 20, 2007), in *Jews Offering New Alternatives to Homosexuality*. "Brief of Amici Curiae Jews Offering New Alternatives to Homosexuality ("JONAH"), Parents and Friends of Ex-Gays & Gays ("PFOX"), and Evergreen International, in Support of Proposition 22 Legal Defense and Education Fund," p. 14. Accessed February 19, 2013.

<sup>93</sup> Pepperdine University is a Christian university affiliated with the Churches of Christ. It seeks to "pursue the very highest academic standards within a context that celebrates and extends spiritual and ethical ideals of the Christian faith." See: Pepperdine University. "About Pepperdine: Pepperdine at a Glance." Accessed March 9, 2013. <http://www.pepperdine.edu/about/pepperdine/>



criterion not preferred by homosexuals.<sup>94</sup> Any homosexual individual can marry, but that individual would have to marry someone of the opposite gender. In this way, homosexuals are not discriminated against as a class, but rather as individuals who choose to engage in a particular lifestyle. There is no evidence of preferential treatment towards men or women, since both genders have access to traditional marriage and neither is allowed to enter into same-sex marriages. Therefore, excluding same-sex couples from the institution of marriage does not violate the equal protection clause. Further, it is vital that traditional marriage be protected, since it solidifies relationships between mothers and fathers of children, which is of utmost importance to society.

Kmiec et al. make use of state statutes to substantiate the claim that the equal protection clause is not violated.<sup>95</sup> By addressing same-sex marriage as an issue that pertains to equal protection, the argument becomes less about same-sex marriage and more about maintaining accurate portrayals of equal protection violations. Kmiec et al. also cite studies that describe the negative impact that fatherless homes have on the development of children.<sup>96</sup> Like other friends of the court, Kmiec et al. are religiously affiliated, but makes secular claims by addressing issues that are pertinent to the state.

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<sup>94</sup> Kmiec et al., “Brief Amici Curiae of Douglas W. Kmiec, Helen M. Alvare, George W. Dent, Jr., Stephen G. Calabresi; Steven B. Presser; and Lynn D. Wardle, Professors of Law in Support of the State of California,” p. 5. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Kmiec\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Kmiec_Amicus_Brief.pdf).

<sup>95</sup> Ibid., p. 3,11

<sup>96</sup> Valerie King, McLanahan, et al., Wendy D. Manning & Pamela J. Smock, in Kmiec et al., “Brief Amici Curiae of Douglas W. Kmiec, Helen M. Alvare, George W. Dent, Jr., Stephen G. Calabresi; Steven B. Presser; and Lynn D. Wardle, Professors of Law in Support of the State of California.” Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Kmiec\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Kmiec_Amicus_Brief.pdf).

## *Knights of Columbus*

The Knights of Columbus, a Catholic fraternal organization, works to promote charitable causes through a Christian framework.<sup>97</sup> As an organization founded on religious pretenses, it is probable that the Knights of Columbus is motivated, to an extent, by religious beliefs. The Knights of Columbus bases its argument on the notion that the case in question is not a sex discrimination case. This is because men and women are treated identically under the law; neither men nor women can marry a member of the same sex.<sup>98</sup> As a result, “laws that impose the same limitations on men and women cannot be said to constitute sex discrimination.”<sup>99</sup> Also, same-sex couples can partake in domestic partnerships that afford them the same rights and benefits as marriage. By allowing domestic partnerships but refraining from legalizing same-sex marriage, the state merely attempts to preserve the historically understood definition of marriage.<sup>100</sup>

These claims are supported by scholarship that suggests that homosexuality is a modern creation and is not historically prevalent.<sup>101</sup> If this is the case, then same-sex couples should not be treated identically to opposite-sex couples. By drawing on a history of marriage, the argument focuses on the importance of maintaining universal conceptions of marriage. This is how the Knights of Columbus can justify their stance on same-sex marriage without referring specifically to religious doctrine.

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<sup>97</sup> Knights of Columbus. Accessed February 19, 2013. <http://www.kofc.org/un/en/about/activities/index.html>.

<sup>98</sup> Knights of Columbus. “Brief *Amicus Curiae* of the Knights of Columbus in Support of the State Defendants,” p. 3. Accessed February 19, 2013. <http://www.courts.ca.gov/documents/knightscolamicusbrief.pdf>.

<sup>99</sup> *Ibid.*, p. 13

<sup>100</sup> *Ibid.*, p. 33

<sup>101</sup> J. D’Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 121 (2d ed, 1997), in Knights of Columbus. “Brief *Amicus Curiae* of the Knights of Columbus in Support of the State Defendants.” Accessed February 19, 2013. <http://www.courts.ca.gov/documents/knightscolamicusbrief.pdf>.

## *National Legal Foundation*

Although it might appear that the National Legal Foundation (NLF) is free of religious ties, upon closer examination, it is revealed that it is considered a “Christian public interest law firm.”<sup>102</sup> As such, it is especially interested in cases of religious liberty. NLF argues that, by definition, same-sex marriage does not exist. Two people of the same sex cannot marry simply because it would violate the very definition of marriage which is widely recognized as a union between a man and a woman. NLF’s argument rests on a chemistry analogy, stating that “just as the term “salt” is given to the specific molecular union NaCl, the term “marriage” is given to the specific social union of one man and one woman.”<sup>103</sup>

NLF relies on dictionary definitions to support the claim that a marriage can only be a union between a man and a woman.<sup>104</sup> An article coauthored by Jay Sekulow, the Chief Counsel for the American Center for Law & Justice, is cited to uphold the “table salt” analogy. By comparing marriage to a tangible chemical union, NLF makes the argument against same-sex marriage almost logical. The analogy serves to separate distinctions of semantics from meaningful differentiations between definitions. By doing so, NLF transforms what could be a religious argument into one that is considered reasonably secular.

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<sup>102</sup> National Legal Foundation. Accessed February 19, 2013. <http://www.nlf.net/>

<sup>103</sup> National Legal Foundation. “*Amicus Curiae* Brief of the National Legal Foundation in Support of Defendants-Appellees,” p. 6. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Nat\\_Legal\\_Foundation\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Nat_Legal_Foundation_Amicus_Curiae_Brief.pdf).

<sup>104</sup> *Ibid.*, p. 4

## *Pacific Justice Institute*

The Pacific Justice Institute (PJI) is a legal defense organization dedicated to protecting religious liberties.<sup>105</sup> Although it is not directly associated with any religious organizations, PJI does admit to being financially supported by donations, some coming from churches. Further, the president and founder, Brad Dacus, has been honorably recognized by Christian academic institutions and is noted as a participant in a debate against the president of “Americans United for Separation of Church and State.”<sup>106</sup> Also, Chief Counsel Kevin Snider is said to have “served on the Commission On Accountability & Policy For Religious Organizations for the Evangelical Council for Financial Accountability” and currently “serves on the Editorial Advisory Board with Christianity Today’s Church Management Team.”<sup>107</sup>

In the amicus brief, PJI argues that the City of San Francisco had no standing in filing suit against the state of California.<sup>108</sup> PJI suggests that the same-sex marriage debate be left to the public which previously established opposition against same-sex marriage. In this way, PJI offers an opinion that targets an overextension of authority on behalf of the City of San Francisco. This is a secular claim and it is easy to see how such a claim would be acceptable in court.

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<sup>105</sup> Pacific Justice Institute. Accessed February 19, 2013. <http://www.pacificjustice.org/index.html>

<sup>106</sup> Pacific Justice Foundation. “Brad Dacus-President.” Accessed February 19, 2013. <http://www.pacificjustice.org/brad-dacus---president.html>.

<sup>107</sup> Pacific Justice Foundation. “Kevin Snider- Chief Counsel.” Accessed February 19, 2013. <http://www.pacificjustice.org/kevin-snider---chief-counsel.html>.

<sup>108</sup> Pacific Justice Foundation. “Amici Brief of Pacific Justice Institute and Capital Resource Institute, in Support of Petitioners Proposition 22 Legal Defense and Education Fund and Campaign for California Families Regarding Party Standing of Petitioners and Respondent City and County of San Francisco,” p. 4. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Pac\\_Justice\\_Institute\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Pac_Justice_Institute_Amicus_Curiae_Brief.pdf).

## *United Families International*

United Families International denies affiliation with any religious organization, but declares in its mission statement that it promotes family values through “respect for existing law, political structure, *religion* and cultural norms” (italics added for emphasis).<sup>109</sup> United Families International utilizes similar arguments to those of other friends of the court. First, United Families International values traditional marriage and holds that marriage lays the foundation for healthy families and society. By allowing same-sex couples to enter into the institution of marriage, society will deemphasize the importance of keeping biological parents and children connected.<sup>110</sup> Similarly, it is in the best interest of children to be raised by both of their biological parents. United Families International also claims that religious doctrine has a place in guiding civil marriage since the religious conception of marriage predates law.<sup>111</sup> As a result, the state does not have the authority to redefine marriage.

United Families International cites studies that refer to the dangers of raising children in fatherless homes.<sup>112</sup> Since data support the notion that children benefit most from being raised by both biological parents, it seems reasonable that the state claim an interest in regulating marriage. United Families International effectively uses data, highlighting the advantages of raising children in a loving environment with both biological parents, to advance the argument

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<sup>109</sup>United Families International. Accessed February 19, 2013. <http://unitedfamilies.org/default.asp?contentID=28>.

<sup>110</sup>United Families International. “*Amici Curiae* Brief of United Families International, Family Watch International, and Family Leader Foundation, in Support of Respondent State of California,” p. 11-12. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/United\\_Families\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/United_Families_Amicus_Curiae_Brief.pdf).

<sup>111</sup>Garnett, Richard. *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*(2000) 76 Notre Dame L. Rev. 109, in United Families International. “*Amici Curiae* Brief of United Families International, Family Watch International, and Family Leader Foundation, in Support of Respondent State of California,” p. 67. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/United\\_Families\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/United_Families_Amicus_Curiae_Brief.pdf).

<sup>112</sup> Blankenhorn, Cere, DeCoste, Popenoe, in United Families International. “*Amici Curiae* Brief of United Families International, Family Watch International, and Family Leader Foundation, in Support of Respondent State of California.” Accessed February 19, 2013. [http://www.courts.ca.gov/documents/United\\_Families\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/United_Families_Amicus_Curiae_Brief.pdf).

against same-sex marriage. A secular claim, that the wellbeing of children is of state interest, disguises what is a potentially religious opposition to same-sex marriage.

*Wilson et al.*

Wilson, the late professor of Public Policy at Pepperdine University, asserts that the institution of marriage must be protected.<sup>113</sup> His arguments coincide with those of other opponents to same-sex marriage, suggesting that the redefinition of marriage will ultimately weaken the institution and lead to a reconstruction of American family structure. Wilson et al. claim that marriage is invariably grounded in procreation and should remain that way. This type of relationship ensures that mothers and fathers are linked to their biological children in an environment that is best suited for healthy child development. Since same-sex couples cannot procreate naturally, the goal of such a marriage cannot be procreation between a mother and father. As it is in the best interest of children to be raised by their biological parents in one household, and this is not possible between same-sex couples, it is in the interest of society to regulate same-sex relationships.

The brief cites numerous sociological studies that describe the impact that fatherless homes have on the development of children.<sup>114</sup> Additionally, Wilson et al. refer to state statutes that confirm that the intention of marriage is procreation.<sup>115</sup> Wilson et al. insinuate that children raised by same-sex couples will suffer the same consequences as children who come from

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<sup>113</sup> Pepperdine University. Accessed February 19, 2013.

