

**Same-Sex Marriage and the Transcendental Engagement:
A Method-Centered Exploration of Contemporary Debate**

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Abstract:

The following study offers a method-centered investigation of contemporary same-sex marriage discourse in the United States, with a view of identifying and addressing foundational conflicts. The research draws from the “transcendental method” proposed by theologian Bernard Lonergan, as well as discourse analyses and process tracing methodologies, in order to conduct a systematic evaluation of competing perspectives. While the study examines rhetorical argumentation, it is also concerned with elucidating the underlying heuristic approaches that support moral and political positioning. In doing so, the research reveals the intricate relationship between theological understandings, morality and political behavior.

In spite of a United States Supreme Court decision on the matter, it is argued that conflict is likely to persist until foundational dialectic is addressed—particularly with problems involving (1) religious discrimination, (2) moral relativity and falsifiability of claims, and (3) the assertion of religious liberty in justifying political behavior. In order to curtail ongoing conflict without settling doctrinal disputes, it is argued that distinctions need to be made between claims based on empirical-scientific reason, and claims based on belief rationale. Rather than a secular separation of reason and faith, the conflict underscores an evolving relationship between religion and politics, which is represented by a creative, postmodern movement away from exclusivist separatisms and unfalsifiable “belief” ideologies. This is resulting in changing “church-state” relationships and the creation of novel “faith” paradigms that increasingly call for openness to revision and the substantiation of both moral and political claims using empirical-scientific reasoning.

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I dedicate this work to my partner Chris

Thank you for all that you have done to help make this work possible;
for your encouragement, support, and companionship;
and above all for renewing my faith in a
committed, life-affirming love.

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INTRODUCTION

Contemporary circumstances around same-sex marriage in the United States suggest that a significant paradigm shift is currently underway in the discourse regarding same-sex relationships. Perhaps the greatest indicator of this is the fact that support for same-sex marriage has been steadily growing at a remarkable pace in recent years, with a slight majority of Americans now in favor of marriage for same-sex couples.¹ While several states have already legislated same-sex marriage, opponents have also stepped up their fight, citing among other reasons procreative differences in gender, the welfare of children, and traditional precedence as justifications for continued abnegation.

In spite of this, unprecedented events over the course of 2012 and 2013 indicate that traditional arguments may no longer be sufficient to continue denying same-sex couples the right to marry or to be treated equally alongside opposite-sex couples, at the very least in civil law. Notably, several federal judicial rulings have deemed the controversial *Defense of Marriage Act* or DOMA (which defines marriage as between one man and one woman in federal law) to be unconstitutional. In response to numerous appeals, the United States Supreme Court has agreed to hear two of the cases. Thus, as the highest judicial body in the land, the fate of DOMA and same-sex marriage could very well be decided over the course of 2013, at least in the United States. While the court faces the additional challenge of dealing with the issue without settling religious disputes or doctrinal conflicts, a decision will undoubtedly have far reaching implications not only for the treatment of same-sex relationships, but also the treatment of “faith” or “belief” reasoning as a basis for legitimate discrimination in the public sphere.

¹ Polling Report, “Same-Sex Marriage and Gay Rights,” <http://www.pollingreport.com/civil.htm> (Accessed December 5, 2012).

Global Contexts

Transcending borders, races and religions, many people still view same-sex relationships as immoral or sinful, and even as a mental disorder or a disease, which harms children, families and the stability of a healthy society. On the extreme end, many religious people view same-sex relationships as a form of Satanism that violates God's plan for humanity, and natural disasters are sometimes invoked as proof of God's wrath against societal permissiveness of same-sex coupling. Due to social, political and religious discrimination, people who engage in same-sex relationships are still beaten, imprisoned and even killed; and in virtually every place in the world same-sex couples are routinely denied the same rights and benefits granted to opposite-sex couples.

With an estimated three hundred million people worldwide who identify as lesbian, gay, bisexual or transgender (LGBT), member groups of the United Nations are increasingly advancing LGBT issues not only as matters of civil and socio-economic rights, but also *human* rights.² In 2011, the United Nations also released its first groundbreaking report that details numerous violations and hate-motivated violence inflicted on same-sex couples and LGBT people globally, including “murder, kidnappings, assaults and rapes, psychological threats and arbitrary deprivations of liberty.” Additionally, the report states that

² The figure is a rough estimate. At the moment, no one really knows for sure what percentage of the global population identifies as LGBT. However, national surveys in the United States indicate that there is roughly three percent of the population who identify as LGBT. National estimates vary widely, ranging anywhere from four to nine million. A primary problem is that, since few censuses have been conducted until recently, it is difficult to examine more reliable trends in data over the long term. However, as researcher Gary Gates suggested in a recent interview, “The number matters... An unfortunate part of our political system is that you don't really count unless you're counted. LGBT Americans still are not routinely counted. That allows legislators and policymakers to say they really don't matter much, because if they did, we'd have this data.” See Andy Towle, “New Study Places Number of LGBT Americans Near 9 Million,” (April 7, 2011) <http://www.towleroad.com/2011/04/9million.html> (Accessed December 5, 2012). See also Gary J. Gates, “How Many People are Lesbian, Gay, Bisexual, and Transgender?” *The Williams Institute* (April 2011) <http://www.scribd.com/doc/52481941/How-many-people-are-LGBT-Final> (Accessed December 5, 2012).

LGBT people are often targets of organized abuse from religious extremists, paramilitary groups, neo-Nazis, extreme nationalists and others, as well as family and community violence, with lesbians and transgender women at particular risk. Violence against LGBT persons tends to be especially vicious compared to other bias-motivated crimes... [and] homophobic hate crimes often include a high degree of cruelty and brutality. Violent incidents or acts of discrimination frequently go unreported because victims do not trust police, are afraid of reprisals or are unwilling to identify themselves as LGBT. Public information campaigns should be introduced, especially in schools, to counter homophobia, and police and law enforcement officials should also receive training to ensure LGBT people are treated appropriately and fairly.³

While the situation is still quite dire for same-sex couples and LGBT people, acceptance is undoubtedly growing, most notably in the Western world. In historical perspective, the changes that allowed same-sex marriage discourse to surface occurred because of evolving attitudes toward same-sex couples and LGBT individuals. Overall, the scientific community has reevaluated empirical data regarding same-sex relationships, and many faith communities have reinterpreted sacred texts and doctrines on the morality of same-sex relationships. As a result, the growing affirmation from both religious and scientific communities regarding the dignity and equality of LGBT people has done much to move the discussion regarding same-sex relationships forward. This is largely due to the conclusion that there is no logical or empirical-scientific basis to substantiate a necessary reason for denying equal treatment. Consequently, in the last few decades many countries have decriminalized homosexuality, and several have even extended many of the rights and privileges of marriage to same-sex couples.

³ United Nations, "UN Issues first Report on Human Rights of Gay and Lesbian People," *UN News Centre*. <http://www.un.org/apps/news/story.asp?NewsID=40743> (Accessed July 16, 2012). See Also United Nations Human Rights Council, "Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," Annual Report of the United Nations High Commissioner for Human Rights. <http://www.ohchr.org/EN/Issues/Discrimination/Pages/PanelSexualOrientation.aspx> (Accessed on July 19, 2012).

Although the LGBT community has gained significant ground in civil equality, any progress has not been without stark opposition. Many countries still criminalize same-sex relationships, with sentences including imprisonment, torture, forced labor and even capital punishment. Some countries (notably Uganda and Russia) are currently attempting to legalize strict prohibitions and even capital punishment against same-sex couples and LGBT people, *as well as their supporters*. Additionally, many countries in the United Nations strongly oppose gay rights initiatives, and view “homosexuality” as a “licentious behavior” not covered by human rights accords.⁴ Thus, any newly won rights and equalities for same-sex couples and LGBT individuals are still precarious at best. It is a stark realization that homophobia still prevails in many parts of the world—and even in countries that have reformed laws, deep homophobic prejudice means that conflict over same-sex relationships and LGBT equality will likely persist for many, many years. The forty-year struggle over same-sex marriage in the United States is a prime example.

Contemporary Circumstances in the United States

Many developments have occurred in recent years that may signify the final thrust toward realizing full civil marriage equality in the United States. Notably, in 2011, President Barack Obama ordered the Department of Justice to stop defending DOMA, and the president was not alone in his shift in thinking. Some of the strongest advocates for same-sex marriage were once former opponents, including many high-profile figures who were once staunchly opposed and even instrumental in the enactment of DOMA.

⁴ Robert Evans, “Islamic States, Africans Walk Out on UN Gay Panel,” NBC News. July 3, 2012. http://www.msnbc.msn.com/id/46657718/ns/world_news/t/islamic-states-africans-walk-out-un-gay-panel/#.UAiqd45dX8s (Accessed July 19, 2012).

Similarly, polls indicate that a slight majority of Americans now favor same-sex marriage,⁵ with support growing most notably among conservative voters.⁶

The issue was also a hot topic of debate during the 2012 elections, with President Barack Obama and the Democratic Party officially endorsing same-sex marriage and the repeal of DOMA—the first US president and political party ever to do so.⁷ In the same election period, the citizens of Maine, Maryland and Washington voted on whether or not to legalize same-sex marriage, and Minnesotans voted on whether or not to institute a state constitutional amendment to ban same-sex marriage altogether. In an unprecedented move, all three states voted in favor of same-sex marriage—the first time any state has done so by voter initiative—and it is also the first time that any voter initiative to institute a constitutional ban on same-sex marriage has failed.⁸ Prior to this, same-sex marriage had only ever been legalized through judicial rulings or state legislative actions.

Additionally, 2012 ushered in several unprecedented federal court rulings regarding DOMA. Early in the year, a federal appeals court had overturned the infamous California “Proposition 8,” a similar DOMA like law.⁹ Although the court ruled that the law is unconstitutional, the court also added a conditional stay that prohibits further

⁵ Sara Gates, “Gay Marriage Support: 51 Percent of American Are in Favor of Marriage Equality, Poll Shows,” *Huffington Post* (November 14, 2012) http://www.huffingtonpost.com/2012/11/14/gay-marriage-support-majority-americans-poll_n_2130371.html (Accessed December 2, 2012).

⁶ Walter Olson, “Republicans Helped Same-Sex Marriage Win at the Polls,” *CATO Institute* (November 30, 2012) <http://www.cato.org/publications/commentary/republicans-helped-samesex-marriage-win-polls> (Accessed December 5, 2012).

⁷ Jeremy W. Peters and Michael D. Shear, “Democrats Draft Gay Marriage Platform,” *The New York Times* (July 30, 2012) http://www.nytimes.com/2012/07/31/us/politics/democrats-draft-gay-marriage-platform.html?_r=0 (Accessed December 2, 2012).

⁸ Deborah L. Jacobs, “Gay Marriage Scores Victories in All Four States that Considered it, but Tough Road Lies Ahead,” *Forbes* (November 7, 2012) <http://www.forbes.com/sites/deborahljacobs/2012/11/07/gay-marriage-scores-victories-in-all-four-states-that-considered-it-but-tough-road-lies-ahead/> (Accessed December 2, 2012).

⁹ Michael De Groot, “Prop. 8 Declared Unconstitutional by 9th Circuit Court; Stay Prevents Same-Sex Marriages from Resuming,” *Desert News* (Feb 7, 2012) <http://www.deseretnews.com/article/700222917/Prop-8-declared-unconstitutional-by-9th-Circuit-Court.html?pg=all> (Accessed November 1, 2012).

same-sex marriages from being legalized, pending appeals to the U.S. Supreme Court. In May, a federal appeals court in Boston also ruled that DOMA is unconstitutional. Writing for the court, Judge Michael Boudin stated that justifications for DOMA, such as "defending and nurturing the institution of traditional, heterosexual marriage" and "traditional notions of morality," were insufficient to justify such discriminatory treatment under the law.¹⁰ Shortly after, a New York court also ruled that DOMA is unconstitutional and that the discriminatory law interfered with the state's right to regulate marriage.¹¹ However, a fourth ruling in Hawaii upheld DOMA based on precedence in the law.¹² In his opinion, the presiding judge wrote that same-sex marriage is an issue that should be decided upon by the voters and lawmakers, and not by judicial mandate. Although these four examples are not inclusive of all the court cases regarding DOMA, they characterize some of the most salient issues and arguments that paved the way for the United States Supreme Court to consider DOMA's constitutionality—and the issue of same-sex marriage—for the very first time.

Contemporary Challenges

Faced with a U.S. Supreme Court ruling that could have significant and widespread ramifications, contemporary debates have reached a fevered pitch as both sides vie for public support and political control. In response, many individuals, groups and religious organizations have come to the forefront in order to argue their position and

¹⁰ Jess Bravin and Geoffrey A. Fowler, "Gay-Marriage Decision Sets Up Next Fight," *Wall Street Journal*. <http://online.wsj.com/article/SB10001424052702303552104577438240016151850.html> (Accessed July 21, 2012).

¹¹ Lisa Shapiro, "Edie Windsor vs. DOMA: 83-Year-Old Lesbian Petitions U.S. Supreme Court To Hear Case," *Huffington Post* (July 16, 2012) http://www.huffingtonpost.com/2012/07/16/edie-windsor-doma_n_1675983.html (Accessed July 21, 2012).

¹² Jennifer Sinco Kelleher, "Federal Judge Rules Against Hawaii Gay Marriage," *USA Today* (August 9, 2010) <http://usatoday30.usatoday.com/news/nation/story/2012-08-08/judge-rules-against-hawaii-gay-marriage/56896354/1> (Accessed November 1, 2012).

to debate the nature of marriage, sexuality and the human person, as well as the effects of political outcomes on social order, the stability of the family, and the welfare of children. The United States is not alone in this struggle. Many other Western countries including Australia, France, Germany, New Zealand and the United Kingdom are currently debating whether or not to legalize same-sex marriage—with many people and organizations rising to the defense (and offense) on both sides of the issue. Discussion is also beginning to surface in some Asian countries. Unfortunately, debates are often highly combatant and attitudinal. No matter where one goes, opponents tend to focus on asserting and defending their own position or on deconstructing competing perspectives, rather than questioning their own understanding and taking the time for critical self-examination.

Additionally, because of the sensitive nature of democracy and religious liberty the United States, governmental actions often make an overt attempt to arrive at outcomes without engaging in and settling religious disputes. This is frequently achieved by avoiding religious language or ignoring the religious and theological dimensions of debate. However, such actions often fail to adequately address the hermeneutical and epistemological foundations of conflict, focusing instead on symptomatic manifestations. Yet when it comes to same-sex marriage, the connections between the theological and political spheres are increasingly hard to ignore—particularly as religious communities on both sides of the debate openly campaign for policies that coincide with theological doctrines and religious beliefs. A clear distinction between religion and government becomes all the more problematic when one realizes that political advocacy is often built upon moral understandings, which are themselves constructed from “faith” beliefs.

Thus, contemporary circumstances underscore the need for an ethical approach that transcends the divisive nature of debates, by redirecting the conversation away from combative discourse and unquestioned ideologies, toward critical self-reflection and peaceful resolution. This requires addressing root problems and points of dialectic between competing perspectives to arrive at outcomes judiciously and democratically, and to avoid further problems with religious discrimination, moral relativity and religious liberty. The necessity to pay attention to root conflicts in both political and religious spheres will only grow in the wake of a United States Supreme Court ruling, and in the international circumstances around same-sex marriage that will be unfolding in the months and years to come. Although a Supreme Court ruling could settle the matter, conflict in both theological and political spheres is likely to persist until the underlying foundations are addressed, both internally with the churches, and externally in the tenuous democratic maintenance of religious liberty and church-state relations.

Research in Theological Studies

The overarching purpose of this study is to demonstrate how theological discourse informs political action and outcomes, and to comment on the implications of this with particular regard for addressing problems with religious discrimination, moral relativity and religious liberty in contemporary same-sex marriage debates. While the definition of theology is at the most basic level “talk” or “theories” about God, it is also a form of abstract discourse that is concerned with the ultimate nature of reality and the origins of morality, and more generally—that to which we ascribe the highest merit. Theology also implicates, among other things, particular understandings of the human body, sexuality, and marriage, which in turn shape how people think and behave socially and politically

about these very things. On a complex level, a given theology acts a creative and interpretive filter, which mediates between past cultural traditions on one hand, and manifestations of new human experience on the other. Thus, it can be said that an individual or communal theology mediates upon how people understand the many other aspects of lived experience and daily life, including what is deemed appropriate behavior and correct political action.