[http://publicpolicy.pepperdine.edu/academics/faculty/default.htm?faculty=james\\_wilson](http://publicpolicy.pepperdine.edu/academics/faculty/default.htm?faculty=james_wilson)

<sup>114</sup> Institute for American Values, Valerie King, Wendy D. Manning & Pamela J. Smock, McLanahan, Kristin Anderson Moore et al., and Elaine Sorensen & Chava Zibman, in Wilson et al. "Brief Amici Curiae of James Q. Wilson, et al., Legal and Family Scholars in Support of the Appellees." Accessed February 19, 2013.

[http://www.courts.ca.gov/documents/Legal\\_Family\\_Scholars\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Legal_Family_Scholars_Amicus_Brief.pdf).

<sup>115</sup> "Brief Amici Curiae of James Q. Wilson, et al., Legal and Family Scholars in Support of the Appellees." P. 26. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Legal\\_Family\\_Scholars\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Legal_Family_Scholars_Amicus_Brief.pdf).

broken families since same-sex couples inherently cannot be both the biological mother and father.

This argument is hardly religious, and instead points to valid concerns that the public has about the increasing numbers of children born out of wedlock. However, within the body of the brief, Wilson et al. state that “research on children raised by same-sex couples is in its beginning stages. We do not have a single study based on nationally representative data that can tell us how the typical child raised by a same-sex couples fares, compares to children in other family structures.”<sup>116</sup> Although the brief attempts to discredit same-sex parents’ qualifications to raise children, it is clear that sufficient evidence is not yet available on the subject, leading us to question the motive behind the brief.

### **The Outliers: Amici without Religious Connections**

#### *Judicial Watch*

Judicial Watch is a conservative organization that encourages government transparency and aims to expose corruption throughout all levels of government.<sup>117</sup> Although its founder, Larry Klayman (who has since left Judicial Watch and founded the conservative government accountability organization, Freedom Watch), is a strong advocate for the state of Israel, it is not clear that Judicial Watch attempts to advance any religiously motivated agenda.<sup>118</sup> Instead, Judicial Watch argues that public opposition towards same-sex marriage should be respected since the court does not have the right to decide issues that have been previously established by

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<sup>116</sup>Wilson et al. “Brief Amici Curiae of James Q. Wilson, et al., Legal and Family Scholars in Support of the Appellees,” p. 44. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Legal\\_Family\\_Scholars\\_Amicus\\_Brief.pdf](http://www.courts.ca.gov/documents/Legal_Family_Scholars_Amicus_Brief.pdf).

<sup>117</sup>Judicial Watch. Accessed February 19, 2013. <http://www.judicialwatch.org/about/>.

<sup>118</sup>Freedom Watch. Accessed February 19, 2013. <http://www.freedomwatchusa.org/issues>.

the public and their elected officials. This argument is quite similar to those of previous briefs, arguing that the court would be overstepping a boundary by ruling definitively in this case.

*Traiman (Leland) et al.*

Leland Traiman and Stewart Blandón are engaged in a same-sex relationship and argue that the fight for recognizing same-sex unions as marriages is not only unnecessary, but dangerous to the previously established rights of homosexuals. Both Traiman and Blandón prefer to belong to a domestic partnership as long as any discrepancies between the benefits of marriage and domestic partnerships are acknowledged and addressed. They argue that bringing same-sex issues in front of a court is excessively risky and may endanger the rights of those in domestic partnerships. They cite John D’Emilio, who claims that “the battle to win marriage equality through the courts has done something that no other campaign or issue in our movement has done: it has created a vast body of new antigay laws.”<sup>119</sup> Along these lines, it is detrimental to the progression of the gay rights movement to place same-sex marriage in the hands of the court. It is clear that Traiman et al. are not religiously motivated and are instead acting out of concern for the protection of their already established rights.

## **V. The Inner Network**

Upon review of the amicus briefs, it is clear that a network of scholars and organizations fuels opposition to same-sex marriage. Listed below are individuals and organizations that appeared across multiple amicus briefs. Their emergence in various briefs suggests that they are

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<sup>119</sup> D’Emilio, John. “The Marriage Fight is Setting Us Back,” in Traiman et al., “Amicus Curiae Brief in Support of State of California and the Attorney General,” p. 7. Accessed February 19, 2013. [http://www.courts.ca.gov/documents/Traiman\\_Amicus\\_Curiae\\_Brief.pdf](http://www.courts.ca.gov/documents/Traiman_Amicus_Curiae_Brief.pdf).



respected sources of information and perhaps act as the backbone to the anti-gay marriage movement.

### *Maggie Gallagher*<sup>120</sup>

Gallagher continues to play a pivotal role in the fight against same-sex marriage. She is a nationally syndicated columnist and has written extensively on gay marriage for publications like the New York Times and the Wall Street Journal.<sup>121</sup> Gallagher, who was raised in a Roman Catholic family, left the church in favor of atheism after reading the works of Ayn Rand.<sup>122</sup> However, her absence from the church was short lived, and she returned soon after an unexpected pregnancy during college.

As co-founder of the National Organization for Marriage (NOM), Gallagher has made a clear stand against same-sex marriage. Although NOM does not appear to have overt connections to religious organizations, the Knights of Columbus has reportedly made generous contributions to NOM's campaign, donating upwards of \$1.4 million dollars to the organization in 2009.<sup>123</sup> Some critics of NOM also argue that the organization is a front for conservative religious groups, attempting to appear as a legitimate organization. Gallagher is also a board member of the Marriage Law Foundation, a nonprofit organization that conducts research on marriage. According to the Human Rights Campaign, the Foundation was founded upon

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<sup>120</sup> Gallagher is cited by the ACLJ, CEROM, CJCLS, JONAH, United Families International, and Wilson et al.. Her articles serve two purposes. First, Gallagher establishes the importance of marriage as a social institution, one that must be preserved in its traditional form. Second, she emphasizes the importance of raising children by both biological parents, using empirical data to support her claims.

<sup>121</sup> National Organization for Marriage. Accessed February 19, 2013.

[http://www.nationformarriage.org/site/c.oML2KeN0LzH/b.3479573/k.E2D0/About\\_NOM.htm](http://www.nationformarriage.org/site/c.oML2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm)

<sup>122</sup> Oppenheimer, Mark. "The making of gay marriage's top foe." *Salon*, February 8, 2012.

[http://www.salon.com/2012/02/08/the\\_making\\_of\\_gay\\_marriages\\_top\\_foe/](http://www.salon.com/2012/02/08/the_making_of_gay_marriages_top_foe/).

<sup>123</sup> Human Rights Campaign. "The Roman Catholic Hierarchy's Devotion to Fighting Marriage Equality." Accessed February 19, 2013. <http://hrc.org/nomexposed/section/the-catholic-hierarchy-devotion-to-fighting-marriage-equality>.

Mormon ideology. Additionally, the current director, William Duncan, served as “acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School at Brigham Young University.”<sup>124</sup>

Gallagher is also a signatory of the Manhattan Declaration, an initiative that aims to consolidate support of traditional marriage from religious organizations.<sup>125</sup> It does appear that Gallagher is directly involved in organizations that do have some type religious affiliation, making it reasonable to suggest that religious influence may fuel her contempt for same-sex marriage.

### *David Blankenhorn*<sup>126</sup>

As founder and president of the Institute for American Values, Blankenhorn has written numerous books on the effect that fatherless homes have on child development. Until recently, Blankenhorn has been a public supporter of the anti-gay movement, believing that he was acting as an advocate for children’s needs. In a June 2012 New York Times Op-Ed, Blankenhorn renounced his opposition of same-sex marriage and committed to advancing a more progressive dialogue on same-sex marriage.<sup>127</sup> Upon this admission, some board members of the Institute for American Values, including Robert George, resigned from their positions and withheld donations from the organization. Although Blankenhorn does not admit to any religious

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<sup>124</sup>Marriage Law Foundation. Accessed February 19, 2013. <http://www.marriagelawfoundation.org/board.html>

<sup>125</sup>Manhattan Declaration. "List of Religious and Organizational Leaders Signatories." [http://manhattandeclaration.org/man\\_dec\\_resources/list\\_of\\_religious\\_leaders.pdf](http://manhattandeclaration.org/man_dec_resources/list_of_religious_leaders.pdf).

<sup>126</sup> Blankenhorn is cited by ACLJ, CEROM, CJCLS, and United Families International. His research details the dangers of raising kids in fatherless homes and how same-sex marriage is correlated with societal devaluation of traditional marriage.

<sup>127</sup>Blankenhorn, David. "How My View on Gay Marriage Changed." *The New York Times*, June 22, 2012. <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?hp>.

motivation behind his previous anti-gay sentiments, he indicates that a large portion of his board members and donor base at the Institute for American Values were in fact driven by religious beliefs.<sup>128</sup>

### *Daniel Cere*<sup>129</sup>

Cere is a professor of Religious Studies at McGill University.<sup>130</sup> His scholarly works are primarily related to the importance of establishing universally applicable definitions for social institutions. For Cere, definitions do matter, as they send a signal to society about how to interpret the meaning and function of an institution. Although his scholarly endeavors do not appear incriminating, he is a signatory of the Witherspoon Institute's *Marriage and the Public Good: Ten Principles*, a document that denounces homosexuals and their alleged lack of sexual fidelity.<sup>131</sup> It is not clear whether Cere is religiously influenced, but it does appear that he is firmly in opposition to same-sex marriage.

### *Frederick C. DeCoste*<sup>132</sup>

A member of the faculty of law at the University of Alberta, DeCoste does not display obvious ties to religious organizations.<sup>133</sup> However, like Cere, he is a signatory of the

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<sup>128</sup>Oppenheimer, Mark. "In Shift, an Activist Enlists Same-Sex Couples in a Pro-Marriage Coalition." *The New York Times*, January 29, 2013. <http://www.nytimes.com/2013/01/30/us/in-shift-blankenhorn-forges-a-pro-marriage-coalition-for-all.html>.

<sup>129</sup> Cere is cited by CJCLS, United Families International, and ACLJ. His work outlines the importance of defining social institutions. In this way, redefining marriage to include same-sex couples would dilute marriage down to a meaningless relationship.

<sup>130</sup>McGill University. Accessed February 19, 2013. <http://www.mcgill.ca/religiousstudies/people/daniel-cere>.

<sup>131</sup>The Witherspoon Institute. "Marriage and the Public Good: Ten Principles." Accessed February 19, 2013. [http://www.winst.org/family\\_marriage\\_and\\_democracy/WI\\_Marriage.pdf](http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf).

<sup>132</sup> DeCoste is cited by CJCLS, CEROM, and United Families International et al.. His works discuss the apparent display of overextended state power in the same-sex marriage debate. According to DeCoste, if the state has the authority to dissolve marriages into merely civil policy relationships, the institution of marriage will be destroyed.

<sup>133</sup>University of Alberta. Accessed February 19, 2013.

<http://lawschool.ualberta.ca/en/facultystaff/faculty/Frederick%20DeCoste.aspx>.

Witherspoon Institute's *Marriage and the Public Good: Ten Principles*, suggesting that he is in clear opposition to gay marriage.<sup>134</sup>

### *Douglas Kmiec*<sup>135</sup>

Aside from submitting his own brief, Kmiec appeared in numerous other briefs in opposition to same-sex marriage. He is a Caruso Family Chair in Constitutional Law at Pepperdine University and a former supporter of Proposition 8.<sup>136</sup> Kmiec recently revoked his position on Proposition 8 and instead threw support behind President Obama's stance on same-sex marriage.<sup>137</sup>

### *Richard Garnett*<sup>138</sup>

Garnett, a law professor at the University of Notre Dame, has written largely on the relationship between religion and constitutional law.<sup>139</sup> He is also actively involved in Catholic school initiatives and has a great interest in protecting religious freedom. In the case in question, Garnett holds that marriage predates law, so the state has no authority to grant same-sex couples the right to enter into an already established institution.