Understood in the context of this study, it is posited that a given individual or communal theology has a significant impact on social perceptions and political actions regarding same-sex marriage. However, as with most discourses, people tend to arrive at theological understandings regarding issues like same-sex marriage without ever paying attention to the activity of understanding, or the conditions that lead to particular theological conclusions or outcomes. Thus, one of the primary objectives of this research is to identify and characterize foundational *dialectic* between competing theological *heuristic* structures that spur debates and political conflicts regarding same-sex marriage.

Relevant Concepts

This study frequently refers to the terms “heuristic” and “dialectic.” Both deal in some way with solving problems and addressing foundational conflicts. The word **heuristic**, as it is used here, refers to the underlying logic, procedure or systematic approach that one uses, in order to arrive at a particular understanding or solution to a problem. In comparison, **dialectic** deals with conflict, usually with the intent of resolving differences or revealing the truth between competing perspectives. However, not all conflict is dialectical. Some differences can be eliminated in light of new evidence; however, there are also fundamental conflicts that can only be overcome through a type

of intellectual, moral or religious conversion. Thus, dialectic often refers to the foundational conflicts where differences are irreducible, with the intention of bringing such conflicts to light in order to promote conversion.

Questions, Methods and Objectives

This study begins by asking how one might proceed to analyze discourse in an ethical and systematic manner, in order to understand and address the foundational conflicts in same-sex marriage politics, which arguably have their roots in religious heuristic structures and theological dialectic. To do so, this research adapts the “transcendental method” proposed by theologian Bernard Lonergan,¹³ which provides a general framework for conducting an ethical examination of any given object of study. Lonergan’s method is “transcendental” insofar as it calls for an reflective self-correcting awareness of how one goes about retrieving facts and using data as evidence, in order to transcend from a state of ignorance and lack of clarity, to a state of knowing and understanding. As a self-reflective engagement, a transcendental investigation includes an intentional examination of not only the object of study, but also of (1) the strengths and weakness of the sources drawn upon, (2) the approaches and methods used to arrive at understanding, and (3) the limitations of the researchers’ own subjective processes.

The study also includes additional methodological considerations for (1) employing discourse analyses to characterize and make generalizations about sources of discourse, and (2) using process tracing techniques to circumscribe discourse, and to identify and address salient points of dialectical conflict. While the study offers considerations on the differing arguments regarding same-sex marriage, it is at times

¹³ Bernard Lonergan, *Method in Theology* (3rd ed. Toronto: University of Toronto Press, 1971).

more concerned with bringing to light the religious and theological dimensions of competing heuristic approaches, which are used to support competing arguments and political positioning. In doing so, the research reveals the intricate relationship between religious and theological understandings, conceptions of morality and political behavior.

Although the following research brings much of the recent discourse around same-sex marriage up to date, the goal is neither to provide a comprehensive overview of the topic nor to recapitulate all the arguments and implications of contemporary debate. Rather, the study is specifically concerned with exploring methods and approaches for identifying and addressing foundational conflict, both in the rhetoric of arguments and in the heuristic approaches underpinning debates. As stated, it is argued that political debates regarding same-sex marriage are often spurred by underlying theological doctrines and religious understandings on both sides of the issue, and that conflicts are likely to persist until these differences are addressed. Thus, the following study offers a systematic examination of discourse, in the attempt to identify and address foundational differences. Additional attention is given to characterizing judicial decision-making processes and the evaluation of moral claims, particularly with respect to addressing ongoing problems with religious discrimination, moral relativity and religious liberty.

However, this study must also humbly admit many limitations, shortcomings and subjection to biases. No study could ever claim to circumscribe the totality of discourse regarding same-sex marriage in a single volume. Therein lies the initial challenge, which was overcome by situating the analysis of discourse in relation to four recent federal court cases. Moreover, this examination cannot possibly get to all the relevant issues and arguments, which are necessarily left for other studies. Thus, this study excludes in-depth

analyses of biblical verses, empirical-scientific studies as “evidence,” and many other related issues. Rather, this study is primarily concerned with providing a snapshot of public discourse as a response to recent judicial cases, in order to reveal the intricate relationship between religious and theological understandings, and political outcomes, in the hearts and minds of the general public. Furthermore, as a qualitative exploration of discourse, great effort is made to use methods and diagnostic tools to limit biases and to present a balanced overview of contemporary circumstances; however, it is readily acknowledged that total elimination of presuppositions and biases is never completely possible. Thus, as a transcendental engagement that necessarily requires openness to revision, any criticism with respect to the limitations and shortcomings of this study is most certainly welcome.

Thesis Structure

Since the exploration of method and heuristic structure is, for the purposes of this thesis, also a primary object of study, chapter one begins by elaborating on the research and methodological approaches undertaken. This includes a more detailed overview of the objectives and methods, including a brief introduction to the “transcendental method” proposed by Bernard Lonergan, as well as the secondary techniques and diagnostic tools of discourse analysis and process tracing methodologies as they are applied to this study.

Chapter two begins with an overview of relevant historical considerations, which have contributed in some way to the development of contemporary debates around same-sex marriage. This includes a brief introduction to (1) the criminalization of sodomy throughout Europe and the United States; (2) changing perspectives regarding sexuality and same-sex relationships throughout the 20th century; and (3) the enactment of DOMA.

Additional consideration is given to elucidating the relevance of historical understandings in contemporary debates, by shedding light on the fact that how one retrieves and understands history, reveals much about how one understands and views the morality of same-sex relationships, and by extension how they behave politically regarding same-sex marriage legislation.

Chapter three moves to the task of characterizing contemporary debates, by generalizing sources of discourse into “anti” and “pro” same-sex marriage stereotypes. Although the boundaries between opposing perspectives are admittedly more fluid, the objective is to characterize sources of discourse and the polarized nature of competing interpretations, by highlighting some of the basic reasoning and rhetorical logic of debates. Additional consideration is given to discussing the religious dimensions of discourse, with particular attention to theological and biblical interpretation, and the politicking of religious beliefs in same-sex marriage politics.

Chapter four provides a cross-case study examination four recent federal court cases that involve the constitutionality of DOMA. The primary objective is to demonstrate how process tracing techniques compliment the analysis of discourse, by (1) circumscribing a manageable portion of discourse suitable for examination within a historical-narrative framework, and (2) providing a means for identifying and addressing relevant dialectical conflict in relation to actual events and outcomes. The analysis concentrates on cases from California, Massachusetts, New York and Hawaii, which encapsulate some of the strongest arguments on both sides of the debate, and that further serve as the foundation for a United State Supreme Court ruling on the issue.

Chapter five provides a discussion on eight points of dialectical conflict that were identified as a result of the process tracing analysis conducted in the previous chapter. The chapter highlights competing perspectives regarding (1) equal rights versus special rights, (2) marriage equality versus traditional marriage, (3) religious discrimination versus religious persecution, (4) constitutional versus unconstitutional, (5) voter legislative majority versus judicial authority, (6) regular review versus heightened scrutiny, (7) rationale versus reason, and (8) federal marriage versus state marriage.

A sixth and concluding chapter synthesizes the findings of the previous chapters with respect to the relationship between theology and politics in spurring debates, and the creative dimensions of dialectical conflict. This includes considerations for (1) the constitutionality of DOMA; (2) religious liberty and same-sex marriage politics; (3) changing paradigms and the transcendental engagement; and (4) avenues for future research.

In the final analysis, it is argued that in order to address ongoing problems with claims of religious discrimination, moral relativism and the assertion of religious liberty as justification to act politically—without settling doctrinal disputes—distinctions need to be made between claims based on empirical-scientific “reason” from those that are based on belief “rationalizations.” Rather than a secular removal of faith from the public sphere, it is argued that contemporary conflict regarding same-sex marriage is representative of a robust relationship between theology and politics. This is manifesting in a creative movement away from exclusivist sectarianism and classicized ideologies, toward transcendental and pluralistic faith paradigms based on openness to revision and logic that is confirmed and substantiated in empirical reality and everyday human experience.

PART I—OVERVIEW OF RESEARCH

1—Overview of Research, Methodologies and Sequence of Analysis

The following chapter provides a more specific overview of the research undertaken, with its emphasis on conducting an ethical, method-centered, case study analysis of contemporary same-sex marriage dialectic in the United States. This includes (1) an overview of the research questions and objectives; (2) a brief discussion on research parameters, challenges and source materials; (3) a survey of the methodological approaches, techniques and diagnostic tools utilized; and (4) the overall sequence of analysis with respect to corresponding chapters.

1.1 Research Overview: Questions and Objectives

Although the fundamental question of contemporary same-sex marriage politics is whether or not same-sex marriage should be legal, the answer to this question has everything to do with how one views the moral equality of same-sex relationships. Thus, understanding the moral foundations of competing perspectives is essential if one is to address the root of the political conflict, in order to move the conversation forward constructively, and to curtail further combativeness on the issue. To address these concerns, this study investigates methods for analyzing discourse and competing claims, with a view of democratic judicial process in the United States. Particular consideration is given to understanding the heuristic logic underpinning moral rhetoric and political positioning on both sides of the debate.

Because conflicts over same-sex marriage often stem from deeply rooted moral value systems, public discourse is often highly attitudinal and difficult to resolve, particularly in light of the fact that freedom of religious belief and moral conscience is

often cited as a way to relativize all opinions as equally valid. One of the primary assumptions of this research is that conflicting theological doctrines and religious beliefs, which inform the moral conscience of many people, often underpins a significant portion of the conflict regarding same-sex marriage. It is also posited that, while the issue of same-sex marriage is in some respects being settled by political decision-making processes, conflict is likely to continue until foundational theological and religious dialectic is addressed; particularly with respect to (1) claims of religious discrimination, (2) ongoing problems with moral relativity and falsifiability of religious belief claims, and (3) the right and freedom to political religious beliefs and theological ideologies in the public sphere.

As an issue with many religious and theological implications, the question remains: how might one go about understanding circumstances with a view of resolving conflict and deciding matters, without settling doctrinal disputes and infringing upon democratic religious liberty protections? This underscores the need to develop methods and diagnostic tools, which focus on identifying and addressing moral conflict—as well as the causal roots that spur conflict—in order to arrive at outcomes judiciously and democratically. Moreover, in order to avoid further conflict, specific attention must also be given to decisions that curtail further combative debate on the issue, at the very least in the public sphere.

With this in mind, the following research anticipates an upcoming United States Supreme Court ruling on the constitutionality of the DOMA, sometime mid 2013. The court can (1) rule against DOMA, (2) uphold it, or (3) find a middle ground that puts the issue back into the hands of the voters. However, with the population more or less

divided on the issue, a court ruling either way will invariably mean going against a very strong counter current. Yet, as a force to be reckoned with, the weight of a U.S. Supreme Court decision could also create a societal thrust toward one side or the other, signaling the end of the current state of polarization. Many people wish to see same-sex marriage legalized as a matter of equal treatment under the law. In contrast, many wish to maintain traditional precedence and the *status quo*, citing gender differences and conscientious moral objection. Thus, in ruling on DOMA, and by extension same-sex marriage, the United States Supreme Court will inadvertently be deciding on whether and how certain foundational understandings regarding same-sex relationships—particularly those based on theological doctrines and religious beliefs—fit within constitutional parameters.

1.2 Challenges, Parameters and Source Materials

As a multifaceted issue that has been discussed over many decades, an initial challenge lay in the circumscription of a manageable portion of discourse suitable for analysis. This was overcome by focusing the examination on rhetoric around a few of the most salient federal court cases involving the controversial *Defense of Marriage Act*, which have contributed to making a U.S. Supreme Court case possible. Thus, the primary analysis presented here is essentially an examination of *discourse in action*. However, it should be noted that the study does not focus strictly on legal discourse within the respective cases, but rather it focuses on the public dimensions of discourse that surfaced around the legal proceedings, in order to demonstrate the intricate relationships between theological doctrines, religious belief and political outcomes. Thus, those looking for legal briefings and case arguments should find that information elsewhere.

While there is certainly a great deal of research that lays the foundation for contemporary debate, circumstances and discussions have changed drastically over 2012-2013, and any examination of recent discourse would necessarily need to leave the halls of academia and journal articles, and turn instead to relevant media sources, including news reports, polls, institutional statements, organizational communications, etc. Therefore, a significant portion of discourse examined in this study draws from various social media communications. Additionally, the study intentionally stereotypes opposing perspectives regarding same-sex marriage. While such intentional stereotyping is normally to be avoided, the polarized distinction suits the purposes of this thesis, which is to examine competing perspectives in order to identify and address foundational conflict. Moreover, the polarization is a fairly accurate representation of actual circumstances, and the “yes or no,” “for or against” nature of debates.

Although the analysis focuses on rhetorical discourse, the format inadvertently sparked some additional considerations for the role of media communications in contributing to the development of public discourse, by presenting skewed portrayals of events and arguments on both sides of debates. These sources nevertheless often serve as the primary sources of information utilized by the general public. In this respect, it is also argued that media sources could play a significant role in changing discourse. Furthermore, consulting Internet sources did not change the transcription or analysis of textual discourse; however, they did present some interesting considerations in the contextual and interactive presentation of discourse. Coupled with new social media platforms like YouTube, Facebook and Twitter, Internet sources are unquestionably changing the nature of public discourse, by providing an avenue for public response and

conversation, on a global scale and in virtual real-time. Unfettered, the comments, videos and blogs reveal, perhaps, a truer picture of public perceptions, and are in their own way worthy of further study.

1.3 Prescriptions for Engaging in Ethical Discourse

The overarching objective of this research is to develop an ethical and systematic approach for identifying and addressing dialectical conflict in contemporary same-sex marriage discourse. In general, the point to such combative discourse is to argue that something should or should not be done, or that something is right as compared to wrong; however, the *ethical* engagement requires an intentional effort not to moralize, proselytize or dictate. Rather, the purpose to any ethical engagement is to offer some constructive ways to think about difficult matters, which are not always so simple or clear-cut.¹⁴ Thus understood, the real value of engaging with discourse intentionally and ethically is not necessarily a universal end product, or a means to an end, but rather the process of being open to finding new ways of dealing with challenging circumstances.

According to ethicist Anthony Weston, the ethical process requires paying attention to and adjusting our language, because “[s]peaking in a more open-minded way may help you begin to *think* in a more open-minded way.”¹⁵ For Weston, the process of ethics begins with an intentional avoidance of defensive, automatic or intentional self-justification. To do this, he recommends being attentive and keeping in mind how defeating self-justification really can be, especially when making excuses to protect behaviors or opinions that really ought to be questioned and changed. Furthermore, he

¹⁴ Anthony Weston, *A Practical Companion to Ethics* (3rd ed.; New York: Oxford University Press, 2006); 5.

¹⁵ *Ibid.*, 5.

suggests watching for the telltale anger or irritation at being challenged, and to avoid the automatic counterattack.¹⁶

According to Weston, it is also important to recognize diversity—and to be open to hearing “the other side”—because we live in a diverse society, and it is the very existence of this diversity that creates the *need* for ethics.¹⁷ However, he also cautions to avoid the temptation to interpret any kind of skepticism or resistance to moral argument as some form of relativism.¹⁸ This is particularly challenging in negotiating cases where ethical questions intersect with religious values—such as with the case of same-sex marriage. In these instances, Weston suggests starting with shared terms and common ground, rather than pushing particular agendas. Furthermore, in issues regarding interpretation of religious texts, he suggests not trying to argue a particular view especially in the face of multiple interpretations, which only serve to stress that fact that the main point can hardly be said to be clear. Rather, he suggests that in such cases, exploring multiple interpretations is perhaps the real work that needs to be done, rather than stubbornly defending one’s own position.¹⁹

Additionally, Weston states that whether one is religious or nonreligious, one must ultimately think for one’s self. We may be expected to be obedient and accountable to authorities, but one cannot ever claim that they are not responsible because they are just doing what they were told to do. It is still up to each individual to ponder and to decide, especially when authorities—for better or for worse—are unreliable. Weston notes, however, that it may be hard to disagree with authority figures that one loves and

¹⁶ Ibid., 6-7.

¹⁷ Ibid., 10-11.

¹⁸ Ibid., 14-15.

¹⁹ Ibid., 15-22.

respects, and it is particularly difficult in religious communities that claim to be speaking as the voice of God, and consequently expect obedience. In such cases, critical thinking may be discouraged or even expressly forbidden.²⁰

Similarly, J. Philip Wogaman states that while the intellectual resources that people use often have some grounding in “faith” beliefs, we also need some guidance in our reasoning to help us say things more clearly and consistently. He suggests keeping in mind six principles of logic and seven pitfalls to avoid in moral argument.²¹ The six principles of logic include:

(1) *General moral principles or values apply across the board to particular cases that logically fall under them*

Essentially, Wogaman claims there is a tendency in moral argument to settle things by appealing to one general principle, usually an abstraction like freedom or justice. However, when we appeal to such a principle we should remember that we might not like some forms of freedom or justice.

(2) *When a moral principle or value is appealed to in settling one moral question, it may not be disregarded when it also applies to other questions*

Wogaman points out that when we appeal to a principle, we must be prepared when someone uses that same principle in opposition to something we support. While it is possible to illustrate general principles being used selectively, it does not mean we should abandon all discussion based on general principles. Rather we need to be careful in the way refer to such principles.

(3) *We must not, therefore, misuse our sources of data and moral norms*

We must guard against quoting sources when they support our case, but ignoring them when they do not. This distorts dialogue and often means that our real reasons for taking the position we do, are usually different from the ones we are voicing.

(4) *A single case is not a sufficient basis for broad generalization*

We must also guard against reaching premature conclusions based on insufficient information, such as stereotyping whole groups of people about whom we may know very little.

²⁰ Ibid., 23.

²¹ J. Philip Wogaman, *Moral Dilemmas: An Introduction to Christian Ethics* (Louisville, Kentucky: Westminster John Knox Press, 2009); 150-161.

(5) *A single case may, however, be enough to challenge a wrong generalization*

In contrast to point four, we must be willing to acknowledge the exceptions, and that one case is sufficient to challenge a generalization. While this does not mean we can never make generalizations, it does mean that we have to make our generalizations more carefully to be taken credibly.

(6) *Not all opposing values or ideas are necessarily inconsistent with each other*

We must be open to exploring the possibility that each side might be partially right, and that apparently contradictory ideas can lead to deeper understandings of truth.

Similarly, the seven pitfalls to avoid include:

(1) *The straw man trap*

According to Wogaman, in arguments we have a tendency to exploit the weakest part of the opposing opinion in order to find the most absurd form of logic possible. He suggests it is a good discipline to try to state instead the opposing view in its *strongest*, not its weakest form.

(2) *Poisoning the wells*

Poisoning the wells is a logical fallacy that stigmatizes the one who presents an idea so we do not have to deal with the idea itself. If we poison the well, so to speak, we will contaminate all that comes out of it. We must guard against dismissing everything somebody says because they have been labeled this or that (e.g. liberal, conservative; humanist, fundamentalist; etc.).

(3) *The non-sequitur trap*

This occurs when we arrive at a conclusion without sufficient evidence or grounds. Simply asserting a relationship between things does not necessarily make it true. Wogaman notes further that it may be compelling to jump from biblical or theological insight to a particular conclusion that may or may not logically follow. Therefore, one needs to be able to say more about the connection and support it with facts and evidence.

(4) *The law = morality trap*

While there is invariably a connection between the law and the underlying moral values of the community, it is a common mistake to treat the two as the same. Many things are legal without being moral, and vice versa.

(5) *Premature consensus*

This happens when agreement is reached before all of the differences have been examined sufficiently.

(6) *The paralysis of analysis*

The opposite of point 5, paralysis of analysis happens with the discussion and questions continue long after most people have arrived at settled conclusions.

(7) *The ritual function*

When confronted with an irreconcilable conflict of values, we may deal seriously with one set of values or goals while “ritualizing” the other. In this case, the ritualized has replaced a serious, realistic effort to achieve the goal.

1.4 Bernard Lonergan and the Transcendental Method

While basic ethical prescriptions and logical principles are important, a more concrete and systematic method is needed in the analysis of same-sex marriage debates, particularly if one is seeking to transcend divisive and relativistic rhetoric, in order to decide outcomes judiciously and democratically. To address this need, the study adapts the “transcendental method” proposed by theologian Bernard Lonergan, in order to provide an overarching framework for the examination.

The Transcendental Method

According to Lonergan, “method”—especially when one is talking about culture and value—is not about sticking variables into a formula to get the right and same answer every time. Rather, he proposes that a method is a “framework for collaborative creativity,”²² which implies a pattern of recurrent and related operations yielding cumulative and progressive results—the purpose of which is to move from ignorance to knowledge, from the unknown to the known. Furthermore, in order for a method to be transcendental it must be concerned with more than just the results of operations, but also with the operations and the operator themselves. Thus, a transcendental method is concerned with objectifying the objects of consciousness, as well as the cognitional levels

²² Bernard Lonergan, *Method in Theology* (3rd ed. Toronto: University of Toronto Press, 1971); xi.

through which one engages in when one is studying or attempting to understand a given object. Lonergan describes these cognitional levels stating that

[t]here is an *empirical* (experiencing) level on which we sense, perceive, imagine, feel, speak, move. There is an *intellectual* (understanding) level on which we inquire, come to understand, express what we have understood, [and] work out the presuppositions and implications of our expression. There is the *rational* (judging) level on which we reflect, marshal the evidence, pass judgment on the truth or falsity, certainty or probability, of a statement. There is the *responsible* (deciding) level on which we are concerned with ourselves, our own operations, our goals, and so deliberate about possible courses of action, evaluate them, decide, and carry out our decisions.²³

Every time one attempts to understand an object this four-fold cognitional process occurs whereby one experiences, understands, judges and decides; however, one's attention is apt to be focused on the object, while conscious operating remains peripheral. However, a transcendental method intentionally and specifically recalls that any inquiry intends not only an object—but also a subject. Thus, a transcendental method begins by taking an honest look and questioning *how* and *why* one has come to know and understand what they do, and further requires one to be intentionally aware of what one is doing when they are experiencing, understanding, judging and deciding.

Moreover, a transcendental approach requires one to intentionally operate at each cognitional level, insofar as is possible, according to four *transcendental precepts*. By being *attentive*, one is intentionally concerned with being aware of one's experiencing, understanding, judging and deciding. By being *intelligent*, one is intentionally concerned with understanding all the data that accounts for the acts of experiencing, understanding, judging and deciding. By being *reasonable*, one is intentionally concerned with using the best available reason for affirming data and the reality of one's experience, understanding, judging and deciding. Finally, by being *responsible*, one is intentionally

²³ Ibid., 9.

concerned with operating in accordance with the highest norms and values of one's experience, understanding, judging and deciding.²⁴

Thus, a method is transcendental only insofar as one raises one's consciousness and operates at a transcendental level, with the objective of transcending ignorance and the unknown, and to replace egoisms with the imperatives to be attentive, intelligent, reasonable and responsible. In this way, a transcendental method moves objectively, by (1) acknowledging ignorance and seeking understanding (as compared to asserting certainty in a position already held), and (2) being open to revision in order to transcend to a more complete and accurate view of "the way things are."

Functional Specialties

According to Lonergan, the transcendental method is concerned with both understanding or "retrieving the past," and the dissemination of knowledge or "moving forward." In each phase, a transcendental approach would require for one to operate attentively, intelligently, reasonably, and responsibly. Thus, moving through both phases require eight cognitional steps in total, to which Lonergan assigns specific "functional specialties" (see Figure 1 below). Although each functional specialty is distinct, they are nevertheless intrinsically related to one another as parts of one and the same process in producing objects of knowledge.²⁵

Within the first phase of "retrieving the past," the first functional specialty is ***research***, which makes data available and relevant to the investigation.²⁶ As the second functional specialty, ***interpretation***, attempts to understand what is meant, with a view of

²⁴ Ibid., 15.

²⁵ Ibid., 126.

²⁶ Ibid., 127.

the intentions of sources. This is largely the domain of Hermeneutics.²⁷ The third functional specialty is concerned with is *history*, which tells what happened, where and when, which is limited by the historian’s access to information, as well as their own understanding, judgment, and evaluation of data.²⁸ As the fourth and last functional specialty within the phase of “retrieving the past,” *dialectic* is concerned with dynamic contradictions, both internally in the researcher’s own horizon, and externally between the competing sources and claims. The aim of dialectic is to identify and understand diverging viewpoints and reasons underpinning conflict.

The second phase of the transcendental approach is concerned with “moving forward.” Drawing upon the results of “retrieving the past,” and particularly the results of dialectical analysis, the fifth functional specialty, *foundations*, involves

Figure 1 “Functional Specialties of the Transcendental Method”		
I—Functional Specialties for “Retrieving the Past”	Cognitional Levels/ Transcendental Precepts	II—Functional Specialties for “Moving Forward”
1. Research ↓	(1) Experiencing/ Be Attentive	← 8. Communications
2. Interpretation ↓	(2) Understanding/ Be Intelligent	↑ 7. Systematics
3. History ↓	(3) Judging/ Be Reasonable	↑ 6. Doctrines
4. Dialectic →	(4) Deciding/ Be Responsible	↑ 5. Foundations

deciding which foundational commitments are more appropriate. Once foundational commitments are established, then doctrinal policies, systems of understanding and modes of dissemination can be built upon them.²⁹ *Doctrines* or policies, as the sixth functional specialty, stem from foundational commitments; thus, they concretize judgments *and* values as matters of official policy.³⁰ The establishment of doctrinal

²⁷ Ibid., 127.

²⁸ Ibid., 128.

²⁹ Ibid., 132.

³⁰ Ibid., 132.

policies gives rise to further questions about how such policies are to be expressed. The seventh functional specialty, *systematics*, attempts to meet these issues, and to work out appropriate systems of conceptualization, to remove apparent inconsistencies, and to move toward some grasp of matters.³¹ Lastly, the eighth functional specialty, *communications*, is concerned with disseminating knowledge and making foundational doctrines and systems of thought accessible to the hearts and minds of people.³²

The Creative Dynamics of Dialectic

While the study attempts to situate the examination in relation to the framework of the functional specialties, further discussion of *dialectic* is necessary since it is one of the primary concerns of this research. As mentioned, dialectic deals with conflict; however, not all conflict is dialectical. There are differences that can be eliminated in light of new evidence, but there are also fundamental conflicts stemming from cognitive theories, ethical stances, or religious outlooks, which profoundly modify and inform one's mentality. According to Lonergan, these dialectical differences can only be overcome through intellectual, moral or religious conversion. Thus, the function of dialectic is to bring such conflicts to light, to objectify subjective differences and to promote conversion.³³

To understand the concept of dialectic more fully, one must first understand the idea that everyone has a particular horizon, or point of view, that is comprised of the extent *and* limit of one's metaphorical field of vision—which is to say the utmost one can know and understand given their current reference points. According to Lonergan

³¹ Ibid., 132.

³² Ibid., 132-33.

³³ Ibid., 235.

As our field of vision, so too the scope of our knowledge, and the range of our interests are bounded. As fields of vision vary with one's knowledge and the range of one's interests vary with the period in which one lives, one's social background and milieu, one's education and personal development, so there has arisen a metaphorical or perhaps analogous meaning of the word, horizon. In this sense what lies beyond one's own horizon is simply outside the range of one's knowledge and interests: one neither knows nor cares.³⁴

From this perspective, horizons are the structured resultant of past achievements, as well as both the condition and the limitation of further development. Thus, horizons are also the boundaries that "limit our capacities for assimilating more than we already have attained."³⁵

Moreover, dialectical conflict is the result of communal and societal horizons that are dialectically opposed—as is the case with same-sex marriage. Lonergan describes this dialectical opposition stating that

What is intelligible in one is unintelligible in another. What for one is true, for another is false. What for one is good, for another is evil. Each may have some awareness of the other and so each in a manner may include the other, but such inclusion is also a negation and rejection. For the opposing horizon, at least in part, is attributed to wishful thinking, to an acceptance of myth, to ignorance or fallacy, to blindness or illusion, to backwardness or immaturity, to infidelity, to bad will, to a refusal of God's grace.³⁶

Ultimately the task in dealing with dialectic is not only to compare, but also to critique fundamental differences in horizons or worldviews. According to Lonergan, not every viewpoint is coherent, and not every reason is a sound reason; moreover, "not every irreducible difference is a serious difference, and those that are not can be put to the side so that attention, study [and] analysis can be devoted to differences that are serious and profound."³⁷ Thus, dialectic is concerned with these more serious and profound

³⁴ Ibid., 236.

³⁵ Ibid., 237.

³⁶ Ibid., 236-7.

³⁷ Ibid., 130.

differences. They are not merely perspectival, nor are they ordinarily removed or overcome by uncovering further data, because additional data will likely be subject to the same opposed interpretations as the data at present.

As stated, the causes of dialectical conflict are gross differences in horizons, and the only remedy for reconciliation is for conversion to occur; thus, the purpose and goal of dialectic is to bring about conversion.³⁸ By conversion Lonergan means a change of course and direction to a new horizon. Moreover, conversional changes can happen among groups and communities, and they can pass from generation to generation and from culture to culture. According to Lonergan, the key to authentic conversion involves self-transcendence, which means to break free from long ingrained habits of thought and speech, and to acquire a mastery of one's self that comes from knowing what one is doing when one is experiencing, understanding, judging and deciding. Thus, within dialectic lies the potential for conversion, and with conversion lies the potential for substantial growth and change.

To deal with dialectic, materials have to be assembled, completed, compared, reduced, classified, and selected; however, investigators operating from different horizons perform these tasks differently. Dialectic moves beyond ordinary encounters with data, to also confront and scrutinize people, including their values, shortcomings, and assumptions. However, the strategy is not necessarily to prove or refute a position, but to exhibit diversity and to point to the evidence for the root of conflict between competing horizons. Additionally, in the process of evaluating dialectic, the researcher reveals something of her or his self.³⁹

³⁸ Ibid., 246.

³⁹ Ibid., 253.

1.5 Addressing Dialectic

As noted, this study it is ultimately concerned with identifying and addressing dialectical conflict. However, there still remains the need to designate more specific methods for doing so. Thus, the examination utilizes the principles, techniques and diagnostic tools from discourse analysis and process tracing methodologies, which compliment the overarching transcendental framework provided above.

1.5.1 Discourse Analysis

A fundamental function of discourse is to produce the objects of knowledge with particular attention to language.⁴⁰ Thus, discourse is essentially about constructing and governing meaning through a process of defining, articulating and making sense of something—in order to produce knowledge that is understandable and clear. Since discourse is both linguistic and social, it can mean anything that is both about language and the uses of language to essentially “say” something about something.⁴¹

Language Analysis

Strictly speaking there is no singular form of “discourse analysis;” however, according to Stephanie Taylor, the most common point of reference in all discourse analysis is the focus on language and its use.⁴² In discourse analysis, language is not treated as information about something, but rather it is problematized as the topic of

⁴⁰ Thao Le and Quynh Le, “Critical Discourse Analysis: An Overview,” *Critical Discourse Analysis: An Interdisciplinary Perspective*. Languages and Linguistics Series. (Megan Short ed. New York: Nova Science Publishers, Inc., 2009), 5-6.

⁴¹ Rogers, Rebecca Rogers, “Critical Approaches to Discourse,” *An Introduction to Critical Discourse Analysis in Education* (2nd ed. New York: Routledge, 2011), 6-7.

⁴² Stephanie Taylor, “Locating and Conducting Discourse Analytic Research,” *Discourse as Data: A Guide for Analysis* (Margaret Wetherell ed. et al., London: Sage, 2001), 5.

study.⁴³ Contrary to a static view of language (such as with learning a new language, where language is deconstructed into fixed components), language in everyday social use evolves. This implies that language *in use* is more than just a vehicle for conveying meaning—it is also a vehicle for changing meaning.⁴⁴ Thus, with discourse analysis, it is often necessary to consider what different users are doing with language in a given context.⁴⁵ The results of discourse analysis—as language analysis—can help clarify meaning and point out inconsistencies or errors in logic. However, discourse analysis cannot prove the “rightness” of a particular view or claim. Rather, it can only point to logical consistency.