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<sup>134</sup>The Witherspoon Institute. "Marriage and the Public Good: Ten Principles." Accessed February 19, 2013. [http://www.winst.org/family\\_marriage\\_and\\_democracy/WI\\_Marriage.pdf](http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf).

<sup>135</sup>Kmiec is cited by Wilson et al. and ACLJ. Kmiec argues that procreation is the original function and intention of marriage. As a result, traditional marriages must be preserved.

<sup>136</sup>Pepperdine University. Accessed February 19, 2013. [http://law.pepperdine.edu/academics/faculty/default.php?faculty=douglas\\_kmiec](http://law.pepperdine.edu/academics/faculty/default.php?faculty=douglas_kmiec)

<sup>137</sup>Ferullo, Joe. "Douglas Kmiec on the crossroads of faith and politics." *National Catholic Reporter*, October 24, 2012. <http://ncronline.org/blogs/ncr-today/douglas-kmiec-crossroads-faith-and-politics>.

<sup>138</sup>Garnett is cited by CEROM and United Families International. Garnett claims that the state has no authority to redefine marriage. More specifically, he argues that "Marriage law no more 'creates' the marriage institution than the Rule Against Perpetuities 'creates' dirt." See: Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children* (2000) 76 Notre Dame L. Rev. 109, 114 n29.

<sup>139</sup>University of Notre Dame. Accessed February 19, 2013. <https://law.nd.edu/directory/richard-garnett/>

### *Monte Neil Stewart*<sup>140</sup>

Stewart, a graduate of Brigham Young's undergraduate and law programs, founded the Marriage Law Foundation. He is known for applying social institutions theory to marriage. Stewart has also filed an amicus brief on behalf of United Families International, Family Watch International, and the Family Leader Foundation in the Iowa same-sex marriage case, *Varnum v. Brien*.<sup>141</sup>

### *The Witherspoon Institute*<sup>142</sup>

The Witherspoon Institute is an independent research organization that seeks to expand public awareness of the democratic process.<sup>143</sup> Although it does not claim to be affiliated with any religious organizations, the Institute does have a branch, the Simon Center on Religion and the Constitution, dedicated entirely to religious study. Robert George is also on the Academic Committee of the Institute which is known for engaging in issues like same-sex marriage, abortion, and pornography.<sup>144</sup>

### *Additional Sources*

Although many of the individuals and organizations cited across multiple briefs did have some type of connection to religion, others appear to unintentionally support opponents of same-

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<sup>140</sup> Monte Neil Stewart is cited by both United Families International and Wilson et al. Stewart's work speaks to the importance of maintaining traditional marriages. According to Stewart, only unions of one man and one woman can adequately benefit society.

<sup>141</sup> *Varnum v. Brien*. Iowa Judicial Branch. 3 April 2009. Accessed February 19, 2013. <http://www.iowacourts.gov/wfData/files/Varnum/07-1499%281%29.pdf>

<sup>142</sup> The Witherspoon Institute is cited by CJCLS and United Families International. The Witherspoon Institute promotes the traditional family structure and suggests that "it is now uncontroversial that the married mother/father child-rearing mode significantly correlates with the optimal outcomes deemed crucial for a child's—and therefore society's—well-being." See: The Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (2006) 21-4.

<sup>143</sup> The Witherspoon Institute. Accessed February 19, 2013. <http://www.winst.org/about/mission.php>.

<sup>144</sup> The Witherspoon Institute. Accessed February 19, 2013. <http://www.winst.org/people/fellows.php>.

sex marriage with sociological and empirical data. It is worth mentioning that these individuals are not found to have ties to religious organizations, nor are they found to directly oppose same-sex marriage. Kristin Anderson Moore et al., William Doherty et. al., Wendy D. Manning, Valerie King, Judith Stacey, and Sara McLanahan are among the scholars most frequently cited in briefs. However, their data are primarily concerned with the impact that fatherless homes have on the development of children. These scholars emphasize the importance of mother-father-child relationships; however, their findings are used to discredit same-sex parents since same-sex parents do not fit the mold of traditional couples.

## **VI. Takeaway Thoughts**

It is clear that religiously affiliated organizations are working to influence same-sex marriage legislation. They do so by presenting a number of secular arguments that are of legitimate concern to a court of law and society at large. Although the position of these organizations in the religious community is evident, it is uncertain whether their motivation to oppose same-sex marriage is purely religious in nature. Further, association with religious organizations does not prove that original, true arguments opposing same-sex marriage are based solely on religious principles, resulting in the transformation of arguments from religious to secular. It is entirely possible that the arguments presented in the briefs are the genuine arguments of those who happen to be religiously affiliated.

Although causation cannot be established, the amicus briefs from this case do raise suspicion. There is a clear correlation between religious association and opposition to same-sex marriage, especially considering that only two of twenty nine briefs offering support for same-sex marriage were found to have ties to religion. This raises questions about the depth of

influence that religious institutions have on civil law. It is reasonable to suggest that this extent of supposed religiosity in the legal system is cause for concern and should be examined in greater detail. The next chapter will untangle the relationship between opponents of same-sex marriage in the political spheres.

## **Chapter 3: Political Legitimation- Proposition 8**

### **I. Introduction**

Upon close examination of organizations that play in the political field of the same-sex marriage debate, it is clear that the majority of arguments presented in opposition are largely secular. Family-centered organizations, like Focus on the Family and the American Family Association, primarily promote nonreligious claims that mirror those from the legal sphere. Despite the fact that religiously affiliated organizations have greater flexibility in the political sphere than in the legal sphere, religious argumentation is utilized rather infrequently.

As in the legal domain, the most common allegations against same-sex marriage refer to the welfare of children. Organizations oftentimes claim that children are best raised by both biological parents under the structure of traditional marriage. In this way, promoters of traditional marriage assert that same-sex marriage is detrimental to the institution of marriage, and subsequently, the health and emotional stability of our nation's children. Similarly, following legalization of same-sex marriage, organizations suggest that public schools will immediately teach children about same-sex marriage and equate it to traditional marriage. The legalization of same-sex marriage would effectively lead to the indoctrination of children with homosexual propaganda, removing parents' ability to monitor their children's exposure to the homosexual lifestyle. Arguments concerning threats to religious and personal liberties also run parallel to arguments made in the legal sector. It is evident that actors in the political sphere make use of predominantly secular arguments in order to advance opposition to same-sex marriage.



Although opponents to same-sex marriage mostly utilize secular arguments in the political sphere, religious claims are certainly present. This is the greatest distinction between the limits of argumentation in the legal and political spheres. In the legal sphere, although religious institutions might be involved, religious argumentation is avoided entirely as there are repercussions for utilizing religious claims in a court of law. Not only is this type of argumentation condemned by the First Amendment (since the establishment clause restricts state promotion of a particular religion), but it is likely considered illegitimate by members of the legal community. In contrast to this strict exclusion of religiosity from the legal sphere, organizations make use of religious argumentation in the political arena. Organizations make direct reference to the Bible or simply claim that same-sex marriage falls out of line with Christian doctrine. In either case, religion is inserted into the political conversation over same-sex marriage.

Aside from making religious claims, organizations in the political sphere also distort the truth about the future implications of same-sex marriage. This represents another divergence from the standards of the legal sector. First, public schools would not promote same-sex marriage in the way that some organizations suggest. Instead, teachers would be obligated to incorporate the legalization of same-sex marriage into lessons pertaining to the social history of the United States. This can hardly be considered indoctrination of children, as traditional marriage and same-sex marriage would be addressed in an identical manner. Similarly, some organizations claim that pedophilia is more prevalent in the homosexual community, suggesting that same-sex marriage puts children in great danger. Other organizations, like Defend the Family International, assert that religious and personal liberties will be destroyed as a result of the legalization of same-sex marriage, implying that any opposition to same-sex marriage would

be challenged in the courts. These claims are inaccurate portrayals of the truth, but they speak to the openness of the political arena. In the realm of politics, claims can be exaggerated and do not necessarily have to be substantiated by evidence.

This chapter outlines the involvement of organizations pertinent to California's same-sex marriage debate. Organizations connected to the 2008 Proposition 8 campaign are detailed at length. In response to the ruling in *In re Marriage Cases* that protected the legal recognition of same-sex marriage, a number of organizations launched Proposition 8 in an effort to bring the same-sex marriage debate to the voters of California. The campaign was ultimately successful, and in November 2008, Proposition 8 passed with 52.2 percent of the vote, putting an end to same-sex marriage.<sup>145</sup> Since Proposition 8 united a multitude of opponents to same-sex marriage, the arguments presented are representative of the anti-gay marriage movement. In the subsequent sections, each organization and its relation to the California same-sex marriage debate is outlined. The organization's argumentation is discussed and then characterized as religious, secular, or both. After becoming familiar with the organizations and their strategies, it should be clear that while allusions to religiosity are made in the political sphere, the use of secular argumentation (including secular claims based on distorted truths) is more abundant.

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<sup>145</sup> Although Proposition 8 was supported by the majority of Californian voters in 2008, it is important to note that the measure was later challenged by United States District Court Judge Vaughn Walker. In August 2010, Walker overturned Proposition 8, sparking intense debate throughout the anti-gay marriage community. A Supreme Court hearing regarding the constitutionality of Proposition 8 is scheduled for March 26, 2013. Jessica, Cara Mia DiMassa, and Richard C. Paddock. "Voters approve Proposition 8 banning same-sex marriage." *Los Angeles Times*, November 5, 2008. <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page=1>.

## II. Organizations Defending Traditional Marriage in California

### *Yes on 8 Campaign*

In response to the California Supreme Court ruling in *In re Marriage Cases*, which overturned Proposition 22 and supported the marriage rights of same-sex couples, the *Yes on 8 Campaign* launched an initiative to promote Proposition 8.<sup>146</sup> The campaign successfully rallied national support and constructed a coalition of high-profile anti-gay marriage organizations from across the country, including Focus on the Family, the National Organization for Marriage, the American Family Association, the Knights of Columbus, Family Research Council, Alliance Defending Freedom, and the Church of Jesus Christ of Latter-day Saints, among others. In April 2008, the campaign submitted 1,120,801 signatures to California's Secretary of State, qualifying Proposition 8 for the November 2008 ballots.<sup>147</sup> In the months preceding the vote, the *Yes on 8 Campaign* held rallies, ran television and radio advertisements, distributed signs, and promoted their website, ProtectMarriage.com, to gain recognition and build support for Proposition 8.

The campaign focused its attention on four main points. First, the traditional definition of marriage had clearly been accepted by Californians when 61 percent of voters approved Proposition 22 in 2000.<sup>148</sup> According to the *Yes on 8 Campaign*, the legal recognition of same-sex marriage, therefore, came as the result of the supposed activist judiciary that ruled in *In re Marriage Cases*. Along these lines, Proposition 8 claimed to “restore” the previously established definition of traditional marriage in California. Secondly, children are best raised by both

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<sup>146</sup> Proposition 8 mirrors Proposition 22, as both initiatives hold that “Only marriage between a man and a woman is valid or recognized in California.”

<sup>147</sup> “Gay Marriage Ban Makes California Ballot.” *CBS News*, January 27, 2010. Accessed March 7, 2013. <http://www.cbsnews.com/stories/2008/06/03/national/main4147991.shtml>.