Four Approaches to Language Analysis

Taylor also outlines four models of dealing with language analysis.⁴⁶ The first examines language at the level of vocabulary, structure or function. Concepts like “genre” are employed to demonstrate the theoretical relationship between language and social situations. A second model is concerned with the *use* of language, or language in conversation. Interaction becomes a major focus, and the language of discourse is understood as constrained and shaped by prior linguistic discourse. A third approach examines patterns and families of terms associated with a particular topic or activity of linguistic discourse. From this perspective, language is understood as more than simply attaching labels to what already exists, but also a dynamic mechanism in constituting and creating what one refers to. A fourth approach to discourse analysis aims to identify patterns of language and related practices, and to show how these constitute aspects of

⁴³ Ibid., 15.

⁴⁴ Ibid., 6-7.

⁴⁵ Ibid., 7-8.

⁴⁶ Ibid., 8.

society and the people in it. The basic assumption is that the language available to people enables and constrains their expression of ideas, as well as what they do.⁴⁷

Finding Patterns and Making Generalizations

A particular concern of discourse analysis is how to trace patterns or generalizations in *interactive* discourse. One way to do this is to identify patterns or features that are common. Another approach is to make generalizations about the roles that people assume and how they speak in these roles (e.g., male, female, conservative, liberal, etc.). A third way is to identify positions and arguments of rhetorical language. Analysis of discourse can be confined to single-case studies, which would not emphasize cross-case recurrences, but rather the significance and persistence within a particular example. Contrastingly, cross-case studies focus on the analysis of larger, interactive discourse between cases.⁴⁸

1.5.2 Process Tracing

To provide a structured framework for the analysis of discourse, the study employs the techniques and diagnostic tools of “process tracing,” in order to circumscribe and situate discourse in relation to events and outcomes as they unfold. Process tracing refers generally to the examination of intervening steps in a narrative sequence of events, in order to make inferences about how that process took place, and whether and how it generated the outcome of interest.⁴⁹ Each link in the narrative chain leading up to a particular outcome or claim works as a causal mechanism in propelling the narrative

⁴⁷ Ibid., 9.

⁴⁸ Ibid., 14

⁴⁹ Andrew Bennett and Jeffrey T. Checkel, “Process Tracing: From Philosophical Roots to Best Practices,” *Simon Papers in Security and Development* 21 (June 2012); 5.

forward, much like a story unfolding. Rather than being concerned with outcomes *per se*, process tracing attempts to identify diagnostic units as causal mechanisms between an originating source and an outcome, in order to uncover the causal stimuli that spur behaviors, actions and events. Thus, process tracing helps to build confidence in a theory that infers causation, with particular attention to addressing competing claims or interpretations—in relation to observable events and outcomes.

Process tracing requires a firm understanding of evidence and alternative explanations for the intervening variables in a given narrative or sequence of events. Thus, a thorough examination of discourse and other relevant information is an important preliminary first step to conducting process tracing analysis. One of the primary advantages to using process tracing is that it provides a way to circumscribe a manageable portion of discourse, and to identify the main actors or sources of discourse within a historical narrative. Analyzing discourse usually involves immense amounts of data, and with a topic such as same-sex marriage there are often many people and organizations who have a lot to say on the matter. Therefore, process tracing provides a framework to reign in discourse in a manner suitable for systematic analysis. Secondly, situating discourse in relation to historical events and outcomes provides a way to focus on points that are relevant to observable processes. By situating discourse thusly, it becomes much easier to compare, analyze and make generalizations about competing claims that attempt to account for the unfolding of circumstances. Lastly, process tracing provides a way to pinpoint relevant dialectical conflict, and further provides diagnostic tools for assessing the empirical likelihood of claims, which is invaluable in ethical decision-making process.

1.6 Evaluating Claims and Inferring Causation

Essentially there are two types of claims: claims based on rationalizations that are believed to be *certainly* true on faith, and claims based on empirical evidence and logical consistency that are considered *likely* true.⁵⁰ Researchers usually put more faith in the second kind of argument, based on empirical evidence and demonstrated causal likelihood, rather than claims based on rationalizations, belief or leaps of faith. Evaluating claims involves a close examination of arguments and supporting evidence. For example, if someone makes the claim that $X + Y = Z$ that does not automatically make it true. Rather reasons and evidence need to be evaluated, particularly ones that raise questions and objections. Thus, claims must be testable and justifiable in order to adequately support an argument. If a claim cannot be tested, then it is considered *unfalsifiable*, meaning that there is no logical means for proving or disproving its validity. From this perspective, logic does not simply mean thinking intelligently and systematically; rather, it must also be confirmed in empirical reality.

Inferring and Establishing Causal Likelihood

Evaluating claims that infer causality calls for making distinctions between *sufficient* and *necessary* conditions of causal mechanisms.⁵¹ A “sufficient” condition is indirect, in that it is sufficient to contribute to the narrative relationship between two events. While a sufficient condition is part of the history of events, it is not the primary source of causation between events. In contrast, causal mechanisms that are “necessary” conditions act as essential mechanisms for the following chain of events to proceed. In a

⁵⁰ Turabian, Kate L., *A Manual for Writers of Research Papers, Theses, and Dissertations: Chicago Style for Students and Researchers* (7th ed. Chicago: The University of Chicago Press, 2007); 48-61.

⁵¹ Andrew Bennett and Jeffrey T. Checkel, “Process Tracing,” 19.

historical narrative, or sequential order of events, a necessary condition makes other events occur, as in cause-and-effect. Thus, to remove one necessary condition means that dependent conditions would not occur. Ultimately, there are four possible outcomes that can help in establishing higher degrees of empirical likelihood and logical causation, in order to evaluate the validity of a particular claim over competing perspectives.⁵² These “tests” are particularly relevant because they are similar to the approaches used by judicial systems when evaluating political claims and establishing causal likelihood.

The first diagnostic test is called the “straw in the wind” test, where neither sufficient nor necessary conditions are established. While multiple tests can lead to increased confidence in a theory (as in repeatedly dropping a straw in the wind to confirm which direction the wind is blowing), direct causation for the wind blowing is not proven. Thus, neither sufficient nor necessary conditions are established, and it is impossible to say with certainty how or why the wind blows in the direction it does, without answering further questions and uncovering additional evidence.

The second test is referred to as the “smoking gun test,” where the evidence would sufficiently explain a theory, but it cannot prove necessary causation. The image given is that of someone holding a smoking gun while standing over a victim of a recent shooting. The evidence of the gun would certainly explain the theory that the person who is holding the gun is the person who shot and murdered the victim. However, unless someone saw this happen with his or her own eyes, it is impossible to establish the necessary conditions that would prove causation. Just because someone is holding the gun, does not prove that they pulled the trigger. In order to make the claim, causation again must be rationalized, or based on unobserved or unobservable assumptions. A more

⁵² Ibid., 19-20.

complex example of this type of claim would be that LGBT people are more prone to psychological depression and suicide; therefore, there must be something inherently flawed about being LGBT. However, this claim fails to establish ontological or biological causation for depression or suicide, and instead requires an assumptive leap in logic that LGBT people must be “sick.” While the argument provides sufficient explanation, it does not necessarily prove causation, particularly in light of competing arguments.

The third test, referred to as the “hoop test,” indicates that a certain condition is necessary, but not sufficient to establish causation. Like the other two tests, the hoop test cannot establish direct causation. However, it can establish a greater degree of likelihood that the particular variable in question contributes to a particular claim, and that alternative claims are less likely to be true. An example of this would be the claim that religion is responsible for the discrimination and unequal treatment of same-sex couples under the law. While it is very possible that if one were to remove religious discrimination from the equation that there would be little to no opposition to the recognition of same-sex marriages, the claim fails to establish sufficient causation in the sense that it cannot be said or measured that opposition only comes from religion, or that all religions oppose same-sex marriage. On the contrary, religious affirmation has done much to affirm legal recognition of same-sex relationships.

In comparison, the fourth or “doubly decisive” test can be said to prove causation with extremely high degrees of likelihood. This is the most desirable scenario in which conditions are both sufficient and necessary in producing the outcome or claim asserted. An example of such a claim would be that the high depression and suicide rates of LGBT people are more likely the result of societal rejection and prejudice. Thus, social rejection

and prejudice not only provides the sufficient impetus for depression and suicide, but the removal of it would also likely negate the depression experienced and the potential for suicide altogether.

1.7 Sequence of Analysis and Concluding Remarks

The following examination unfolds in four primary steps. The next three chapters are concerned with ways of “retrieving the past,” whereas the last two are concerned with synthesizing the results of the previous three chapters as the foundation for “moving forward.” As the next section of this thesis, chapter two begins the examination by focusing on the retrieval of relevant background information, as well as the basic dialectical conflicts between competing historical interpretations and understandings of the “history of same-sex relationships.” Knowing this is important in order to understand the foundations that people draw upon when making judgments about the morality of same-sex relationships, and to further underscore the theological underpinnings of contemporary debate, particularly regarding the nature of discrimination. Chapter three focuses on identifying and characterizing sources of contemporary discourse, with additional consideration for theological assertions and biblical interpretations, as well as the politicking of religious beliefs in recent same-sex marriage politics. Chapter four uses process tracing techniques to outline the historical narratives of four recent federal court cases regarding DOMA, in order to circumscribe and situate a manageable portion of discourse suitable for analysis, in relation to recent legal proceedings. Competing perspectives are then compared and contrasted, in order to identify salient points of contemporary dialectical conflict in relation to actual events and outcomes, which further

demonstrates the dynamic and creative interplay between theological doctrines, religious beliefs and political outcomes.

The final two chapters offer a discussion that synthesizes the results of analysis, whereby theological doctrines and religious beliefs shape and impacts same-sex marriage politics, and vice versa, whereby same-sex marriage politics shapes and impacts theological doctrines and religious beliefs. It is concluded that contemporary circumstances represent a significant paradigm shift in Western society, and that far from being a secular separation of religion and government, conflict regarding contemporary same-sex marriage politics is underpinned by competing theological heuristics and an overt relationship between theology and politics—which acts as a creative and causal mechanism in generating outcomes. The creative power of such dialectical conflict in shaping circumstances and lived realities, serves to highlight the need for the relationship between theology, religion and politics to be addressed in order to resolve the matter judiciously and democratically. Again, this is all the more necessary if one is to avoid further conflict regarding issues with (1) religious discrimination claims, (2) moral relativity and falsifiability of claims, and (3) the assertion of democratic religious freedom principles, in order to justify politicking against others on the basis of theological doctrines, religious beliefs and “moral conscience.”

PART II—“RETRIEVING THE PAST”
HISTORICAL CONSIDERATIONS AND DISCOURSE ANALYSES

2—Historical Considerations

The following chapter seeks to contextualize the historical foundations of contemporary same-sex marriage debates in the United States, with a historical overview of attitudes regarding same-sex relationships throughout Western history. This includes an introduction to (1) the criminalization of sodomy throughout Europe and the United States, (2) a brief overview of gender perspectives regarding same-sex relationships and homophobia in the 20th century, and (3) the circumstances surrounding the enactment of DOMA. A final section highlights the nature of a critical historical investigation, and the fundamental differences between competing heuristic approaches, which are used to assert both “anti” gay and “pro” gay understandings of the “history of same-sex relationships.”

2.1 Criminalization of Sodomy in Western History

There is considerable documentation that human societies have always had to find ways of living with sexual diversity. According to historian James Neill, the oldest evidence for homosexual behavior surfaces around the beginning of the third millennium B.C.E., in artifacts depicting same-sex copulation.⁵³ Additionally, the earliest legal regulations regarding sex between two men date to the middle of the second millennium B.C.E., in Assyrian codes that specify that “a man who forcibly rapes another man is to be himself forcibly penetrated.”⁵⁴ Neill points out that what seems to be of concern in the

⁵³ James Neill, *The Origins and Role of Same-Sex Relations in Human Societies* (Jefferson, North Carolina: McFarland & Company Inc., 2009); 83.

⁵⁴ *Ibid.*

ancient code is not the morality of same gender coitus, but rather the non-consensual context that it occurs in.⁵⁵

It is notable that in ancient times many cultures have shown very high levels of toleration and acceptance of same-sex relationships. Classical Greek and Roman examples are frequently cited to demonstrate how same gender relations were once considered as part of societal norm, rather than an exception to the rule. Furthermore, same-sex marriages among Roman upper classes were generally accepted, and even the emperor Nero legally married at least two young men during his reign.⁵⁶ Thus, in the Western world, it was not until 342 C.E., with the growing influence of Christianity in government affairs and the process of biblical canonization that same-sex marriages were officially declared to be illegal by the state, and that couples engaging in same-sex coitus were to be put to death.⁵⁷

Sodomy and the Early Medieval Period

Although the evidence supports that same-sex relationships were acceptable in many instances in the classical world, circumstances began to change significantly around the end of antiquity and through the Middle Ages. Historian Byrne Fone attributes the growth of homophobia during this time to political upheavals and the resulting disturbances to intellectual and spiritual life, which coincided with a growth of ascetic Christian monasticism and strict rules of sexual purity.⁵⁸ Neill concurs stating that

[b]y the middle of the third century A.D., the Roman Empire, that only a century earlier had seemed in its power and glory to last forever, was showing

⁵⁵ Ibid., 84.

⁵⁶ David E. Newton, *Same-Sex Marriage* (Contemporary World Issues. Santa Barbara, California; ABC-CLIO LLC, 2010); 111.

⁵⁷ Ibid.

⁵⁸ Fone, *Homophobia*, 70.

serious signs of deterioration. The disasters and upheavals that occurred in this period set in motion social and political changes that would eventually lead to a profound transformation in, first, moral attitudes to homosexuality, and then, ultimately, its legality under imperial law.⁵⁹

Neill further points out that after Constantine's edicts, which essentially made Christianity a state religion, many functions in the Western World that were previously carried out by civic officials had been taken over by bishops or the Patriarch. This included the "collection of taxes, administration of justice, regulation of commerce, dispensing of charity, negotiations with barbarians, and even the recruitment of soldiers."⁶⁰ According to Neill, the results of these developments led to a transformation of Roman society into what was "essentially a religious community under ecclesiastical rule."⁶¹ Neill argues, however, that the enactment of anti-homosexual legislation in early Christendom was not simply a case of some devout Christian ruler concerned about the well-being of his subjects, but rather the laws were implemented as a tool to persecute political enemies, or as a pretense to seize property from opponents.⁶²

Additionally, Fone asserts that the evolution of homophobic laws and attitudes in Europe during the Middle Ages is linked to the spread of the myth of Sodom and Gomorrah.⁶³ He argues that the interpretation and use of the biblical story in justifying laws and attitudes against homosexuality, spread as Christendom spread across Europe. Its interpretation during this period, which focused on sodomy as the chief sin of the cities—deserving of terrible punishment and destruction—led to widespread criminalization of sodomy across Europe. Additionally, the bubonic plague devastated

⁵⁹ James Neill, *The Origins and Role of Same-Sex Relations in Human Societies*, 209.

⁶⁰ *Ibid.*, 229.

⁶¹ *Ibid.*, 229.

⁶² *Ibid.*, 231.

⁶³ Fone, *Homophobia*, 118-225.

Europe and England in the 1340s, and brought with it a renewed concern for communicable diseases. According to Fone, heretics, sodomites and Jews were blamed for the plague, which was seen as a manifestation of divine displeasure.⁶⁴ By the end of the Middle Ages anti-sodomite rhetoric reached a heightened fervor, and the legal punishment for sodomy often called for the death penalty, usually by hanging or burning, and often for a single infraction.⁶⁵

However, this does not mean that there were no instances of tolerance or acceptance in this period. Notably, earlier medieval literature speaks of marriage between knights through formal, ritualized ceremonies, as well as unions of love between monks and between nuns.⁶⁶ Neill points out further that until the thirteenth century, when the Catholic penitential was canonized, there was no uniform authority on sexual morality or the consequences for same-sex relations.⁶⁷ Thus, before the thirteenth century, there was considerable variation in the treatment of homosexual acts.