<sup>148</sup> Yes On Prop 8. “Ballot Arguments in Favor of Prop 8.” Accessed February 25, 2013. <http://protectmarriage.com/ballot-arguments-in-favor-of-prop-8-2008>.

biological parents who are engaged in a committed marital relationship.<sup>149</sup> Third, the approval of Proposition 8 ensures that public schools do not require teachers to equate homosexual marriage to heterosexual marriage.<sup>150</sup> This point was articulated at great length throughout the campaign, as advertisements and mailers consistently suggested that children would soon be bombarded with pro-gay marriage propaganda if Proposition 8 were not passed.<sup>151</sup> Finally, Proposition 8 does not interrupt any rights and benefits previously acquired by same-sex couples through domestic partnerships.<sup>152</sup> As a result, same-sex couples' rights to make particular lifestyle choices are still protected.

The *Yes on 8 Campaign* does not speak directly to religious values, and instead focuses on secular concerns raised by the people of California. By drawing attention to the welfare of children, and suggesting that homosexual lifestyles will be promoted by teachers in public schools, the initiative makes use of secular argumentation. However, it is important to note that although the *Yes on 8 Campaign* does not explicitly rely on religious beliefs or suggest that defeat of Proposition 8 will endanger religious liberties, its coalition members consistently call on these types of tactics. In this way, the *Yes on 8 Campaign* is not entirely separated from the religious sphere, tainting the supposed secular nature of the initiative.

### *Knights of Columbus*

The Knights of Columbus, one of the world's largest Catholic fraternal organizations, continues to throw immense verbal and financial support behind the maintenance of traditional

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Garrison, Jessica, Cara Mia DiMassa, and Richard C. Paddock. "Voters approve Proposition 8 banning same-sex marriage." *Los Angeles Times*, November 5, 2008. <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page=1>.

<sup>152</sup> Ibid.

marriage.<sup>153</sup> On its website, the organization speaks predominantly to Christian doctrine that considers marriage to be a union between one man and one woman. Further, marriage is an “indispensable institution established by the Creator with its own essential properties, purpose, and nature.”<sup>154</sup> As such, the organization does not recognize any other relationships between consenting adults as marriages, and “confidently supports public policies designed to strengthen marriage and families, and opposes those that disregard its fundamental nature.”<sup>155</sup>

Although the organization relies heavily on Catholic proclamations to support its stance against same-sex marriage from within the Catholic community, the influence of the Knights of Columbus is not limited to the confines of church walls. Instead, the Knights of Columbus is also prominent in the public arena, donating millions of dollars to anti-gay marriage initiatives in California.<sup>156</sup> In response to successful gay rights activism, like the 2004 distribution of marriage licenses to same-sex couples in San Francisco, the organization printed and distributed over 10 million postcards to Catholic churches nationwide, outlining its support for a constitutional ban on same-sex marriage.<sup>157</sup> The Knights also contributed upwards of \$1.4 million to the 2008 Proposition 8 campaign, urging Californian voters to pass a ban on same-sex marriage.<sup>158</sup> In discussing the organization’s generous contributions to the Proposition 8 campaign, Knights of Columbus spokesman Patrick Korten affirmed that protecting traditional family structure is

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<sup>153</sup> As of April 2010, the organization had nearly 2 million members worldwide. See: Knights of Columbus. “Knights of Columbus membership tops 1.8 million.” [http://www.kofc.org/en/news/releases/detail/1point8\\_20100505.html](http://www.kofc.org/en/news/releases/detail/1point8_20100505.html).

<sup>154</sup> Knights of Columbus. “Marriage and Family.” Accessed February 25, 2013. [http://www.kofc.org/un/en/public\\_policy/marriage.html](http://www.kofc.org/un/en/public_policy/marriage.html)

<sup>155</sup> Ibid.

<sup>156</sup> According to a report released by Equally Blessed, a Catholic organization fighting for marriage equality, the Knights of Columbus have spent upwards of \$6 million on anti-gay marriage efforts between 2005 and 2012. Figures are based on IRS tax filings. See: Equally Blessed. “Knights of Columbus Spending Millions to Stop Marriage Equality.” <http://www.equally-blessed.org/release/knights-columbus-report>.

<sup>157</sup> Kirkpatrick, David D. “A Religious Push Against Gay Unions.” *The New York Times*, April 24, 2006. [http://www.nytimes.com/2006/04/24/washington/24catholic.html?\\_r=0](http://www.nytimes.com/2006/04/24/washington/24catholic.html?_r=0).

<sup>158</sup> Wildermuth, John. “Prop. 8 opponents take lead in money race.” *San Francisco Chronicle*, October 25, 2008. <http://www.sfgate.com/default/article/Prop-8-opponents-take-lead-in-money-race-3188689.php>.

imperative to the longevity of a health society. Further, Korten explained that children are best cared for by both biological mother and father, as “it is the most favorable environment in which to protect the rights and best interests of children.”<sup>159</sup>

It should come as no surprise that the Knights of Columbus, a Christian organization, presents religious arguments in support of traditional marriage. However, the organization’s influence in the political sphere takes a different form. Instead of relying on religious argumentation, making biblical references or calls to Christian tradition, the Knights of Columbus discusses issues of secular concern. The organization argues that children benefit most in a household with married biological parents, a secular claim that is made regularly by opponents of same-sex marriage.

### *National Organization for Marriage*

The National Organization for Marriage (NOM), discussed briefly in Chapter 2, formed in 2007 in anticipation of the California Supreme Court ruling in *In re Marriage Cases*. Notable members of the organization’s leadership team include Maggie Gallagher and Robert George.<sup>160</sup> The organization aims to “develop political messaging, build its national grassroots email database of voters, and provide political intelligence and donor infrastructure on the state level,” especially in states where marriage is most at risk, like California.<sup>161</sup> Following this strategy, NOM’s support was crucial to the placement of Proposition 8 on the California ballot, donating more than \$1.7 million to the *Yes on 8 Campaign* in 2008.<sup>162</sup> It is important to note that the National Organization for Marriage does not openly affiliate itself with a religious organization

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<sup>159</sup> “Knights of Columbus contributes \$1 million to Prop 8 campaign.” *Catholic News Agency*, August 20, 2008. [http://www.catholicnewsagency.com/news/knights\\_of\\_columbus\\_contributes\\_1\\_million\\_to\\_prop\\_8\\_campaign/](http://www.catholicnewsagency.com/news/knights_of_columbus_contributes_1_million_to_prop_8_campaign/).

<sup>160</sup> National Organization for Marriage. “About NOM.” Accessed March 7, 2013.

[http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About\\_NOM.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm).

<sup>161</sup> *Ibid.*

<sup>162</sup> Turnbull, Lornet. “National forces likely to lead on gay-marriage referendum effort.” *The Seattle Times*, February 3, 2012. Accessed March 7, 2013. <http://seattletimes.com/avantgo/2017409257.html>.

in the same way that the Knights of Columbus is directly associated with the Catholic Church. However, some same-sex marriage advocates suggest that the organization represents political advocacy efforts on behalf of Christian churches.<sup>163</sup>

NOM advances support for traditional marriage, urging followers to advocate for the preservation of marriage as a vital social institution. The organization's website suggests that same-sex marriage deprives children of their fundamental right to a mother and father, which further devalues the importance of the roles played by both biological parents in the development of a child.<sup>164</sup> The organization goes on to list various other secular claims, including the need to protect children from indoctrination by same-sex marriage advocates. In this way, NOM presents secular arguments in order to solidify their support of traditional marriage.

### *Church of Jesus Christ of Latter-day Saints*

The Church of Jesus Christ of Latter-day Saints, like the Knights of Columbus, makes use of religious arguments in order to support its stance against same-sex marriage. CJCLS bases its definition of marriage on religious teachings, asserting that "as a doctrinal principle, based on sacred scripture, we affirm that marriage between a man and a woman is essential to the Creator's plan for the eternal destiny of His children."<sup>165</sup> Similarly, CJCLS supports any legislation that recognizes the traditional definition of marriage as a union between one man and one woman.<sup>166</sup> In this view, no other forms of marriage should be afforded legal recognition.

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<sup>163</sup> Human Rights Campaign. "The Roman Catholic Hierarchy's Devotion to Fighting Marriage Equality." Accessed February 19, 2013. <http://hrc.org/nomexposed/section/the-catholic-hierarchy-devotion-to-fighting-marriage-equality>.

<sup>164</sup> National Organization for Marriage. "Marriage Talking Points." Accessed March 7, 2013. [http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage\\_Talking\\_Points.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage_Talking_Points.htm)

<sup>165</sup> The Church of Jesus Christ of Latter-day Saints. "First Presidency Statement on Same-Gender Marriage." Accessed February 25, 2013. <http://www.mormonnewsroom.org/article/first-presidency-statement-on-same-gender-marriage>.

<sup>166</sup> Ibid.

Similar to the Knights of Columbus, CJCLS gave abundant support to anti-gay marriage initiatives in California. In anticipation of the November 2008 vote on Proposition 8, leaders from the Mormon Church sent a letter to every congregation across California, insisting that Mormons “do all [they] can to support the proposed constitutional amendment by donating of [their] means and time.”<sup>167</sup> The letter emphasized that “the formation of families is central to the Creator’s plan,” appealing to foundations of the Mormon faith in order to encourage and energize members into action.<sup>168</sup> The leadership of the Mormon community also compiled a video broadcast outlining their support of Proposition 8, showing the presentation to congregations throughout Salt Lake City.<sup>169</sup> The Mormon community reciprocated their leaders’ enthusiasm for the anti-gay marriage movement, as donations from individual Mormons constituted nearly 40 percent of the total contributions to the Proposition 8 campaign.<sup>170</sup> Members of CJCLS are also said to have comprised nearly 80 to 90 percent of the volunteers who spent time making door-to-door visits throughout communities in California.<sup>171</sup> Further, in 2009, CJCLS was under investigation by the California Fair Political Practices Commission for underreporting its nonmonetary contributions to the campaign that were said to amount to nearly \$200 thousand, underscoring CJCLS’s dedication to the Proposition 8 campaign.<sup>172</sup> Mormon financial and volunteer support for Proposition 8 seemed to dwarf that of other religious organizations, emphasizing the Church’s impact on political initiatives.

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<sup>167</sup> Wildermuth, John. “Out-of-state money floods to Prop. 8.” *San Francisco Chronicle*, July 28, 2008. <http://www.sfgate.com/default/article/Out-of-state-money-floods-to-Prop-8-3202371.php>.

<sup>168</sup> McKinley, Jesse, and Kirk Johnson. “Mormons Tipped Scale in Ban on Gay Marriage.” *The New York Times*, November 14, 2008. <http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all>.

<sup>169</sup> Kuruva, Matthai. “Conservative Christians lead push for Prop. 8.” *San Francisco Chronicle*, October 15, 2008. <http://www.sfgate.com/default/article/Conservative-Christians-lead-push-for-Prop-8-3190147.php#page-1>.

<sup>170</sup> Ibid.

<sup>171</sup> McKinley, Jesse, and Kirk Johnson. “Mormons Tipped Scale in Ban on Gay Marriage.” *The New York Times*, November 14, 2008. <http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all>.

<sup>172</sup> McKinley, Jesse. “California Releasing Donor List for \$83 Million Marriage Vote.” *The New York Times*, February 2, 2009. <http://www.nytimes.com/2009/02/03/us/03calif.html>.