Renaissance and Reformation

According to Fone, homoerotic sentiments became more visible and even celebrated during the Renaissance; however, in response, churches became more concerned that sodomy was on the increase, and so states acted to stamp it out. Additionally, the Protestant Reformation ushered in a new ferocity in anti-sodomite rhetoric. Factional divides between Protestant and Catholic churches in the sixteenth and seventeenth centuries led to widespread accusations of sodomy as a form of political rhetoric to discredit and undermine enemies. Since both Catholic and Protestant churches

⁶⁴ Ibid., 187.

⁶⁵ Ibid., 224.

⁶⁶ Neill, *The Origins and Role of Same-Sex Relations in Human Societies*, 351-58.

⁶⁷ Ibid., 329-30.

were heavily involved in state affairs, it was easy to argue that an enemy was not only a sodomite, but also a traitor against the king and the country.⁶⁸

Protestant sects were especially concerned with attacking the Catholic doctrine of clerical celibacy as the cause of sodomy. According to Fone, Martin Luther not only identified sodomy with Satan, but also defined it as the absolute antithesis of marriage, which he considered essential to the maintenance of Christian society.⁶⁹ Fone argues further that Protestants saw sodomy as the enemy of marriage worse than fornication. Conversely they saw hetero-normative marriage as the primary bulwark against sodomy and Satanism. By this rationale, the Catholic Church, which demanded celibacy from the clergy, also endorsed a pernicious doctrine that promoted sodomy and ultimately Satanism.

While the Catholic church did not bend its doctrine on clerical celibacy, it responded to the challenge during the Counter Reformation by (1) declaring the sanctity of marriage, and (2) by heightening prevention strategies against anything that might be considered to undermine it—including bigamy, prostitution, masturbation, fornication and sodomy.⁷⁰ By the end of the Renaissance, church influences played a significant role in institutionalizing and evolving anti-sodomite discourse across Europe to such an extent that sodomy was seen as (1) an excessive and capital sin; (2) as an infectious and vile disease; and (3) as a severe crime linked with all sorts of other capital offenses—including treason, heresy and even Satanism.

⁶⁸ Ibid., 188.

⁶⁹ Ibid., 188.

⁷⁰ Ibid., 189.

The New World

The reports of early European explorers of the Americas describe many native cultures that exhibited high levels of tolerance and acceptance of same-sex relationships. Thus, there is no doubt that natives in the New World engaged in same-sex relationships when the Europeans came on the scene. However, by the time of the first expeditions to the Americas, Europe had been steeped in over a thousand years of anti-sodomite discourse. Thus, there was a significant clash of worldviews between the indigenous people and the European explorers. Fone asserts that, along with the need to conquer and impose religious beliefs and customs on the natives, Europeans also imported Christian anti-sodomite rhetoric—along with its demand for severe punishment.⁷¹ He states that

[t]he early settlers who colonized America hoped to find a new Eden, free of the sins and ills of old Europe. Instead, almost immediately they discovered sodomy—or so they saw it—not as an occasional isolated crime by a degenerate, but the accepted practice of entire peoples. However, Europeans possessed, so they were certain, the divine warrant and the legal right to prescribe a cure. That cure, administered by a Holy Office, a conqueror, a missionary, or a gun, tended largely to exterminate peoples who knew nothing of Sodom. Of course it can hardly be said that colonization was primarily a battle against sodomy. Europeans well knew that what they wanted was land and wealth. But sodomy...very often became a useful pretext for demonizing—and eliminating—those whose real crime was to possess what Europeans desired.⁷²

Early American explorers recorded evidence of same-sex activities, and while they condemned such practices, their reports indicate different expressions of gender identity and same-sex relations in the New World. In 1702, the French explorer Pierre Liette wrote of the Illinois Indians saying, “The sin of sodomy prevails more among them than in any other nation,” and that “there are men who are bred for this purpose from

⁷¹ Ibid., 319.

⁷² Ibid., 326.

childhood.”⁷³ Around the same time, Father Francois Charlevoix, a Jesuit missionary who wrote on Indians of the Mississippi Valley, reported that

[e]ffeminacy and lewdness were carried to the greatest excess in those parts; men were seen to wear the dress of women without a blush, and to debase themselves so from whence followed a corruption of morals past all expression; it was pretended that this custom came from...religion.⁷⁴

Similarly, William Clark (of the Lewis and Clark Expedition) also reported about the Hidatsas Indians that

[i]f a boy shows any symptoms of effeminacy or girlish inclinations, he is put among the girls, dressed in their way, brought up with them, and sometimes married to men. They submit as women to all the duties of a wife. I have seen them—the French call them Berdaches.⁷⁵

The explorers’ responses to their discoveries were often brutal and filled with disgust. One of the most notorious responses occurred on October 5, 1513, when the Spanish explorer Vasco Nuñez de Balboa is reported to have massacred several hundred Panamanian Indians.⁷⁶ Of them, some forty or so were sentenced to being eaten alive by his dogs—because they had purportedly engaged in sodomy. The explorers’ reports often express vehement distain and a desire to end the natives’ sinful sexual practices. Ironically, the explorers’ accounts shed light on a world for which evidence would otherwise be much more difficult to find. Their explorations, spanning the Americas from coast to coast, reveal a world with very different understandings of sexuality and gender, and varying attitudes toward same-sex relationships. They also betray the brutal side of European exploration, and the use of constructed religious ideology to oppress and inflict violence on native cultures.

⁷³ Neill, *The Origins and Role of Same-Sex Relations in Human Societies*, 33.

⁷⁴ *Ibid.*, 33-34.

⁷⁵ *Ibid.*, 34.

⁷⁶ Fone, *Homophobia*, 320.

Colonialism, American Independence and the Enlightenment

Over 100 years after Balboa's massacre, colonists began forming some of the first colonial communities in the New World. Drawing from early sermons, Fone posits that the colonial mindset was influenced heavily by preaching that was preoccupied with starting a new life in a promised land.⁷⁷ By referring to biblical archetypes, he asserts that the early colonists envisioned the New World as a New Eden or New Israel. Fone also claims that becoming a "new Sodom" was a constant source of anxiety for the colonists, and that they saw the New World as a promised land that required obedience to God.⁷⁸ Obedience included a vehement abhorrence of sodomy, and consequently many colonists sought not only to be free of sodomy, but to also stand as a reproof to it.⁷⁹

Consequently, many anti-sodomy laws were imported to the New World during the early colonization of the Americas. Influenced by the Church of England, the legal system in the British colonies considered sodomy as an excessive sin deserving of stern punishment. The first colonial law dealing with sodomy was passed in Virginia on May 24, 1610, which stated that "[n]o man shal [*sic*] commit the horrible, and detestable sinnes of Sodomie upon pain of death."⁸⁰ Other colonies soon followed suit, and the first person sentenced under the law was hanged for his acts in 1625.⁸¹ Notably, colonial law frequently cited the Bible concerning the treatment of sodomy. Yet, seeds of Enlightenment thinking also began to appear around this time. In 1646, Governor Winthrop of the Massachusetts Bay Colony described a legal case of sodomy where the

⁷⁷ Ibid., 326-27.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Newton, *Same-Sex Marriage*, 15.

⁸¹ Ibid.

defendant “insinuated the seed of atheism, and questioned whether there was a God.”⁸² However, changes in sodomy laws would have to wait another hundred and fifty years.

Once the colonies won their independence from Britain, they began the process of laying out the principle foundations for nation building. This contributed to a growth in experimental speculation in government—particularly regarding democratic equality and the separation of religion and government. In this post-Revolutionary Period, many Americans saw capital punishment laws as a leftover abuse of British tyranny and many states began to abolish the death penalty for sodomy through the end of the 19th century. Additionally, American literature of the early 1800s began to include a new interest in male intimacy. Authors like as Ralph Waldo Emerson, Henry David Thoreau, and Walt Whitman began using language that allowed for exploration of passionate and even erotic emotions between members of the same sex.⁸³ Fone points out, however, that while Enlightenment thinking did not eliminate criminal sanctions for sodomy in the early United States, it did eventually begin to shift legislative attitudes away from capital punishment and moral condemnation, to focus more strictly on legal censure.⁸⁴

According to Fone, while the Enlightenment brought about the decriminalization of sodomy in many European nations, this did not mean that intolerance disappeared.⁸⁵ France was the first to decriminalize sodomy in 1791. Prussia and Russia abolished the death penalty in 1794, with Tuscany following suit by the end of the century. Additionally, in 1810 the Napoleonic Code eliminated all punishment for sodomite practice throughout Napoleon’s empire. By the end of the 19th century, criminal

⁸² Fone, *Homophobia*, 331.

⁸³ *Ibid.*, 334-44.

⁸⁴ *Ibid.*, 332.

⁸⁵ *Ibid.*, 265-66.

prohibitions were also removed from the laws in Belgium, Italy, Luxembourg, Monaco, Portugal, Romania, Spain and the Netherlands.⁸⁶ Contrastingly, judgments of criminal sodomy increased in England and the United States. England was one of the last European countries to abandon statutes that demanded the death penalty for sodomy in 1861,⁸⁷ with the United States following suit in 1873.⁸⁸ Sodomy remained, however, a criminal offence in England and the United States until well into the 20th century.

Modernity

Although the end of the 19th century ushered in a new era of scientific exploration and growing humanism, there was still an equal response to impose moral condemnation onto clinical “homosexuals,” who were increasingly characterized by medical professionals as unnaturally effeminate and clinically insane. Thus, while early medical experts and social scientists observed “facts” about homosexuals, they also subjected them to moral judgments about mental and emotional stability. According to Fone, the medical field in the late 19th and early 20th centuries was still steeped in Christian ideology, which built upon centuries of anti-sodomite rhetoric as the antithesis of a healthy Christian society. Thus, any deviant sexuality that did not lead to procreation was considered a threat to society, and sexual activities that deviated from the norm needed to be treated and even eradicated for safety’s sake.⁸⁹ Moreover, anti-sodomite rhetoric was used to marginalize, and doctors called for anti-homosexual crusades, urging fellow scientists to remove homosexuals from the community and to put them in an asylum or a

⁸⁶ Ibid., 265.

⁸⁷ Ibid., 265-66.

⁸⁸ Louis Cropmton, “Homosexuals and the Death Penalty in Colonial America” *Journal of Homosexuality Faculty Publications* (1976); 288.

⁸⁹ Fone, *Homophobia*, 345-48.

prison. Fone also adds that some medical and psychological literature even warned of covert conspiracies to infect others.⁹⁰

2.2 Foundations for Contemporary Debate

Many events paved the way for the possibility of LGBT rights and same-sex marriage equality. The abolition of slavery toward the end of the 19th century, and consequent discourse of human and civil equality opened the door to a number of other rights issues to develop over the following century. The Woman's Suffrage Movement addressed growing concerns about gender inequality and the right of women to vote. The ongoing threats of war, nuclear bombs, communism and the space race also brought a new demand for technology and increasingly scientific thinking. Segregation and the Civil Rights movement also raised concerns about racial equality and interracial marriage, which coincided with changing attitudes toward sexuality, including norms of premarital sex, divorce, contraceptives, abortion and adoption.

The legalization of interracial marriage also sparked the initial attempts of same-sex couples to marry. In 1967, in the landmark case of *Loving v. Virginia*, the U.S. Supreme Court ruled that the state's law that prohibited against marriage between two individuals of different races was unconstitutional. The court founded its decision upon the proposal that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."⁹¹ This ruling not only established marriage as a civil right and a necessary part of life, but also established that people should not be barred from the union of marriage because of race, or more implicitly, because of circumstances of birth.

⁹⁰ Ibid., 348-50.

⁹¹ Newton, *Same-Sex Marriage*, 112.

Shortly after, in 1970, two men applied for a marriage license in Hennepin County, Minnesota. They were refused and consequently sued, appealing all the way to the U.S. Supreme Court. However, the Supreme Court refused to hear their case because of the lack of any “substantial federal question.”⁹² Interestingly, another same-sex couple was granted a marriage license from another county *in the very same state*. A Methodist minister married them, making them the first same-sex couple to legally marry in the United States.⁹³ However, the clerk who issued the marriage license claimed that they only did so because the names were androgynous, and the marriage was soon nullified. Over the next couple of decades, other same-sex couples also attempted to marry in other areas of the country, but they were met with failure.

Legally sanctioned same-sex marriage was unthinkable for most of the 20th century; however, fueled by Civil Rights movements for racial and gender equality, many closeted homosexuals began to object to prejudiced treatment by the state. Early gay activism was narrowly concerned with protecting private spaces and subcultural institutions. However, things began to change significantly after the Stonewall Riots of 1969, when LGBT people began coming out of the closet and forming rights organizations in droves. They demanded that states ensure equal rights and protections that other minorities had achieved, and that new measures be adopted to discourage and prohibit discrimination on the basis of sexual orientation.

Decriminalization of Sodomy and the Rise of Gay Marriage Bans

According to Newton, public attitudes toward sodomy began to change in the 1950s, particularly after the American Law Institute published a model penal code in

⁹² Ibid.

⁹³ Ibid.

1955 that made no recommendations for consensual sexual acts performed in private.⁹⁴ This suggested that such acts did not belong under the jurisdiction of civil law. Shortly after, Illinois became the first state to adopt this perspective and repeal its sodomy laws in 1961, with many others following suit. However, sodomy laws would remain enforceable in several states until 2003, when the U.S. Supreme Court reversed a previous ruling in 1986, stating that private consensual sexual behavior is protected by the Constitution.⁹⁵

While sodomy laws were gradually repealed, bans that would prohibit same-sex couples from legally marrying began to increase, largely as a response to the initial attempts of same-sex couples to obtain marriage licenses. Maryland became the first state in 1973 to officially ban marriage between two people of the same sex. Before this, no specific prohibition existed in any state constitution or legal code.⁹⁶ By 1975, four states had adopted laws that officially prohibited same-sex marriage.⁹⁷ Since the 1970s, approximately forty states have instituted laws to expressly prohibit same-sex marriage.

However, the 80s and 90s reflect mixed trends. In 1984 the city of Berkeley, California became the first legal entity in the United States to create a domestic partnership that provided many of the same benefits of traditional marriage to same-sex couples, but only in areas controlled by city law.⁹⁸ Elsewhere in the United States, same-sex couples were increasingly allowed to adopt and retain custody of children, and LGBT activists became increasingly vocal against the unequal treatment of same-sex couples. By the end of the 1990s, the ability for homosexuals to live openly, and relatively unmolested, became more or less commonplace.

⁹⁴ Ibid., 15.

⁹⁵ Ibid., 16.

⁹⁶ Ibid.

⁹⁷ Ibid., 113.

⁹⁸ Ibid., 114.

2.3 “Homosexuality” and “Homophobia”

The German sexologist Karl Heinrich Ulrichs first coined the word “homosexuality” in 1868.⁹⁹ Thus, the word homosexual is a relatively recent nomenclature. Indeed, the historical study of homosexuality, and sexual diversity, is a relatively recent phenomenon—one heavily influenced by Western developments. Like homosexuality, the term “homophobia” is also a fairly recent nomenclature. Its use surfaced around the same time that the Western psychiatric community removed homosexuality as an illness from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in the early 1970’s.

At the start of the 20th century in the United States, homophobic violence forced homosexuals to live behind a social mask, and there was little organized resistance to homophobia. However, things slowly began to change. In 1925 the Society for Human Rights became the first homosexual group in America whose mission was to “protect the interests of people who by reason of mental and physical abnormalities are abused and hindered in the legal pursuit of happiness...and to combat the public prejudices against them.”¹⁰⁰ However, Fone claims that the great depression and World Wars ushered in new strains of homophobia that conflated sexual difference with anti-American sentiment and betrayal of the nation’s values, and efforts to suppress homosexuality and put it in the closet were renewed with vigor.¹⁰¹

During most of the 20th century, homophobia in the United States was still so strong that it constrained most disagreement for fear of hostility, and was thus challenged

⁹⁹ Fone, *Homophobia*, 4.

¹⁰⁰ *Ibid.*, 381.

¹⁰¹ *Ibid.*

by very few.¹⁰² However, as American scholars began cataloguing homoerotic literature and surveys of homosexual lives, they revealed that historical facts had been obscured by moralist judgments, social prejudice and scientific fallacies.¹⁰³ For example, in one of the first works surveying the history of homosexuality, author Edward Stevenson, writing as Xavier Mayne, challenged the assumption that all homosexuals were effeminate degenerates, by emphasizing the numerous biographies of military heroes purportedly to have also engaged in homosexuality.

He further disputed interpretations of the Sodom and Gomorrah myth, arguing that there is no textual evidence to give a sexual value to the story.¹⁰⁴ While his interpretation was questionable, it is indicative of how scholars began to develop new methods and literary approaches for reevaluating biblical texts. Furthermore, the gendered interpretations that began to surface did much to change the religious and moral landscape regarding homosexuality in the United States, and elsewhere, particularly in the latter decades of the 20th century. However, such religious discussion about sexuality did not occur in a vacuum, but rather it coincided with changing religious, biblical and theological interpretations—as a result of the dynamic conflicts that occurred around racial and gender equality in the decades prior.

Although Western scientific perspectives regarding homosexuality have changed significantly since the 1970's, there is still open discussion around the meaning of homophobia, which includes an irrational fear or negative emotional reaction to homosexuality (e.g. anxiety, anger, discomfort, aversion). There is also open discussion about the manifestations and extent of homophobia, and whether or not it even actually

¹⁰² Ibid., 355.

¹⁰³ Ibid., 360.

¹⁰⁴ Ibid., 361.

exists. However, what seems to be agreed upon by those who view homophobia as a reality is that there are both external and internal forms. In other words, homophobia does not always manifest as an external prejudice, but rather it is sometimes the homosexual who exhibits homophobic characteristics, usually as a form of self-loathing. Additionally, the term homophobia tends to be used pejoratively, and is used synonymously with other similar sexual phobias, including “biphobia” (aversion of bisexuals) and “transphobia” (aversion of transsexuals).

Some medical professionals even go so far as to advocate for treating homophobia as a mental illness. Martin Kantor, a medical doctor who favors viewing homophobia as an emotional disorder, outlines six models of homophobic paradigms,¹⁰⁵ including:

- (1) **The medical model:** gays and lesbians are sick, that is, too unhealthy to be permitted to raise children or even to be allowed to move freely through society, and they may even need to be quarantined, or better still, exiled.
- (2) **The religious model:** gays and lesbians are sinners and ought to do penance for their sins.
- (3) **The criminal model:** gays and lesbians do things that are illegal; for example, they are pedophiles and ought to be jailed.
- (4) **The political model:** gays and lesbians make good common-cause enemies for those who want to get ahead personally and professionally, for example, to get out the conservative vote.
- (5) **The sociocultural model:** gays and lesbians and their homosexual lives are dangerously subversive and poised to disrupt the world order and keep us from ever having lasting peace.
- (6) **The biological model:** gays and lesbians, like gypsies, Jews, or aborigines, are inherently genetically inferior and so ought to be put into a symbolic version of a concentration camp, confined to a real ghetto, sterilized, or even exterminated for the greater good and well-being of society as a whole.

¹⁰⁵ Martin Kantor, MD, *Homophobia: The State of Sexual Bigotry Today* (2nd ed; Westport, Connecticut: Praeger, 2009); 11.

2.4 Feminist Perspectives on Sexism and Homophobic Oppression

Because developing gendered perspectives on sexual identity are pivotal in the conflict around same-sex relationships, it is important to establish what they are, and how they relate to the discussion on marriage. In her book, *Homophobia: A Weapon of Sexism*,¹⁰⁶ feminist author Suzanne Pharr asserts that sexual identities are morally neutral, and whether one is heterosexual or homosexual, it is not an indication of good or evil character. Pharr points out that humans have yet to clearly understand how sexual identity develops, and further notes that there are many theories, including genetic makeup, hormones, socialization, environment, etc.¹⁰⁷ Additionally, there is no conclusive evidence that one type of sexual identity, such as heterosexuality or homosexuality, comes from any particular or specific process. From this perspective, sexual identity is highly contextual to individual life circumstances. Additionally, to understand sexual identity, one must go beyond biological gender and whom one has sex with.

Pharr describes sexism as the tendency to discriminate and stereotype on the basis of sex or sexual identity, and further categorizes homophobia as an oppressive type of sexism that manifests largely in aversive language used to describe homosexuality. Pharr claims that homophobic people often assert that homosexuality is a sin, and that gay people have the choice of not being homosexual. However, according to Pharr, homosexuality is not simply a matter of choice, but rather wholeness. Additionally, she states that it is very difficult to be denied the life of a sexual being—the way one's body and being needs to feel whole. Thus, Pharr claims that homosexuals are often forced to

¹⁰⁶ Suzanne Pharr, *Homophobia: A Weapon of Sexism* (Berkeley: Chardon Press, 1997).

¹⁰⁷ *Ibid.*, 20.

trade wholeness, for privilege and survival in a heterosexual society, while their true selves remain in exile.

Gender Stereotyping and Oppression

According to Pharr, stereotyping is a way of categorizing individuals or groups according to an oversimplified, standardized image or idea. Furthermore, stereotyping is often caused by a distortion and lack of knowledge about others who are not part of the norm.¹⁰⁸ Pharr claims that, through negative gender stereotyping, marginalized sexual minorities are denied their individual character and behavior, and are even dehumanized. Additionally, she argues that a primary tactic of negative sexual stereotyping is to blame the victims for their own victimization, with the goal to lead the victims to be complicit with their own victimization, by thinking that it is deserved and should not be resisted.¹⁰⁹ Pharr notes, however, that blaming victims for their own oppression diverts attention from the true abuser or the cause of the victimization, and points out that once oppression is identified and accepted as a reality, then the issue is no longer about addressing sexual identity, but rather it is about addressing sexism and homophobia.

Adding to this, Pharr claims that the most effective tactic of sexism is to ostracize, deny access and treat victims as outsiders, particularly in areas where it is most vital to be accepted in order to feel secure and confident—namely in the family, the community and the workplace. Thus, the threat of violence and insecurity is a primary weapon of sexist oppression, which aims to keep people in a narrowly defined place or role.¹¹⁰ Additionally, whether consciously intended or not, because sexism is used to enforce

¹⁰⁸ Pharr, *Homophobia*, 58-59.

¹⁰⁹ *Ibid.*, 59.

¹¹⁰ *Ibid.*, 13.

compliance and obedience, by ostracizing and threatening punishment or loss, it is ultimately a violent attempt to seek power and control over another person. However, Pharr notes that violence need not be physical. Language itself can also be a form of violence, and the results to psychological, emotional and spiritual esteem can be every bit as damaging as it is to inflict bodily harm. Thus, Pharr claims that sexism and negative gender stereotyping manifests as an oppressive violence that aims to produce sexual conformity in society, and that is directly related to conditions in society that refuse equal treatment, equal access and equal status.

A Feminist View of Heterosexism and Marriage

Pharr argues that heterosexism sets the foundation for other forms of sexism, including homophobia, by creating a climate based on the assumption that the world is and must be heterosexual. Essentially, heterosexism assumes that everyone normal is heterosexual, and that those who deviate are abnormal. In a heterosexist society, heterosexuals can be affectionate in public, talk about their family and social lives, and be open with social networks; however, if homosexuals do then they are ridiculed and accused of flaunting deviancy. Moreover, homosexuals are threatened with losing employment, family, children, privileges, protections, physical safety, mental health, emotional wellbeing, communal acceptance, credibility, etc.¹¹¹

Additionally, in a heterosexist society, heterosexism is backed by institutions (primarily by marriage laws) that ensure its predominance. In such a heterosexist state, heterosexuality is compulsory for access to certain privileges, including marriage and the family unit. In other words, those who do not fit within the strict sexual confines of

¹¹¹ Ibid., 21-23.

heterosexual marriage are denied access to rights and privileges, and lose opportunities that would otherwise be available. Thus, Pharr asserts that marriage, *as a strictly heterosexual institution*, is a primary societal enforcer of homophobic oppression.

2.5 Defense of Marriage Act (DOMA)

The *Defense of Marriage Act* was enacted in 1996, largely in response to circumstances in Hawaii, where same-sex couples had appealed all the way to the Hawaii Supreme Court for the right to obtain marriage licenses. The court agreed that the state marriage law should guarantee same-gender couples equal protection but did not order the state to grant the couples licenses. Instead, the court sent the case back to the lower court of appeals, and directed the state to prove that the inequality of marriage rights was justified. However, the state legislature stepped in and quickly changed the marriage laws to assert that the contract of marriage is only applied to marriages between a man and a woman. With the law changed, the court case was considered a moot point and consequently dropped. Despite this change, the reluctance of the Hawaii Supreme Court to deny same-sex marriage rallied conservatives against the threat that it could potentially be legitimized elsewhere in the country by judicial review.¹¹² Shortly after, DOMA was quickly drafted and proposed to Congress, and passed through the House and Senate with little opposition. Until fairly recently, DOMA and other similar laws largely flew under the radar, and were enacted with little public debate.

The simplicity of DOMA and other DOMA-like laws is remarkable, in light of all the conflict that surrounds them. DOMA only has two main provisions.¹¹³ The first

¹¹² “Defense of Marriage Act of 1996,” *Free Online Law Dictionary*, <http://legal-dictionary.thefreedictionary.com/Defense+of+Marriage+Act+of+1996> (Accessed August 10, 2012).

¹¹³ *Ibid.*

emphasizes that no state, territory or Indian tribe shall be required to recognize same-sex relationships that are treated as marriage elsewhere. This language refers to the Full Faith and Credit Clause of the U.S. Constitution, by essentially stating that it has no application to same-sex marriages, even though it does for opposite-sex marriages. The second provision instructs the federal government to define “marriage” as only between one man and one woman, and that the word “spouse” only refers to persons of the opposite sex as husband and wife. This provision was meant to preclude non-heterosexual couples from the rights and protections of marriage under federal jurisdiction, including access to federal benefits, income tax status, social security survivor payments, and the ability to sponsor a spouse as a permanent resident.

2.6 The Critical Historical Engagement

In describing history, Lonergan refers to the experiencing human subject in time, whose “conscious and intentional acts keep shifting in one way or another to make his ‘now’ slip out of the past and into the future...”¹¹⁴ Thus, as experiencing historical beings, our pasts consist of a living tradition, passed on from person to person and from group to group, whereby the future continually becomes the past foundations for the next generation. So the cycle continues, which contributes to shaping who and how we are, individually and collectively. In comparison, the study of history is not typically construed as being concerned with understanding what authors or historians intended, or how they produce and generate historical understanding, but rather more generally to “grasp what was going forward in particular groups at particular places and times.”¹¹⁵ However, generating historical “understanding” is not simply a matter of gathering and

¹¹⁴ Lonergan, *Method in Theology*, 181.

¹¹⁵ *Ibid.*, 178.

testing all the available evidence, but rather it involves making discoveries and interpretations based on available evidence, in order to produce historical knowledge.¹¹⁶

Lonergan also makes a further distinction between “pre-critical history” and “critical history.” The function of *pre-critical history* is to promote knowledge and devotion to a particular perspective, identity or even ideology. He further states that pre-critical history is never just a narrative of the facts, but rather

[i]t is *artistic*: it selects, orders, describes; it would awaken the reader’s interest and sustain it; it would persuade and convince. Again it is *ethical*: it not only narrates but also apportions praise and blame. It is *explanatory*: it accounts for existing institutions by telling of their origins and development and by contrasting them with alternative institutions found in other lands. It is *apologetic*: correcting false or tendentious accounts of the people’s past, and refuting the calumnies of neighboring peoples. It is *prophetic*: to hindsight about the past there is joined foresight on the future...¹¹⁷

Such an account of history, however, does not qualify as the functional specialty “history.” In comparison, the work of *critical history* is not just a matter of stringing together testimonies that are considered credible, which merely reedits historical experience, but rather it sets out to discover *evidence* that supports a version of what was going forward, by settling matters of fact—insofar as that is possible.¹¹⁸

Such evidence begins as “potential” evidence, and moves to the status of “formal” evidence through a process of verifying (1) sources and authors of sources, and (2) how the sources are used to understand and make a claim about the object to which they are relevant. Lonergan adds to this stating that,

Not only does understanding the authors contribute to understanding historical events, but in coming to understand the events there arise questions that may lead to a revision of one’s understanding of the authors and, consequently, to a revision of one’s use of them.”

¹¹⁶ Ibid., 180-181.

¹¹⁷ Ibid., 185.

¹¹⁸ Ibid.

In other words, the ulterior aim of establishing “facts” in a historical examination is to understand what authors were up to and how they went about doing it, which distinguishes the strengths and weaknesses of sources, and how they are used and applied accordingly.¹¹⁹ However, while the objective of history is to move sources to a point where they transition from being formal evidence to actual evidence, the judgment humbly remains no more than the best available opinion, because later discoveries may force a correction or revision of earlier opinions.¹²⁰

Theoretically, there is no one systematic or universal approach to the objectification of historical understanding. However, critical history is more than simply taking a good look and letting the facts speak for themselves. It also involves an interpretive process whereby one comes to understand. Although there is no singular procedure for the systematic and ethical objectification of historical knowledge, this does not mean that there is no heuristic structure in an ethical or critical examination.¹²¹ To begin with, a critical account of history is overtly concerned with the proper procedures relative to a historical investigation, with particular attention for avoiding certain ethical traps (e.g., relativism, perspectivism, subjectivism, etc.). Secondly, while neither the past nor the present can be known in their entirety, the historian must attempt an account that is as close to reality as possible. This calls for one to use the best intellectual faculties available, given one’s particular horizon. Thirdly, the investigator must rely to one degree or another on the best available theoretical constructs, which help to formulate hypotheses and theories, and to promote clear understanding. Fourthly, the theories that

¹¹⁹ Ibid., 187-189.

¹²⁰ Ibid., 191.

¹²¹ Ibid., 224-233.

are developed must be subject to criticism in light of their scientific, philosophical, and theological bases.

A critical approach, also calls for the understanding that all historical explanations are really just sophisticated extensions of the best available commonsense understandings, *which are almost always incomplete and adjustable*. In this sense, a critical-historical heuristic is consonant with a transcendental method, with their mutual concerns for self-correction, openness to revision and “retrieving the past” ethically. Such a critical-transcendental approach also requires the admission that *all* investigators are subject to bias and limitations. Overcoming these requires the constant application of ethical prescriptions and the transcendental precepts to be attentive, intelligent, reasonable, and responsible in one’s investigative approach.

2.7 Competing Heuristics and the “History of Same-Sex Relationships”

It is argued that the same heuristic approaches used in the ascertainment of historical “knowledge” regarding same-sex relationships are also employed to inform political behavior and positioning regarding same-sex marriage. This is because the historical heuristic structures, which are concerned with the “retrieval of the past,” are foundational to the worldviews that underpin how people view the morality of same-sex relationships, and by extension same-sex marriage. To demonstrate this, the following section intentionally stereotypes the heuristic approaches of both “anti” gay perspectives and “pro” gay perspectives regarding the history of same-sex relationships. This is followed by a concluding section that further highlights some of the implications of competing historical heuristics in setting the foundations for contemporary same-sex marriage debates.

2.7.1 Anti-Gay Perspectives

Although the study endeavored to be attentive to differing views, it is very difficult to find a comprehensive historical examination from an overtly “anti” gay perspective specifically regarding the “history of same-sex relationships.” This is possibly due to the fact that such perspectives rarely view the history of same-sex relationships as a salient concern worth writing about, except perhaps as a source of contention to fight against. It may also be that anti-gay perspectives are somewhat censored, whether intentionally or not, by the search services available to this investigator (i.e., university libraries, academic databases, the Internet, etc.). Thus, it is questionable whether researchers from more conservative institutions might have access to different resources wherein one might find such a comprehensive text.

Initial searches for books on conservative websites and with conservative booksellers resulted in a list of works related to arguments against homosexuality; however, few, if any, overtly professed to offer a comprehensive account specifically concerned with the “history” of same-sex relationships. Rather the history of homosexuality is dealt with in bits and pieces, to be gleamed from the claims of apologetic works. Moreover, it is argued that while such sources may be critical and rational in their own way, they fail to meet the heuristic criteria of “critical history” put forth earlier in this chapter. Rather, anti-gay perspectives often begin with the overt religious agenda to confirm anti-gay understandings through credible or authoritative testimonies, and with frequent reference to particular biblical texts. Thus, such accounts typically follow a different set of procedures and objectives considered “proper” in the historical investigation.