Considering the amount of financial and volunteer support that the Mormon community gave to the Proposition 8 campaign, it is clear that the Church of Jesus Christ of Latter-day Saints is highly influential in the realm of politics. Although CJCLS presents religious arguments to its members, it also engages in secular argumentation. In a statement released in February 2013, amidst the debate over the constitutionality of Proposition 8, CJCLS affirmed that “our members supported Proposition 8 based on sincere beliefs in the value of traditional marriage for children, families, society and our republican form of government. Only a demeaning view of religion and religious believers could dismiss our advocacy of Proposition 8 as ignorance, prejudice or animus.”<sup>173</sup> Just as the Knights of Columbus divided its support for traditional marriage between religious and secular claims, so too does CJCLS. In religious settings, CJCLS speaks to Mormon doctrine, emphasizing the importance of God’s intentions for families. In the Proposition 8 campaign, however, CJCLS appeals to the American tradition of marriage and relies on secular arguments that underline the importance of raising children in married households.

### *Focus on the Family*

Focus on the Family, one of the nation’s largest and most powerful Christian ministry organizations, is dedicated to promoting healthy marriages and, subsequently, strengthening traditional family life. The organization has achieved international notoriety, as it spans across 130 countries and reaches approximately 238 million supporters worldwide.<sup>174</sup> In order to fulfill its goals, Focus on the Family encourages members to “glorify God through an authentic

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<sup>173</sup> Schulzke, Eric. "LDS Church files brief in gay marriage cases." *Deseret News*, February 5, 2013. <http://www.deseretnews.com/article/865572385/LDS-Church-files-brief-in-gay-marriage-cases.html>.

<sup>174</sup> Focus on the Family. “Jim Daly Statement on Chik-Fil-A.” Accessed February 25, 2013. [http://www.focusonthefamily.com/about\\_us/news\\_room/news-releases/20120920-focus-president-jim-daly-statement-chickfila.aspx](http://www.focusonthefamily.com/about_us/news_room/news-releases/20120920-focus-president-jim-daly-statement-chickfila.aspx).

relationship with His Son, Jesus Christ.”<sup>175</sup> The organization is supported by a notably extensive membership base and annual revenue amounting to nearly \$100 million in 2011.<sup>176</sup> Focus on the Family was also a notable participant in the Proposition 8 campaign. Along with its affiliated branches, the organization donated upwards of \$1.25 million dollars to efforts to ban same-sex marriage in California.<sup>177</sup> Needless to say, Focus on the Family has profound influence over the understanding of the same-sex marriage debate.

In distinguishing its position on same-sex marriage, Focus on the Family emphasizes the importance of raising children by their biological parents, as there is “more than 30 years of social science research that indicates children do best on every measure of well-being when raised by their married mother and father.”<sup>178</sup> Further, “God created humans in His image, intentionally male and female, each gender with unique and complementary qualities.”<sup>179</sup> As such, it is imperative to consistently emphasize that both mothers and fathers play distinct roles in the healthy development of children.<sup>180</sup> The absence of either biological parent has a profound impact on children, as children of divorce are “far more likely to struggle academically, live in poverty, engage in drug and alcohol use and other high-risk behaviors, commit suicide, and

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<sup>175</sup> Focus on the Family. “About Us.” Accessed February 25, 2013.

[http://www.focusonthefamily.com/about\\_us.aspx](http://www.focusonthefamily.com/about_us.aspx).

<sup>176</sup> Focus on the Family. “Return of Organization Exempt from Income Tax.” Accessed February 25, 2013.

<http://www.guidestar.org/FinDocuments/2011/953/188/2011-953188150>.

<sup>177</sup> Contributions from Focus on the Family amounted to \$727,250, while one of their board members also donated \$450,000. Their offshoot organization, Family Research Council made up the difference, donating approximately \$75,000 to the campaign. See: Luning, Ernest. “Focus on the Family vastly outpaced Mormon spending on Proposition 8.” *The Colorado Independent*, February 11, 2009. <http://coloradoindependent.com/21271/focus-on-the-family-vastly-outpaced-mormon-spending-on-proposition-8>.

<sup>178</sup> Focus on the Family. “Cause for Concern.” Accessed February 25, 2013.

<http://www.focusonthefamily.com/socialissues/social-issues/marriage/cause-for-concern.aspx>.

<sup>179</sup> Focus on the Family. “Our Position.” Accessed February 25, 2013.

<http://www.focusonthefamily.com/socialissues/social-issues/marriage/our-position.aspx>.

<sup>180</sup> On this point, Focus on the Family refers to research from Dr. David Popenoe. In his book, *Life Without Father: Compelling New Evidence that Fatherhood and Marriage are Indispensable to the Good of Children and Society*, Popenoe outlines the importance of raising children with both biological parents. Research from Popenoe was used similarly cited in amicus briefs from *In re Marriage Cases*.

experience psychiatric problems and relationship failure in adulthood.”<sup>181</sup> This suggests that children of same-sex couples are invariably exposed to these same dangers since, by definition, same-sex parents cannot fulfill the roles of both a biological mother and father.

Focus on the Family supports its opposition to same-sex marriage with both secular and religious claims. References to the Bible might appeal directly to Christians whose opposition to same-sex marriage is grounded in theological understandings of the meaning of marriage. Further, Focus on the Family makes secular claims by discussing child welfare. In doing so, Focus on the Family speaks to both religious communities and members of the general public.

### *American Family Association*

The American Family Association (AFA) is a non-profit organization that promotes traditional family values in accordance with Christian teachings. AFA believes that “a culture based on biblical truth best serves the well-being of our nation and our families,” and the public can help to advance the goals of the Gospel by praying “daily for this ministry and our country.”<sup>182</sup> The organization opposes the “gay agenda,” or what it considers to be an attempt by gay rights advocates “to abolish the traditional, Judeo-Christian view of human sexuality, marriage and family.”<sup>183</sup> In this way, AFA appeals directly to religiously affiliated groups and individuals.

AFA is known nationwide for tackling large corporations, like Pepsi Co., which promote the gay rights movement and make financial contributions to same-sex marriage efforts. But, the organization does not limit its influence to national efforts endorsing traditional marriage. In response to the Proposition 8 campaign, the organization produced a 30-minute documentary summarizing its opposition to same-sex marriage. The video was distributed at no cost to more

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<sup>181</sup> Ibid.

<sup>182</sup> American Family Association. Accessed February 23, 2013. <http://action.afa.net/Detail.aspx?id=31>.

<sup>183</sup> American Family Association. Accessed February 23, 2013. <http://action.afa.net/FAQ.aspx?id=2147483680>.

than 21,000 churches across California.<sup>184</sup> The organization is also said to have contributed substantially to the Proposition 8 campaign, following the lead of other Christian organizations like the Knights of Columbus and Focus on the Family.<sup>185</sup> Additionally, then-president of AFA Tim Wildmon responded to the 2010 overturning of Proposition 8 as “a tyrannical, abusive and utterly unconstitutional display of judicial arrogance.”<sup>186</sup> According to Wildmon, the same-sex marriage debate has no place in the judiciary, and instead should be disputed among members of the public.

The American Family Association grounds its claims against homosexuality in the scripture, as homosexuality is “a sin grievous to God and repulsive to Christians” who believe that man was created by God to procreate with women.<sup>187</sup> Further, the promotion of same-sex marriage only serves to cripple the institution of marriage, the very institution that lies at the heart of society.<sup>188</sup> In accordance with other opponents to same-sex marriage, AFA also affirms that discrimination based on sexual behavior is not equivalent to discrimination based on racial characteristics, and should therefore not be protected.<sup>189</sup> Further, the organization condemns the judicial system for overstepping its authority in an issue that should be decided by the public. In this way, AFA targets both religious and secular claims about homosexuality and same-sex marriage.

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<sup>184</sup> American Family Association. "Has AFA Made an Impact?." Accessed March 5, 2013. <http://www.afa.net/faq.aspx?id=2147483676>.

<sup>185</sup> Garrison, Jessica, Cara Mia DiMassa, and Richard C. Paddock. "Voters approve Proposition 8 banning same-sex marriage." *Los Angeles Times*, November 5, 2008. <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page=1>.

<sup>186</sup> American Family Association. "AFA condemns marriage ruling tyrannical, abusive and unconstitutional." Accessed March 5, 2013. <http://action.afa.net/Media/PressRelease.aspx?id=2147497207>.

<sup>187</sup> American Family Association. Accessed February 23, 2013. <http://action.afa.net/FAQ.aspx?id=2147483680>.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

## *Alliance Defending Freedom*

Alliance Defending Freedom (also known as the Alliance Defense Fund) was founded in 1994 in order to “keep the door open for the spread of the Gospel by transforming the legal system and advocating for religious liberty, the sanctity of life, and marriage and family.”<sup>190</sup> As a legal defense organization, Alliance Defending Freedom unites Christian leaders and lawyers from across the country in an effort to advance the defense of religious freedoms in relation to a variety of social issues. The President, CEO, and General Counsel, Alan Sears, along with a host of executive board members, are dedicated to combating same-sex marriage on the legal front.

However, Alliance Defending Freedom’s influence is not limited to the courtroom. Through public outreach efforts, the organization speaks to the general public and members of the Christian community in particular. In anticipation of the March 2013 Court hearings over the constitutionality of the Defense of Marriage Act (DOMA) and California’s Proposition 8, Alliance Defending Freedom has launched a prayer initiative, urging the public to participate in “9 Weeks of Prayer for Marriage.”<sup>191</sup> In the weeks leading up to the Court review, Alliance Defending Freedom provides a prayer sheet, one for each week, offering prayers for specific leaders on both sides of the same-sex marriage movement. For example, in the prayer sheet for Week 5, participants are asked to pray for Jeffrey Zarrillo, the plaintiff arguing in opposition to Proposition 8, that “God would manifest His goodness in his life.”<sup>192</sup> Additionally, one of the organization’s lawyers advocating for the defense of Proposition 8 recently stated that the

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<sup>190</sup> Alliance Defending Freedom. "About Us." Accessed February 23, 2013.  
<http://www.alliancedefendingfreedom.org/about>.

<sup>191</sup> Alliance Defending Freedom. "Marriage at the Supreme Court." Accessed February 23, 2013.  
<http://www.alliancedefendingfreedom.org/issues/marriage-and-family>.

<sup>192</sup> Alliance Defending Freedom. "9 Weeks of Prayer for Marriage." Accessed March 5, 2013.  
<http://www.alliancedefendingfreedom.org/content/docs/issues/marriage-and-family/Pray-for-Marriage-Week5.pdf>.

Supreme Court should rely on the political process to settle the same-sex marriage dispute and “resist demands to prematurely end the national debate over the future of marriage.”<sup>193</sup>

Alliance Defending Freedom has also compiled articles on its website that support its stance against same-sex marriage. A piece co-authored by Robert George, a leading scholar in opposition to same-sex marriage, is among the articles listed.<sup>194</sup> The Witherspoon Institute, mentioned in the previous chapter, offers an article entitled “Privatizing Marriage is not the Answer to Same-Sex Marriage.”<sup>195</sup> Touchstone Magazine, a publication sponsored by members of various Christian sects, reiterates the importance of fighting same-sex marriage proposals.<sup>196</sup> These articles all outline the social function of marriage, insisting that marriage between a man and a woman is crucial to society, as it ensures that children are raised in a stable environment with both biological parents.

Alliance Defending Freedom satisfies both conservative Christians as well as members of the public who seek secular justification of opposition to gay marriage. By incorporating prayer into their fight against same-sex marriage, Alliance Defending Freedom satisfies those who are religiously affiliated and looking for doctrinal support of their opposition. On the other hand, the articles listed on the website validate the organization’s opposition to same-sex marriage by utilizing secular argumentation from trusted individuals. Alliance Defending Freedom focuses its

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<sup>193</sup> Mintz, Howard. “Proposition 8: Same-sex marriage advocates urge U.S. Supreme Court to strike down California’s--and all other states’-- gay marriage bans.” *Oakland Tribune*, February 21, 2013. [http://www.insidebayarea.com/samesexmarriage/ci\\_22637680/proposition-8-challenge-same-sex-marriage-advocates-urge?IADID=Search-www.insidebayarea.com-www.insidebayarea.com](http://www.insidebayarea.com/samesexmarriage/ci_22637680/proposition-8-challenge-same-sex-marriage-advocates-urge?IADID=Search-www.insidebayarea.com-www.insidebayarea.com).

<sup>194</sup> Referring to Girgis, Sherif, Robert P. George, and Ryan T. Anderson. “What is Marriage?” *Harvard Journal of Law & Public Policy* 34, no. 1 (2010): 245-87. <http://www.harvard-jlpp.com/wp-content/uploads/2011/08/GeorgeFinal.pdf>.

<sup>195</sup> Roback Morse, Jennifer. “Privatizing Marriage is not the Answer to the Same-Sex Marriage Debate.” *The Witherspoon Institute*, March 10, 2009. Accessed February 23, 2013. <http://www.thepublicdiscourse.com/2009/03/80/>.

<sup>196</sup> Farrow, Douglas. “Why Fight Same-Sex Marriage?” *Touchstone: A Journal of Mere Christianity*, January 2012. Accessed February 23, 2013. <http://www.touchstonemag.com/archives/article.php?id=25-01-024-f>.

secular opposition on the effect that same-sex marriage might have on child development, a concern that could potentially raise doubts in the minds of the public.

### *Family Research Institute*

The Family Research Institute (FRI) was founded in 1987 by psychologist Dr. Paul Cameron.<sup>197</sup> Cameron is notorious for producing scientific evidence that suggests that homosexuality is in fact harmful to all aspects of society. His findings are used consistently by the opposition groups of same-sex marriage, including the American Family Association, to prove that homosexuals have a detrimental impact on the development of children, while simultaneously deepening and expanding the scope of public health problems.<sup>198</sup> In 1983, Cameron's membership from the American Psychological Association was revoked, as he violated "the Preamble of the Ethical Principles of Psychologists."<sup>199</sup> Although FRI insists that their research is peer-reviewed, countless esteemed organizations including the Nebraska Psychological Association and the American Sociological Association have cut ties to Cameron, claiming that he has routinely "misinterpreted and misrepresented sociological research on sexuality."<sup>200</sup> Cameron addresses this animosity towards his research, noting that although his work is oftentimes considered unethical and distorted, "a careful review of the facts shows quite the opposite."<sup>201</sup>

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<sup>197</sup> Family Research Institute. "About FRI." Accessed February 25, 2013. <http://www.familyresearchinst.org/about-2/>.

<sup>198</sup> The Southern Poverty Law Center notes that the American Family Association, Americans for Truth about Homosexuality, Concerned Women for America, Coral Ridge Ministries, and the Family Research Council have all relied on Cameron's research to support their claims about same-sex marriage. See Schlatter, Evelyn. "18 Anti-Gay Groups and Their Propaganda." *Southern Poverty Law Center Intelligence Report* (2010). Accessed February 24, 2013. <http://downloads.frc.org/EF/EF11B30.pdf>.

<sup>199</sup> American Psychological Association. "Letter to Dr. Paul Cameron." Accessed February 25, 2013. [http://psychology.ucdavis.edu/rainbow/html/Cameron\\_apalletter.html](http://psychology.ucdavis.edu/rainbow/html/Cameron_apalletter.html).

<sup>200</sup> Schlatter, Evelyn. "18 Anti-Gay Groups and Their Propaganda." *Southern Poverty Law Center Intelligence Report* (2010). Accessed February 24, 2013. <http://downloads.frc.org/EF/EF11B30.pdf>.

<sup>201</sup> Family Research Institute. "About FRI." Accessed February 25, 2013. <http://www.familyresearchinst.org/about-2/>.

Cameron refers to four main truths about the dangers of homosexuality. First, homosexuals are not known to engage in long term monogamous relationships; instead, they prefer “variety over monogamy.”<sup>202</sup> Secondly, same-sex couples that do eventually decide to commit to monogamous relationships or marriages are more likely to engage in risky sexual behaviors, increasing the chances of spreading HIV/AIDS. Because partners take less safety precautions when having sex with a monogamous partner, research suggests that “gays disproportionately contract more disease, especially AIDS and the various forms of hepatitis, from sex with ‘partners’ than they do from sex with strangers.”<sup>203</sup> Third, domestic violence is more prominent among same-sex couples than heterosexual couples. Evidence shows that domestic violence occurs “among less than 5% of traditionally married couples, 20% to 25% of cohabiting heterosexuals, and approximately half of lesbian couples.”<sup>204</sup> Lastly, research demonstrates that same-sex couples do not make effective parents.<sup>205</sup> This is due in part to the prevalence of molestation and incest in families of same-sex couples. In sum, same-sex marriage has a series of severe disadvantages which are harmful to society. Cameron asserts that “‘gay marriage’ harms everyone it touches,” putting additional emphasis on the impact that it has on the development of children.

The Family Research Institute utilizes scientific research to advance its position against same-sex marriage.<sup>206</sup> FRI presents a number of critiques of same-sex marriage, most of which are reiterated by other organizations. In order to substantiate these claims against homosexuals,

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<sup>202</sup> Family Research Institute. “Getting the Facts: Same-Sex Marriage.” Accessed February 25, 2013. <http://www.familyresearchinst.org/2009/02/getting-the-facts-same-sex-marriage/>.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> It should be noted that the majority of cited sources of scientific research are from the 1980s and 1990s. Although this finding is in itself inconclusive, it does raise questions concerning the validity of the gathered information. Perhaps methodology and changes in the societal acceptance of homosexuality have altered the environment from which data was collected. This could potentially impact the data that is presented as evidence.



FRI speaks to common public health concerns and the wellbeing of children. These types of claims are secular, as issues of health and child welfare are of significant importance to society. Although it does not appear that FRI has any apparent religious agenda, their data is often cited by opponents to same-sex marriage that do share some connection to religious institutions. In this way, FRI maintains a secular stance against same-sex marriage while supplying religiously affiliated organizations with data that supports their claims against same-sex marriage.

### *Defend the Family International*<sup>207</sup>

Scott Lively, president of Defend the Family International and former director of California's branch of the American Family Association, is known for his controversial assertions on homosexuality.<sup>208</sup> He is currently an attorney and activist in bold opposition to the gay rights movement. Lively is most credited with evangelist activism that has taken him across the United States and Europe where he has proclaimed the "truth" about the role of homosexuality in society.

Defend the Family International lists a number of "news" pieces on the main page of its website. Articles address a range of issues, including homosexuality. One of the articles under the "Leading News" banner entitled "Obama Vacations with Reggie Love, Not Michelle" insinuates that President Obama is engaged in a homosexual relationship with his assistant.<sup>209</sup> These types of assertions are not uncommon for Defend the Family International, as the organization is set on making completely unfounded and unsubstantiated claims about homosexuality. Lively also contends that the same-sex marriage movement puts religious liberties at stake, stating that "if the First Amendment falls to the "gays" like the Magna Carta

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<sup>207</sup> An associated branch of Abiding Truth Ministries, an organization listed by the SPLC

<sup>208</sup> Lively co-authored "The Pink Swastika: Homosexuality in the Nazi Party." In the preface of the book, Lively claims that "homosexuals a[re] the true inventors of Nazism and the guiding force behind many Nazi atrocities."

<sup>209</sup> Defend the Family. "Leading News." Accessed February 23, 2013. <http://www.defendthefamily.com/>.

did, true human rights will be finished in America.”<sup>210</sup> In this view, if organizations like Defend the Family International are silenced, religious liberty will be a pastime of American history. Moreover, in response to California’s approval of same-sex marriage, Lively initiated a campaign to prevent public educators from normalizing the homosexual lifestyle in classrooms.<sup>211</sup> In his view, parents have the right to dictate their child’s exposure to homosexuality, especially if a parent’s opposition is religiously based.

Defend the Family International presents an extreme stance on homosexuality, one that demeans the homosexual lifestyle in every sense. However, the arguments put forth by the organization, which suggest that homosexuals threaten society, are simply amplified variations of those presented by other organizations. Defend the Family International also emphasizes the importance of religious liberties, an aspect of the American way of life that is relevant to all who practice their faith. Although Lively’s attempt to appear victimized by the homosexual community is hardly convincing, he does raise secular concerns about the strength and maintenance of religious freedoms in America.

### *American Center for Law & Justice*

The ACLJ, discussed in Chapter 2, utilizes many of the same tactics in the political sphere as they do in the legal sphere. In response to the California Supreme Court decision in *In re Marriage Cases*, ACLJ’s Jay Sekulow maintained that “this flawed decision represents another example of an activist judiciary that overreached by taking this issue out of the hands of

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<sup>210</sup> Lively, Scott. "The Death of Human Rights." Scott Lively Ministries. Accessed February 24, 2013. <http://www.scottlively.net/>.

<sup>211</sup> Lively, Scott, Richard D. Ackerman, Gary G. Kreep, and Citizens for Community Values. "The Legal Liability Associated with Homosexuality Education in California Public Schools." [http://www.defendthefamily.com/\\_docs/resources/2032505.pdf](http://www.defendthefamily.com/_docs/resources/2032505.pdf).

the state legislature where it belongs.”<sup>212</sup> In this instance, ACLJ refers to an overextension of judicial authority, an object of concern to the American public. This statement confirms ACLJ’s commitment to secular argumentation, as the organization previously cited arguments which questioned the impact that same-sex marriage would have on children, a legitimate concern of the state.

### **III. Final Thoughts**

Through examination of the arguments presented by proponents of Proposition 8, it is increasingly clear that organizations adjust their claims depending on the standards of argumentation in the appropriate sphere. Religiosity appears in the political sphere in a way that is entirely absent from the legal sphere. Although organizations in the political arena make consistent use of secular arguments, and religiosity in no way overpowers the magnitude of secular justification, references to the Bible and other Christian traditions are hardly foreign to the same-sex marriage discussion. In this way, there is a definite divide between the standards of argumentation in the legal and political spheres.

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<sup>212</sup> American Center for Law & Justice. "CA Supreme Court 'Overreached' by Issuing Flawed Decision on Same-Sex Marriage." Accessed February 23, 2013. <http://aclj.org/traditional-marriage/aclj-ca-supreme-court-overreached-by-issuing-flawed-decision-on-same-sex-marriage>.

## Chapter 4: Analysis

### I. Lessons from *In re Marriage Cases* and Proposition 8

Chapters 2 and 3 provide valuable insight into the types of argumentation utilized by opponents to same-sex marriage in both the legal and political spheres. After identifying the actors involved in the same-sex marriage debate, along with their respective arguments, we can establish a framework that helps us better understand the processes of legal and political legitimization in the same-sex marriage debate.