Moreover, historical claims and hypotheses that are founded on religious evidence are rarely subject to scientific criticism; but rather the commonsense religious understanding of history that is put forth is considered complete and not in need of empirical validity or “scientific” adjustments. Rather, they require “faith”¹²² of things not perceived empirically, but that are nevertheless considered to be known, understood and manifested in other ways—namely by divine revelation. From this religious orientation, self-reflection typically occurs through earnest prayer for understanding to be revealed supernaturally and for spiritual fortification of beliefs, rather than establishing causal logic and empirical evidence. Unfortunately, such an axiomatic faith account of history is rarely open to revision.

To illustrate these points, this discussion will now turn briefly to a conservative religious view of the “history of homosexuality.” The following example was found on the *Conservapedia* website, which claims to be “the trustworthy encyclopedia” that

¹²² “Now faith is being sure of what we hope for and certain of what we do not see” (NIV); “Faith is the confidence that what we hope for will actually happen; it gives us assurance about things we cannot see” (NLT); “Now faith is the assurance of things hoped for, the conviction of things not seen” (ESV); “Now faith is the reality of what is hoped for, the proof of what is not seen” (HCSB); “Now faith is the assurance that what we hope for will come about and the certainty that what we cannot see exists” (ISV); “Now faith is the substance of things hoped for, the evidence of things not seen” (KJB Cambridge Ed.); “Now faith is the conviction concerning those things that are in hope, as if it were these things in action, and the revelation of those things that are unseen” (ABPE); “Faith assures us of things we expect and convinces us of the existence of things we cannot see” (GWT); “Now faith is the substance of things hoped for, the evidence of things not seen” (KJ); “Now faith is the substance of things hoped for, the evidence of things not seen” (AKJV); “Now faith is assurance of things hoped for, a conviction of things not seen (ASV); “Now faith is the substance of things to be hoped for, the evidence of things that appear not” (DRB); “Now faith is the substantiating of things hoped for, the conviction of things not seen” (DBT); “Now faith is the assurance of things hoped for, the proving of things not seen” (ERV); “Now faith is the substance of things hoped for, the evidence of things not seen (WBT); “Now faith is a well-grounded assurance of that for which we hope, and a conviction of the reality of things which we do not see” (WNT); “Now faith is assurance of things hoped for, proof of things not seen” (WEB); “And faith is of things hoped for a confidence, of matters not seen a conviction (YLT). See Bible Suite, *Hebrews* 11:1, <http://bible.cc/hebrews/11-1.htm> (Accessed February 13, 2013).

“avoids the arbitrary and biased enforcement that is rampant on Wikipedia.”¹²³ The first thing one notices is that the opening statement refers to the Bible as the ultimate moral authority on homosexuality. This is followed by a list of biblical proscriptions as evidence regarding the immorality and sinfulness of homosexual acts, which is followed by a third section on ecclesial attitudes toward homosexuality. The point of these initial sections is to provide an apologetic defense of religious attitudes against homosexuality from a Judeo-Christian perspective, which serves as the foundation for understanding the “history of homosexuality,” particularly in Western culture.

Additionally, the conservative anti-gay account frames the historical-religious endeavor by concluding the article with a discussion on the prophetic consequences of homosexuality, stating that

[h]istorically, societies that have embraced homosexuality have perished, whereas those that have upheld traditional values have endured. For example, ancient Rome’s decline and its eventual fall in A.D. 476 were due in no small part to a growing tolerance of homosexual acts beginning in the Late Republic period ending in 27 B.C. We also see this today, both internationally and nationally. Internationally, those countries that preserve conservative social morality and family values are the leaders in both freedom and prosperity, while those that grant special rights to homosexuals lag in both areas. Nationally, in America’s big cities, the “gayborhoods” have the highest rates of crime and other social dysfunctions and the lowest property values, whereas the reverse is true in neighborhoods in which socially conservative Christian churches are prevalent.¹²⁴

Although the claims do not appear overtly religious it is hard to miss their prophetic intonations, and their religious foundations are revealed in the end. This small example says much about the foundations that inform and frame such claims, and what consequently drives the anti-gay historical heuristic.

¹²³ Conservapedia, “History of Homosexuality,” http://www.conservapedia.com/History_of_homosexuality#Historical_data_concerning_the_history_of_homosexuality (Accessed January 3, 2013).

¹²⁴ Ibid.

It is not until the fourth section that the *Conservapedia* entry deals more specifically with non-religious historical data. As a disclaimer, it is immediately noted that most of the research referenced comes from “pro-homosexual” writers, and that these writers “sometimes interpret obscure data as positively denoting homosexuality, while tending to render negative comments on homosexuality as being due to homophobia.”¹²⁵ Additionally, the article argues that the pro-homosexual authors seek to contrive a history more usable to them and that they sometimes extrapolate prevalent homosexuality out of little real evidence. Moreover, it is stipulated that such authors are only included in the article for reference purposes, and not as recommended reading.

Although far from comprehensive, the article continues through a somewhat systematic survey of evidence regarding same-sex relationships in different societies throughout history. In most cases, the survey follows an antithesis–thesis rhetorical structure, whereby the evidence of the acceptance of same-sex relationships is offered insofar as it is used to introduce or set the stage for counter evidence, or more specifically the credible historical testimonies of those who are opposed to homosexuality. Ultimately, the overarching argument of the article is that acceptance of homosexuality has not been the prevalent viewpoint throughout the Judeo-Christian heritage, particularly in Western history after the fall of Rome. While the article readily admits that foreign countries and ancient societies have accepted homosexuality and even same-sex marriages, they serve primarily as examples not to follow—because the correct Judeo-Christian view espoused throughout most of Western history, which rejects homosexuality, is considered superior.

¹²⁵ Ibid.

It is the observation of this study that religious-historical heuristic of such an anti-gay account is typically more concerned with asserting *belief claims* that are validated by authoritative testimony. Thus, the anti-gay heuristic often means to establish historical “facts” by asserting moral values regarding homosexuality based on belief rather than scientific scrutiny or causal logic. This does not mean that all conservative sources are unscientific or lack empirical-scientific validation, nor does it mean that liberal perspectives are not guilty of their own shortcomings. What it does mean, however, is that the evidence provided by religious belief perspectives is often very difficult to establish as proof, because they rely heavily on faith assertions and beliefs that must first be assumed to be true axiomatically, but that nevertheless remain unsubstantiated. This is particularly problematic when such unverified axiomatic claims are used in turn to support further claims.

For example, the claim that God ordained marriage to be only between a man and a woman and therefore any other arrangement is not marriage, is loaded with axiomatic assumptions that cannot be “proven” empirically, but rather they must be assumed to be true on faith. The validity of this argument requires that one accept *a priori* the proposition that a creator god created and breathed life to a first man and a first woman, and that this God prefers that the social institution of marriage be limited based on the procreative complementarity of opposite-sex partners. As a point of empirical-scientific logic, there is no observable data to date that directly supports this hypothesis. At best, given current circumstances and the best available reason and logic, a deistic cosmogony that defines marriage can only be said to be plausibly true, in the equal proportion that it is untrue.

Ironically, many people assert unfalsifiable beliefs as if they are certainly true; however, the underlying foundations can neither be proven true nor untrue through any observably testable means. In the final analysis, religious arguments such as “Adam and Eve, not Adam and Steve” suffer because of the inability to provide physical evidence to directly support the claim. Nor does it establish a sufficient and necessary causal link between the belief that (1) God created a man and a woman, not a man and a man, and the claim that (2) same-sex relationships are incomparable and therefore should not be legalized. This argument fails further in light of the fact that many families headed by same-sex couples can and do have children.

2.7.2 Pro-Gay Perspectives

This study admittedly relies more on pro-gay sources for the primary examination of historical data. As outlined above, this is due to the lack of a substantial comprehensive treatment of the subject from anti-gay historians, and the failure of the religious heuristic utilized by many anti-gay perspectives in meeting the criteria of “critical” history. However, this does not mean that pro-gay accounts do not suffer gravely from their own inadequacies and shortcomings. For example, such perspectives are ultimately no less concerned with asserting a social goal or cultural agenda, and there is growing recognition among postmodern scholars that no endeavor can be completely “value-free.”

However, within the pro-gay heuristic there is nevertheless an overt respect for (1) empirical evidence and causal logic, (2) the restriction of personal biases and value judgments as far as possible, and (3) an openness to revision. While these parameters do not eliminate all problems, they certainly do a better job in effecting higher degrees of

partial elimination and in establishing claims in observable reality. This certainly goes a long way to inform interpretations, as well as the ethical use of historical “facts” to establish and substantiate claims.

It is the observation of this study that pro-gay perspectives are more concerned with *judgment-claims*, particularly those based on empirical-scientific evidence. While the historical data is sometimes arguable and even skewed, the pro-gay perspective argues that there are at least some facts that have moved to the status of “actual” evidence. Thus, some evidence has more of a judicial status, particularly evidence based on empirical data and scientific logic. From this perspective, an empirical-scientific heuristic is required in order to transcend the problem of moral relativity and unfalsifiability, and the illusion that all claims are somehow equally rational or equally possible simply because they cannot be disproved.

2.8 The Relevance of Historical Inquiry in Contemporary Debate

It was not until the last half of the 20th century that the discussion regarding LGBT rights and same-sex marriage could be had. Moreover, it has only been forty years since Western scientific communities officially stopped characterizing “homosexuals” as clinically ill and mentally insane, and only a decade since sodomy laws have been fully repealed in the United States. This underscores that fact that historically the acceptance of same-sex relationships is still relatively new, and perhaps even precarious at best. Although the discussion is still very young, it has certainly come a long way in a very short period of time, particularly since the 1970s—when the first request for a marriage license made by a same-sex couple was denied. However, as a result of the dynamic conflicts that ensued, there are now decades of new data and understandings, which

support different conclusions from traditional orientations, particularly regarding the morality of same-sex relationships in American society.

Gender perspectives over the past few decades have done much to redirect the conversation regarding same-sex relationships, by reframing “homosexuals” as the victims of homophobic oppression. Fueled by the force of the Civil Rights and Women’s Liberation movements that erupted in the decades prior, and the evolving understandings about the constructedness of religious and political discriminations between men and women, new criticisms eventually arose to challenge the yolk of dogmatic patriarchy and punitive heterosexism. These criticisms argue that the conflict regarding same-sex marriage is finally and fundamentally about gender, and the evolving and constructed nature of societal norms that define and control acceptable gender roles.

Far from being static, the changes throughout history underline the intricate and evolutionary nature of discourse regarding same-sex relationships. Moreover, the results of decades of intense inquiry from virtually every discipline in the natural sciences, social sciences and humanities has been enough to sway not only mainstream scientific communities and many religious circles as well, but also judicial authorities and the popular vote. However, given that LGBT people and same-sex couples can now live their lives relatively unmolested, many people question whether or not the inability of same-sex couples to have their marriages legalized represents a legitimate oppression or discrimination.

For many opponents of same-sex marriage, there are real and sharp bodily differences between same-sex and opposite-sex relationships—differences that have been made throughout most of Western history—that warrant such distinctions and separations

to continue to be made. Rather, with the question of discrimination still open for debate, many claim that the real discrimination occurs against those who oppose same-sex marriage as a matter of moral conscience and theological doctrine—which have been the accepted and established position for hundreds and thousands of years. Moreover, it is argued that as a result of same-sex marriage conflict many well-intending people are being branded as sexists, bigots and irrational homophobes, and that the discrimination against those who oppose same-sex marriage constitutes persecution of faith belief and a violation of democratic religious liberty principles.

2.9 Concluding Remarks

What the critical investigation of history reveals is that not all sources, claims and evidence share the same status or reliability. However, the interpretation of reliability depends as much on the representation of “facts,” as it does on the heuristic structures that drive the investigation. In the process of investigating the “history of same-sex relationships,” two significant differences arose between competing heuristics approaches used in determining “reliability” in order to substantiate of claims. On one hand, the religious heuristic of the “anti-gay” position often places emphasis on belief rationale and the assertion of credible witness testimonies. On the other hand, the empirical-scientific heuristic of the “pro-gay” position places greater emphasis on judging the logical consistency and empirical likelihood of claims.

Interestingly, both pro-gay and anti-gay accounts of history can agree on many points. For example, both agree that same-sex relationships have been around for at least as long as recorded history, as well as the fact that they have been largely abhorred and prohibited in Western culture. Both can also agree that although same-sex relationships

have been prohibited in many societies throughout history, there have also been times of significant tolerance and even acceptance—not simply of same-sex relationships, but also of same-sex marriages. However, for the anti-gay historical heuristic, the facts provide evidence for continued and justifiable abnegation; whereas for the pro-gay perspective the facts support the changing nature of attitudes, and the onus of religion in spurring anti-gay prejudice.

This underscores the fact that the fundamental dialectic is in many cases less concerned with establishing the “facts,” as it is with how to interpret and use them polemically in order to assert a particular point of view. In this respect, both anti-gay and pro-gay perspectives often fail to employ an ethically reflective approach or “transcendental” mode of investigation. In the final analysis, it is argued that a critical investigation of history reveals the theological underpinnings of contemporary debate, particularly regarding the origin and nature of discrimination. This is revealed in the unquestionable theological foundations of discrimination against “sodomites” throughout history, as well as in the underlying religious “belief” heuristic that many people draw upon to “retrieve the past” in order to make judgments about the morality of same-sex relationships in modern times.

3—Contemporary Same-Sex Marriage Discourse

The objective of the present chapter is to identify and characterize some of the primary sources of discourse regarding same-sex marriage, *circa* 2012-2013. Divided into four primary segments, the first two sections intentionally stereotype “anti” and “pro” same-sex marriage discourse, while the third section examines ecclesial discourse regarding same-sex marriage by denomination. The remaining sections offers considerations regarding competing rhetorical claims and the logic of underlying heuristic approaches, along with a brief discussion of some of the key dialectic that surfaced as a result of the examination. This includes issues with theological and biblical interpretation, and the politicking of religious beliefs in same-sex marriage politics.

3.1 Anti Same-Sex Marriage Discourse

During the 2012 elections, the Republican Party officially endorsed traditional marriage, and further affirmed the right not to recognize same-sex marriages.¹²⁶ Their policy platform frequently referred to DOMA, and further accused the Democrats of attacking parental rights and the stability of the family unit by endorsing the repeal of the law. Additionally, the platform claimed that the future of America’s children is best preserved in a traditional family with married parents consisting of one father and one mother; and further advocated for an amendment to the U.S. Constitution in order to define marriage as strictly between one man and one woman, for all time.

Neither the Republican Party nor the Mitt Romney campaign (which represented the Republican presidential bid during the 2012 elections) addressed same-sex marriage

¹²⁶ Republican Party, “GOP Platform,” <http://whitehouse12.com/republican-party-platform/> (Accessed July 25, 2012).

or other LGBT related issues as salient political concerns. However, in line with the Republican Party platform, the Romney campaign highlighted his support for traditional marriage, by emphasizing that traditional marriage is more than just about personal fulfillment, and claiming that it is also critical for the well being of civilization.¹²⁷ Similarly, the Romney campaign promised to uphold DOMA and to champion a federal marriage amendment to define marriage as between one man and one woman in the federal Constitution.

Romney's position is revealed further in a letter written by conservative community leaders, which was posted on the campaign website.¹²⁸ The letter highlights Romney's efforts to support pro-family and traditional marriage agendas, by (1) attempting to stop civil unions, (2) affirming Catholics' right to deny adoption services to same-sex couples, and (3) advocating for constitutional amendments to define marriage as between one man and one woman. The letter further suggested that speaking against homosexuality is not discrimination, but rather the exercise of free speech and religious liberty. It is also claimed that punitive attempts to stop people from speaking or acting out against homosexuals is a violation of free speech and religious liberty, and that "forcing gay marriage" is the real discrimination.