In the legal sphere, as established by close examination of *In re Marriage Cases*, secular argumentation prevailed. Although a clear majority of the organizations sponsoring briefs were found to be religiously affiliated, the presented arguments followed strict standards of secular argumentation. This secular argumentation engaged the court by proposing that the legalization of same-sex marriage could potentially lead to serious societal consequences. The most common societal issue resulting from the recognition of same-sex marriage concerned the welfare of children, as multiple briefs suggested that children benefit most from the structure of traditional marriage. Additional arguments also addressed the destruction of marriage as a respected, traditional social institution, the posed threat to religious liberties, and the inaccuracy of comparisons to racial discrimination, among others.

The political arena was explored through examination of California's Proposition 8 initiative and the organizations responsible for ensuring its success. Similar to the legal sphere, organizations in the political sphere adhered primarily to secular forms of argumentation. Although child welfare was the most prominent argument against the legalization of same-sex

marriage, there was a definite push to protect religious liberties, as organizations claimed that successful legalization efforts would effectively silence religious opposition to same-sex marriage. Again, as in the legal sphere, arguments against same-sex marriage were promoted extensively by religiously affiliated organizations.

However, contrary to the legal sphere, participants in the political discussion over same-sex marriage exercised their religious freedoms by referencing Biblical passages and alluding to religious teachings. This type of argumentation is not permitted in the legal sphere, as the establishment clause prohibits the state from promoting or favoring any religion (or absence of religion). Moreover, the boundaries of acceptable argumentation in the political sphere extended beyond the mere use of secular argumentation. Some secular arguments in the political sphere took the form of distorted or exaggerated truths. This phenomenon is evidenced by some organizations' attempts to demonize public school teachers and officials who opponents claim would actively promote the "homosexual agenda" upon legalization of same-sex marriage.

*In re Marriage Cases* and the Proposition 8 campaign shed light on legitimization processes in the legal and political spheres. Both arenas rely heavily on secular argumentation, suggesting that ideas are most effectively translated to and accepted by the public when they are substantiated by nonreligious claims. Perhaps this demonstrates the need to present arguments that are relevant to the general public, not just those who are associated with religious groups. This could be because religious argumentation, outside the walls of churches, is considered completely subjective and sometimes irrational. Critics of religious argumentation point to the inescapable traps set by religious doctrine: if the Bible proclaims that marriage is defined as a

union between one man and one woman, then it must be true.<sup>213</sup> In this way, it is rather difficult to challenge assertions based on absolute truths. Offering a religious justification of a position on a particular social issue does not satiate the public's general desire to form legislative decisions on "public reason."<sup>214</sup>

Because religious reasoning, although legally permitted, is viewed as inadequate in the public arena, religious organizations depend on secular argumentation that addresses broad societal concerns. If a religious organization can articulate that same-sex marriage poses a threat to some basic societal function, like raising children, then a religious opponent to same-sex marriage can begin to build a legitimate case. This tendency to utilize secular argumentation speaks to the public's apparent need to relate the issue in question to everyday life. If, for example, an organization claims that legalization will set off a new era of same-sex marriage promotion in public schools, a parent might consider opposing same-sex marriage. After all, opponents to same-sex marriage claim that public school teachers would be legally obligated to address homosexuality in the classroom and, further, equate same-sex marriage to traditional marriage. A parent, whether they oppose same-sex marriage or not, might perceive this action as a threat to their parental authority. If a parent feels forced to renounce their right to limit their child's exposure to homosexuality, legalization of same-sex marriage becomes a topic of interest. In this way, legalization not only affects same-sex couples, but it affects all parents and children.

Along these lines, religious organizations do not necessarily need to establish religious understandings of their opposition to same-sex marriage. In fact, it is probably more beneficial to propose secular arguments against same-sex marriage than it is to establish opposition based on

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<sup>213</sup> Beckwith, Francis J. "Religious and Secular Arguments." *The Catholic Thing*. Accessed March 12, 2013. <http://www.thecatholicthing.org/columns/2012/religious-and-secular-arguments.html>.

<sup>214</sup> *Ibid.*

religious claims. By appealing to a common interest of members of society, like child welfare or the protection of religious liberties, religiously affiliated organizations can persuade people to support their stance, not just members of religious communities. If same-sex marriage appears to challenge already established personal rights or liberties, attention shifts away from the rights of same-sex couples toward members of the general public.

## **II. A Closer Examination of the Legal versus the Political**

To further emphasize the differences in argumentation between the legal and political spheres, it is helpful to compare the arguments presented by one religiously affiliated organization in both arenas. The Church of Jesus Christ of Latter-day Saints (CJCLS) presented arguments in *In re Marriage Cases* and the Proposition 8 campaign.

In its amicus brief from *In re Marriage Cases*, CJCLS emphasized that procreation is the sole function of marriage. The CJCLS substantiated this claim by referring to “historical and sociological facts” that reiterate the long-standing tradition of heterosexual marriage. Along these lines, since procreation is the main component of societal preservation, unions of one man and one woman are central to the longevity of society. The CJCLS also suggested that the same-sex marriage debate is best left to the determination of the public, not the judiciary. This assertion speaks to a common public concern: the overextension of judicial power. Finally, CJCLS argued that since same-sex couples cannot procreate, they cannot fulfill the basic purpose of marriage. Couples who engage in traditional marriages do so in order to have biological children and build families. Same-sex couples are not capable of having children together, so their motivation to enter into a marital relationship is based on self-fulfillment. In this way,

same-sex marriage only perpetuates an adult-centric mentality, one that emphasizes the importance of adult satisfaction, challenging the importance of a family-centered society.

In the political sphere, there was a clear divergence from solely secular forms of argumentation. Instead, CJCLS offered Christian doctrine in support of its stance against same-sex marriage. The religious organization's website reiterated its devotion to Christian teachings, stating that "we affirm that marriage between a man and a woman is essential to the Creator's plan for the eternal destiny of His children."<sup>215</sup> Also, in a letter sent to congregations across California, the Mormon leadership urged Californians to support Proposition 8 since "the formation of families is central to the Creator's plan."<sup>216</sup> This is a marked display of religiosity, one that was entirely absent from the legal sphere. The organization later utilized secular argumentation, claiming that its opposition to same-sex marriage is grounded in the belief that traditional marriage is best for children and families.

The CJCLS offers a unique example of an organization that is active in both the legal and political spheres. As a result, we can draw conclusions on the differences between argumentation and legitimation in the two sectors of public life. In the legal sphere, it is evident that secular argumentation is necessary in order to appear legitimate to the legal community. This is mostly true of argumentation in the political sphere, but here, religiosity is valid and acceptable in a way that it is not in the legal sphere. This underlines the largest distinction between argumentation in the two spheres.

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<sup>215</sup> The Church of Jesus Christ of Latter-day Saints. "First Presidency Statement on Same-Gender Marriage." Accessed February 25, 2013. <http://www.mormonnewsroom.org/article/first-presidency-statement-on-same-gender-marriage>.

<sup>216</sup> McKinley, Jesse, and Kirk Johnson. "Mormons Tipped Scale in Ban on Gay Marriage." *The New York Times*, November 14, 2008. <http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all>.



### III. Connections to Constitutional Legitimation

#### *Constitutional Culture*

Reva Siegel's concept of "constitutional culture" helps us to make sense of the interaction between the legal and political spheres of influence in the same-sex marriage debate. Constitutional culture encompasses the relationship between lawmakers and the public.<sup>217</sup> Through a shared understanding of what the Constitution represents (a binding allegiance to the sovereign), lawmakers and members of the general public engage in a conversation to clarify the meaning of the actual content of the Constitution. In this way, participants in the same-sex marriage debate partake in a give-and-take discussion over the meaning of marriage in California. Amicus briefs and ballot initiatives are tools that (like those filed in *In re Marriage Cases* and Proposition 8) open the lines of communication between the legal and political spheres, reinforcing the symbiotic nature of their relationship.

Following Siegel's analysis, the same-sex marriage debate exemplifies the codependent interaction between the legal and political spheres. The prominent argument presented against the legalization of same-sex marriage involves child welfare. According to most sponsors of amicus briefs from *In re Marriage Cases* and proponents of Proposition 8, children benefit most from being raised by both biological parents. Traditional marriage ensures that children are connected to both of their parents in this fashion, solidifying the opposition against same-sex marriage. Although it is unclear whether the argument originates from the legal or the political sphere, it is evident that the argument transfers across the border between the two spheres.

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<sup>217</sup> Mazzone, Jason. "The Creation of a Constitutional Culture." *Tulsa Law Review* (2005): 672.

Moreover, if the legal and political spheres are in constant dialogue with one another, then religious argumentation in the political sphere has the potential to indirectly influence the legal sphere. For example, the passage of Proposition 8 (which was proposed and supported by religiously affiliated organizations that sometimes offered religious justifications of their stance against same-sex marriage) could legitimate future legal claims against same-sex marriage. More specifically, the passage of Proposition 8 provides legal precedence of a ban on same-sex marriage. Just as the Church of Jesus Christ of Latter-day Saints cited dozens of other state statutes affirming the traditional definition of marriage as a union between one man and one woman, the passage of Proposition 8 presents yet another case of a state legitimating opposition to same-sex marriage.<sup>218</sup> This poses a potential threat to the maintenance of American democracy, as religious organizations can have a substantial amount of influence on public policy.

### *Ideological Drift*

When discussing “ideological drift,” Jack Balkin proposes that the “meaning of [an] idea [is] inextricably intertwined with the context in which it appears.”<sup>219</sup> Along these lines, ideas are interpreted based on the social and political context in which they exist. Similarly, societal norms are comparable to “moving target[s],” as the understanding of social standards shifts in tandem with the changing social and political climate.<sup>220</sup> In this way, advocates of same-sex marriage might be viewed as proponents of ideological drift since they define marriage in relation to the morphing understanding of human sexuality in society. On the other hand, defenders of

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<sup>218</sup> See Church of Jesus Christ of Latter-day Saints. “Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California,” footnote on p. 18. Accessed February 19, 2013. <http://www.courts.ca.gov/documents/calcfamconfamicus.pdf>.

<sup>219</sup> Balkin, Jack M. “Ideological Drift and the Struggle Over Meaning.” *Connecticut Law Review* 25, no. 869 (1993): 871.

<sup>220</sup> Balkin, Jack M. “Constitutional Hardball and Constitutional Crises.” *QLR* 26 (2007): 579.

traditional marriage maintain that their definition of marriage is superior, regardless of the notable change in the social and political environments.

In the view of the opposition, same-sex marriage activists are advocating for “change” to the public meaning of marriage.<sup>221</sup> Opponents to same-sex marriage see advocates as altering the traditional definition of marriage given the increased social acceptance of homosexuality.<sup>222</sup> For example, Alliance Defending Freedom points to historical examples of groups attempting to “change” the understanding of marriage.<sup>223</sup> During the time of racial segregation, segregationists redefined marriage by enforcing racial restrictions. Opponents to same-sex marriage claim that this is characteristic of historical efforts to reinterpret marriage. Just as segregationists redefined marriage based on racial tensions of the time (an aspect of the social and political climate), same-sex marriage activists are trying to redefine marriage in accordance with the societal shift toward homosexual acceptance.

Although it is unclear which side of the same-sex marriage movement will come out victorious, it appears as though the overturning of Proposition 8 poses a danger to groups that do not follow the trends of current ideological drift. Perhaps resigning to ideological drift coincides with the establishment of legitimacy, as proponents of same-sex marriage look to benefit from the change in the social and political atmosphere.

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<sup>221</sup> See Church of Jesus Christ of Latter-day Saints, Coverdale, Wilson et al., and Alliance Defending Freedom

<sup>222</sup> Clip from a speech given at the *Resurrection Life of Jesus Church* in Sacramento, California on January 15, 2012. [http://www.massresistance.org/docs/issues/scott\\_lively/speech\\_011512.html](http://www.massresistance.org/docs/issues/scott_lively/speech_011512.html). This clip was removed from YouTube after it was characterized as “hate speech.”

<sup>223</sup> Alliance Defending Freedom. “Defining Marriage-Defending DOMA.” Accessed March 12, 2013. [http://www.alliancedefendingfreedom.org/content/docs/issues/marriage-and-family/DOMA\\_facts.pdf](http://www.alliancedefendingfreedom.org/content/docs/issues/marriage-and-family/DOMA_facts.pdf).

## *Interpretation of Facts*

Historical or empirical facts are often utilized to propel an argument forward toward legitimacy. In the realm of constitutional politics, lawmakers and justices frequently employ fact-based knowledge in order to substantiate a particular claim.<sup>224</sup> A similar tactic is applied to the legal and political spheres of argumentation.

In the same-sex marriage debate, opponents regularly cited empirical data that supported their positions. For example, amicus briefs in *In re Marriage Cases* and claims from organizations that promoted the Proposition 8 campaign argued that children benefit most from traditional marriage. This may be true; however, this conclusion is drawn from a selective use of information. The majority of sources suggesting that children benefit most from traditional marriage speak directly to research conducted on fatherless homes.<sup>225</sup> Little to no evidence spoke directly to same-sex parenting. In fact, some organizations openly admitted that adequate research has not yet been conducted to draw any firm conclusions on the effects of same-sex parenting on children.<sup>226</sup> In this way, opponents to same-sex marriage legitimate their claims by speaking to empirical evidence. Unfortunately, this evidence completely dismisses and does not account for the presence of same-sex parents.

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<sup>224</sup> Levinson, Sanford. The Embarrassing Second Amendment. *The Yale Law Journal*, Vol. 99, No. 3 (Dec., 1989) p.642 and George, Robert P. "Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution." *Loy. LAL Rev.* 32 (1998): 29.

<sup>225</sup> See Wendy D. Manning& Pamela J. Smock, *New Families and Non-Resident Father-Child Visitation* (Sept. 1999) 78(1) *Social Forces* 87, 89; Popenoe, Life Without Father (Harvard University Press 1996) 144, 146; also Valerie King, *Variations in the Consequences of Nonresident Father Involvement for Children's Well-Being* (1994) 56 *J. Marriage & Fam.* 963; Popenoe, David. *Life without father: compelling new evidence that fatherhood and marriage are indispensable for the good of children and society*. N.p.: Harvard University Press, 1999.; Manning& Lamb, *Adolescent Wellbeing in Cohabiting, Married, and Single-Parent Families* (2003) 65 *Journal of Marriage & the Family* 876, 890.

<sup>226</sup> Church of Jesus Christ of Latter-day Saints. "Amici Curiae Brief and Amici Curiae Brief in Support of Respondent State of California," p. 36. Accessed February 19, 2013.

## *Moral Politics*

In constitutional politics, creating moral distinctions between groups (creating an “us” versus “them” scenario) manipulates the public into accepting an otherwise demeaning or absurd argument.<sup>227</sup> This is also utilized in the political sphere of the same-sex marriage debate. The political sphere offers increased flexibility to organizations that propose particular arguments, a leniency that is not so easily granted in the legal sphere. As previously mentioned, the legal sphere has higher standards of argumentation in which claims must be supported by substantial evidence. In *In re Marriage Cases*, the legal opposition had to make a strong, convincing case for regulating marriage by showing that regulation served a specific state interest.<sup>228</sup> Otherwise, restricting marriage to heterosexual couples would violate the equal protection clause. Unlike political arguments, legal arguments cannot be substantiated merely by moral distinctions that do not serve a particular state purpose. These higher standards are not as deeply engrained in the political sphere, allowing for exaggerations of moral truth to enter into the political debate.

In the fight over same-sex marriage, some organizations, including Defend the Family International, insinuated that the legalization of same-sex marriage would be immediately followed by threats to religious liberties, stating that “if the First Amendment falls to the “gays” like the Magna Carta did, true human rights will be finished in America.”<sup>229</sup> Similarly, the

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<sup>227</sup> James A. Morone, *Hellfire Nation: The Politics of Sin in American History*. Yale University Press.(2003)p. 3

<sup>228</sup> Judicial Council of California. "News Release: California Supreme Court Rules in Marriage Cases." Accessed March 12, 2013. <http://www.courts.ca.gov/documents/NR26-08.PDF>.

<sup>229</sup> Lively, Scott. "The Death of Human Rights." Scott Lively Ministries. Accessed February 24, 2013. <http://www.scottlively.net/>.

Family Research Institute claimed that molestation and incest are prevalent in families of same-sex couples, implying that homosexuals are more likely to abuse children than heterosexuals.<sup>230</sup>

Not only are these claims expansive distortions of the truth, but they represent an attempt by religiously affiliated organizations to distinguish homosexuals from heterosexuals. In this case, opponents to same sex marriage create an “us” versus “them” dynamic, urging members of the public to view homosexuals as a community all their own. This tactic serves to legitimate outlandish claims in an attempt to persuade otherwise unsuspecting individuals of the danger posed to “us” by “them.”

#### **IV. Conclusion**

Ideas become legitimate through various processes. However, the most prominent and effective method of legitimation lies in secular argumentation. Although religiosity is acceptable in the political sphere, religious organizations depend heavily on secular argumentation to substantiate their claims against same-sex marriage. Without secular argumentation, religious organizations might not be able to address relevant societal concerns of the general public. Realistically speaking, it is unlikely that references to the Bible would provoke the majority of Americans to defend traditional marriage. Instead, religious organizations understand that secular arguments are necessary to advance their stance on same-sex marriage. In this way, it is clear that secular argumentation is a vital element of the idea legitimation process.

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<sup>230</sup> Family Research Institute. “Getting the Facts: Same-Sex Marriage.” Accessed February 25, 2013. <http://www.familyresearchinst.org/2009/02/getting-the-facts-same-sex-marriage/>.

## Chapter 5: Conclusion

Following our examination of California's same-sex marriage debate, it is clear that both legal and political actors adopt predominantly secular forms of argumentation. Secular argumentation allows opponents of same-sex marriage to craft claims that address issues pertinent to most individuals in society, not just same-sex couples. In doing so, opponents deflect concern away from the marginalized group (in this case, same-sex couples) towards members of the general public. For example, by claiming that homosexuality would not just be taught, but promoted and encouraged in public schools, opponents likely draw the attention of parents who might not otherwise feel affected by the legalization of same-sex marriage. In this case, parents might question the legalization of same-sex marriage if it means that their parental authority to limit their children's exposure to homosexuality will be ignored. By inferring that parental power is threatened by same-sex marriage, opponents create a universally salient concern for the populace. Despite the prevalence of secular argumentation in the legal sphere, we cannot ignore the fact that the majority of briefs submitted in opposition to same-sex marriage were sponsored by religiously affiliated groups. In this way, religiosity creeps into the legal sphere.

Although secular argumentation prevails in both spheres, it is important to recognize the role that religiosity plays in the political arena. As previously established, religious arguments are unacceptable in a court of law since the First Amendment prohibits the state from advancing any particular religious view. As a result, religious argumentation is limited to the political sphere. Organizations do in fact make use of religious arguments by referencing the Bible or making other religious allusions. One might also consider the concentration of religious organizations in the political debate against same-sex marriage as an indicator of religiosity.

Interestingly, what is most alarming about opponents to same-sex marriage debate is not that they sometimes support their claims with biblical references. In fact, these religious remarks do not seem to forcefully advance the movement against same-sex marriage, as secular arguments appear to be most effective. Similarly, religious talk helps those studying legal and political legitimation to easily identify actors as religiously affiliated; this is also not particularly challenging to American democracy.

Instead, religious organizations pose the greatest threat to society by approaching the same-sex marriage debate in a secular fashion, effectively disguising their religious identities from the general public. Unlike the Church of Jesus Christ of Latter-day Saints whose name suggests religious ties to the public, many organizations' names camouflage their religious affiliations. This phenomenon is widespread throughout the political and legal spheres, as groups like National Legal Foundation and Family Research Institute are most likely perceived by the public as legitimate civic organizations. If religious organizations can so easily conceal their identities, Americans may unknowingly continue to support social positions that reflect religious beliefs.

It is important to note that basing personal political beliefs on religious teachings is acceptable and perhaps even expected in the American political system. The First Amendment protects individuals' rights to exercise their religious liberties, and political attitudes are sometimes an extension of these religious beliefs. However, it is problematic when political organizations which actively seek to affect social policy are not overtly identifiable as religious. Entirely informed decisions about a stance on same-sex marriage cannot be made if the key opponents to same-sex marriage are not overtly identifiable.



Moreover, religiously connected organizations depend on secular argumentation in both the legal and political spheres. This secular argumentation poses the greatest threat to the democratic system, a system that relies on the clear separation of church and state. It is as if members of the general public are blinded by secular arguments and cannot or do not recognize the religious nature of the very organizations presenting these arguments. Secular arguments might lure in some members of the public who would not otherwise accept the positions of the anti-gay marriage movement. Although these arguments do not motivate all members of the public to oppose same-sex marriage, the passage of Proposition 8 confirms that a simple majority (52.2%) of Californian voters acted to preserve traditional marriage.<sup>231</sup>

Further, the translation of ideas from religious to secular (as evidenced by organizations' use of religious references in the political sphere and secular arguments in the legal sphere) virtually clouds the boundaries between church and state. If members of the public are led to believe that their opposition to same-sex marriage is rooted in a desire to better society, then religious organizations may continue to advance attacks on other contemporary social policies that fall in conflict with religious ideology. Who is to say that religious organizations will stop at same-sex marriage? Religious institutions oftentimes hold firm beliefs on abortion, euthanasia, contraception, and the role of women in society, to name a few. There is no indication that secular argumentation proposed by religiously affiliated organizations has a limit. After all, as long as the presented argument is secular, why challenge the source of that argument?

If the American public continues to be unknowingly flooded with secular justifications of religious beliefs, our democratic system is at risk. For a nation that prides itself on its dedication

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<sup>231</sup> Garrison, Jessica, Cara Mia DiMassa, and Richard C. Paddock. "Voters approve Proposition 8 banning same-sex marriage." *Los Angeles Times*, November 5, 2008. <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page=1>.

to democratic institutions, the United States appears to be far too accepting of religiosity in the political and legal spheres. If this trend persists, and religiously affiliated organizations continue to extend their influence throughout the legal and political spheres, it will be even more evident that the American democratic system is flawed. However, these weaknesses do not have to endure. Instead, by engaging in debate over the place of religion in society, the American public can choose to reject religiously driven argumentation. By conducting further research on legitimization processes that pertain to other socially salient issues (like abortion), we can come to a deeper understanding of how religious institutions formulate secular claims. This knowledge can then be applied to the discussion over the role of religion in American politics.

On March 26, 2013, the United States Supreme Court will hear arguments concerning the constitutionality of California's Proposition 8.<sup>232</sup> The Court's final decision will lay the foundation for the future of the same-sex marriage debate, and it is important to remain optimistic. Regardless of the Court's ruling, optimism and a genuine interest in understanding legitimization processes will help us, as members of the American public, to make informed political decisions.

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<sup>232</sup> Dolan, Maura, and Jessica Garrison. "Prop. 8 supporters, opponents await Supreme Court decisions." *Los Angeles Times*, November 29, 2012. <http://articles.latimes.com/2012/nov/29/local/me-prop8-marriage-20121130>.

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