Anti Same-Sex Marriage Rhetoric

Opponents of same-sex marriage have long contended that a majority of Americans oppose same-sex marriage; thus, it is claimed that the issue is not about "gay"

¹²⁷ Romney Campaign, "Marriage, Family, Life," *Values*. <http://www.mittromney.com/issues/values> (Accessed July 25, 2012).

¹²⁸ Romney Campaign, "Conservative Leaders Pen Letter Praising Romney on Life, Marriage and Religious Freedom," <http://www.mittromney.com/news/press/2012/01/conservative-leaders-pen-letter-praising-romney-life-marriage-and-religious-freed>. *Values—Related Posts* (Accessed July 25, 2012). See also <http://www.mittromney.com/issues/values>.

marriage, gay equality, or gay rights, but about protecting marriage as the majority of people have traditionally understood it—to be strictly between one man and one woman. Instead, gays and lesbians want to “redefine” marriage from how it has been traditionally understood and practiced throughout recorded history—as a civil and religious arrangement between one man and one woman, who come together primarily for the purpose of having children, in order to perpetuate human civilization and to promote strong family relationships. Thus, many opponents maintain that any other arrangement is not a real “marriage,” but rather a counterfeit to the real thing.

It is also contended that same-sex couples are seeking special rights to marry that did not exist previously; thus, limiting marriage does not discriminate or take away rights, but rather it protects the original commonsense meaning and status quo. From this perspective, a distinction is made between same-sex marriage and opposite-sex marriage as two completely separate things. Additionally, many opponents claim not to be bigoted or discriminatory, but rather they argue that they are just talking about two different types of relationships that should be treated accordingly under the law. Moreover, it is argued that if same-sex relationships are promoted as legal and equal, then opposite-sex relationships will be simultaneously devalued and the transmission of a traditional marriage culture diminished.¹²⁹ This will lead not only to the breakdown of the family unit, but also increased immorality, chaos and insecurity, and potentially the demise of human civilization.

Opponents of same-sex marriage often argue that the mother-father relationship is indispensable and serves as the foundation of the social family structure, and that it

¹²⁹ National Organization for Marriage, “Marriage Talking Points.” http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage_Talking_Points.htm (Accessed July 29, 2012).

provides the best possible scenario for raising children.¹³⁰ It is contended that supporting same-sex marriage not only devalues traditional marriage, but that it also devalues the importance of mothers and fathers, and the right of children to be born into this world with both their biological parents present. According to this rationale, two fathers cannot replace a mother, and two mothers cannot replace a father; and it is argued that even opposite-sex couples that cannot have children can still adopt and give a child a mother and a father. Same-sex couples simply cannot do this. Moreover, the opposing argument posits that there is a significant body of social science research spanning several decades that supports these claims.¹³¹ Furthermore, it is contended that even though some professional organizations have claimed that there are no adverse effects of same-sex parenting, research in this area is still preliminary and often suffers from methodological flaws and inadequate data.

3.2 Pro Same-Sex Marriage Discourse

During the 2012 elections, the Democratic Party officially endorsed marriage for same-sex couples, becoming the first political party ever to do so. Their official policy platform asserted that Democrats have been the defenders of civil rights since the 1960's, which they assert are directly linked to the ability to provide for one's self and one's family. Moreover, the Democrats officially endorsed the repeal of DOMA, claiming that the law resulted in the discriminatory treatment of LGBT people and same-sex couples, and their families.¹³² During the same year, President Barack Obama became the first

¹³⁰ Ibid.

¹³¹ Religion Coalition for Marriage, "Top 10 Social-Science Arguments Against Same Sex Marriage (SSM)," http://religiouscoalitionformarriage.org/html/top_ten.php (Accessed July 29, 2012).

¹³² Democratic Party, "LGBT Community," *People*, http://www.democrats.org/people/lgbt_community (Accessed July 25, 2012).

acting president to endorse same-sex marriage, and the incumbent's campaign devoted specific attention to LGBT issues, and further supported the repeal of DOMA.¹³³

Pro Same-Sex Marriage Rhetoric

Proponents of same-sex marriage argue that the issue is fundamentally about sexual discrimination and inequality under the law. It is contended that civil rights are based on the premise that all people are equal in dignity and humanness by virtue of being human, and not on the basis of race, gender, or sexual orientation. Thus, civil law should treat same-sex couples the same as opposite-sex couples, on the basis of their humanity, not their sexuality. However, it is argued that current legal provisions bar same-sex couples from equal access to marriage rights, protections, and privileges under the law, primarily on the basis of religiously spurred moral value judgments regarding sexual orientation. Moreover, proponents assert that the Supreme Court has recognized marriage as a fundamental civil right, and that barring same-sex couples from civil marriage equality on the basis of gender is a form of undue discrimination.¹³⁴

As a result, it is contended that same-sex couples are routinely subjected to biases in hundreds of laws. For example, they are likely to pay higher taxes than married opposite-sex couples particularly in times of crises. For example, they are not eligible to receive social security survivor benefits; and they are often denied healthcare, disability, military and other benefits afforded to heterosexual couples. Furthermore, when a partner dies, is sick or terminally ill, the surviving partner is ineligible for essential services, tax

¹³³ Obama-Biden Campaign, "LGBT Families" and "Civil Rights," *LGBT Americans for Obama*, <http://www.barackobama.com/lgbt/accomplishments> (Accessed July 25, 2012).

¹³⁴ National Organization for Women, "Equal marriage NOW: Talking Points," <http://www.now.org/issues/marriage/points.html#conservative> (Accessed July 29, 2012).

breaks and benefits normally afforded to heterosexual spouses.¹³⁵ Moreover, a child with same-sex parents, whose non-biological parent passes away, is also ineligible for benefits that would normally be afforded to the stepchild of a non-biological stepparent in an opposite-sex marriage. Additionally, many international couples cannot sponsor their spouses for immigration visas or permanent residency status, so international couples face the added threat of deportation, separation and even exile.

Same-sex marriage proponents maintain that lesbians and gays, as women and men, and as human beings, are entitled to the same rights as heterosexual men and women; and that anything less than full and equal access to marriage would promote a separate status in society. It is argued that even if same-sex couples were granted full legal rights through state civil unions and domestic partnerships, they are no substitute for federal marriage provisions because they do not carry the full cultural significance or legal equality. Supporters also contend that constitutional provisions have typically been meant to expand civil rights, not to restrict them, and that any amendment to limit marriage is designed to deny equal protections and privileges, by treating one group of people and their families differently from another.

At the heart of the proponent argument, it is contended that the creation of laws like DOMA only serves to limit the type of families that the government is allowed to protect and support. In contrast, repealing DOMA and legalizing same-sex marriage protects a greater number of citizens and their families equally. Additionally, granting rights to same-sex couples does not take away privileges or benefits from opposite-sex couples; therefore, the government's interest in marriage is not about protecting procreative sex or traditional, heterosexist orientations, but rather about encouraging and

¹³⁵ Ibid.

supporting as many positive family relationships as possible. Thus, it is possible that the government can support marriage for both opposite-sex and same-sex couples alike.

Same-sex marriage supporters also argue that the institution of marriage—as a form of discourse—is not static, but that has changed over time. Arguments often cite how married women were once treated as the legal property of their husbands, and that interracial marriages were illegal up until forty years ago. Such social conventions, which were once considered legal and the “traditional norm,” are now considered discriminatory.¹³⁶ Thus, norms and laws change in order to adapt to evolving cultural needs and circumstances. While same-sex marriage might not have been possible in the past, the liberal position argues that they are now—at least at the state level—and that same-sex couples deserve support and protection just like any other family. Moreover, it is contended that traditional norms are filled with negative stereotypes of LGBT people that need to be addressed.

Proponents claim to recognize that the issue of marriage is also an issue of religious freedom. Citing the first amendment, it is often argued that the government should not interfere with religion or the free practice of religious beliefs; however, it is argued that this also means that the government should not impose a particular religious interpretation, by favoring sectarian religious ideologies about marriage.¹³⁷ Many minority religious groups choose to sanction same-sex marital unions, and supporters maintain that the government must remain neutral respecting diversity of religious expression. It is further claimed that permitting same-sex marriages does not demand that any church perform ceremonies for same-sex couples. However, it is contended that

¹³⁶ Ibid.

¹³⁷ Ibid.

when the government fails to honor the unions of one religious community in the same way it honors those of other religious communities, then it does not honor the democratic principles of religious freedom or equal protection found in the U.S. Constitution.

3.3 Religious and Theological Discourse by Denomination

The following sections summarize some of the primary religious and theological responses that have contributed to the development of contemporary discourse around DOMA and same-sex marriage in the United States. While there are undoubtedly other faith perspectives that have contributed to the conversation, the following surveys the denominations that have been the most vocal and that represent the largest religious demographics on both sides of the debate.

3.3.1 African-American Protestant Discourse

Shortly after President Obama signaled his support for same-sex marriage in May of 2012, the National Association for the Advancement of Colored People (NAACP) released a statement supporting gay marriage as a civil right. The resolution supported marriage equality as a right guaranteed by the 14th Amendment of the U.S. Constitution, and also committed the organization to fight any effort to write discrimination into the law against the LGBT community.¹³⁸ Supporters argued that same-sex marriage is but one of the many issues that the organization is concerned with, and that the NAACP stands firmly against all laws that demean, dehumanize, or discriminate against any person. Founded and supported largely by African-American Protestant communities, the NAACP is one of the oldest and longest running civil rights organizations in the country.

¹³⁸ Cheryl Corley, "After NAACP Marriage Stance, Discord and Discussion," *NPR*. June 8, 2012. <http://www.npr.org/2012/06/08/154522287/after-naacp-marriage-stance-discord-and-discussion> (Accessed July 30, 2012).

The NAACP has long argued that equality does not occur in the creation of laws that are meant to restrict or to deny rights, particularly on a biological basis such as the color of one's skin, and especially when those rights are routinely afforded to others.

The NAACP's fight for marriage equality goes as far back as 1967 to the Supreme Court case of *Loving v. Virginia*, which legalized interracial marriage. According to liberal media sources, a year before she died, Mildred Loving was quoted saying that she supported the freedom to marry for all people, gay or straight.¹³⁹ The NAACP has also participated in marches for LGBT rights, and has worked to oppose California's Proposition 8 and DOMA.¹⁴⁰ While the NAACP now supports same-sex marriage as a matter of official mandate, the announcement also caused a rift within the organization, resulting in the resignation of several regional officers.

Conservative media sources argued that by supporting same-sex marriage, the board rejected real marriage and declared homosexual acts to be a civil right; and that marriage equality is just a euphemism for the real effort to destroy the uniqueness of true marriage by redefining the word.¹⁴¹ Notably, Dr. Alveda King was cited saying,

Neither my great-grandfather an NAACP founder, my grandfather Dr. Martin Luther King, Sr. an NAACP leader, my father Rev. A. D. Williams King, nor my uncle—Dr. Martin Luther King, Jr.—embraced the homosexual agenda that the current NAACP is attempting to label as a civil rights agenda. In the 21st Century, the anti-traditional marriage community is in league with the anti-life community, and together with the NAACP and other sympathizers, they are seeking a world where homosexual marriage and abortion will supposedly set the captives free.¹⁴²

It was further contended that the NAACP has taken a position directly at odds with the

¹³⁹ Benjamin Todd Jealous, "NAACP President and CEO Benjamin Todd Jealous Statement on Marriage Equality," *NAACP*. <http://www.naacp.org/pages/naacp-president-ceo-benjamin-todd-jealous-statement-on-marriage-equality> (Accessed July 30, 2012).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

opinion of those whom the organization claims to represent. Opposition came most loudly from ministers and NAACP officers who claimed that, “deviant behavior is not the same thing as being denied the right to vote because of the color of one’s skin,” or “being denied where one may sit on a bus.”¹⁴³ Resigning officials also expressed insult that the gay community was trying to align itself with the African-American struggle, and that the resolution was passed by fiat without debate on the matter.¹⁴⁴ Notably, the opposition relied heavily on biblical interpretations, which they asserted were clear and not open to debate or discussion.

3.3.2 Baptist Discourse

In May of 2006, the board of the American Baptist Churches Pacific Southwest region (with approximately 300 churches in California, Hawaii, Nevada and Arizona) voted unanimously to separate from the parent denomination,¹⁴⁵ which is geographically situated in New England. The split stemmed from theological and doctrinal disagreements over homosexuality, and the lack of corrective action to punish LGBT affirming churches that were accepting of homosexual persons. The Southern Baptist Regional Convention had already split the year before over the same issue.¹⁴⁶ Many Baptists believed that it was possible to maintain the unity of the church, even without doctrinal agreement; however, the Southern regional boards insisted that they made the right decision by following the correct teachings of Scripture on homosexuality.¹⁴⁷

¹⁴³ Cheryl Corley, “After NAACP Marriage Stance, Discord and Discussion.”

¹⁴⁴ Keith Fournier, “No Moral Compass: NAACP Leaders Reject Marriage, Declare Homosexual Practice A Civil Right,” *Catholic Online*. May 24, 2012. http://www.catholic.org/national/national_story.php?id=46330 (Accessed July 29, 2012).

¹⁴⁵ Gregory Tomlin, “Split Among American Baptists over Homosexuality is Final,” *Baptist Press*. May 18, 2006. <http://www.bpnews.net/bpnews.asp?ID=23275> (Accessed July 29, 2012).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

The American Baptist Church USA (ABC), like many other churches, has been having long and ongoing discussions regarding homosexuality for over twenty-five years. In the mid 1980s, debate surfaced around the scriptural depiction of homosexuality as a “social and moral evil,” and whether or not the unrepentant homosexual has a claim to full acceptance in the Christian community.¹⁴⁸ In response, the ABC General Board unanimously passed the *American Baptist Resolution Against Manifestations of Prejudice*, which declares that “God calls [Christians] to serve as agents of peace and reconciliation,” and to oppose “...manifestations of prejudices against persons because of their ethnic origin...race... religion or sexual orientation...regardless of our approval or disapproval of that orientation.”¹⁴⁹

The conversation continued with a statement of concern by conservative church members, which rejected “the homosexual lifestyle, homosexual marriage, ordination of homosexual clergy or establishment of ‘gay churches’ or ‘gay caucuses,’” while simultaneously affirming “that the church should love and minister to the homosexual, but condemn the sin... of homosexuality.”¹⁵⁰ In response, delegates called for the initiation of a process of identifying resources for “clarification and guidance” for “a Christian understanding of God’s gift of sexuality.”¹⁵¹ Shortly after, the General Board established the *Commission on Human Sexuality Resources* in June 1992. At the same time, the board narrowly overturned an initiative to define God’s plan for sexual union (as a matter of official doctrine) as the fulfillment between one man and one woman, in

¹⁴⁸ American Baptist Churches USA, “ American Baptist Churches USA: Responses/Actions Pertaining to Homosexuality,” <http://www.abc-usa.org/LinkClick.aspx?fileticket=iRGq66AgLAU=&tabid=199> (Accessed July 29, 2012).

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

“heterosexual, life-long, monogamous marriage.” Although the initiative failed, it argued that Christ’s love is available to practicing homosexuals who turn to God in faith and repentance. In argument, speakers against the resolution emphasized varying interpretations of Scripture, biological causes of homosexuality, and local church autonomy.¹⁵²

Continuing the conversation, the General Board affirmed the *American Baptist Resolution Calling for Dialogue on Human Sexuality*, which maintained that there are a variety of understandings and issues pertaining to human sexuality.¹⁵³ The resolution encouraged dialogue, unity and the avoidance of divisiveness. However, in January 1996, the ABC Western region voted to dismiss four congregations who had affiliated with the Association of Welcoming and Affirming Baptists. Churches in Alaska and Ohio were also dismissed for their LGBT friendly affiliation around the same time.¹⁵⁴

By the end of 2005, the ABC General Board voted to amend their doctrinal document entitled *We Are American Baptists* by adding to this the statement *A Biblical People*. The statement declared that God’s design for sexual intimacy places it within the context of marriage between one man and one woman, and further acknowledged that the practice of homosexuality is incompatible with biblical teachings.¹⁵⁵ The Southern Baptist Regional Convention concurred with an organizational statement that affirmed “God’s plan for marriage and sexual intimacy [was] one man and one woman, for life.”¹⁵⁶ The document further states that homosexuality is not a “valid alternative lifestyle,” and

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Southern Baptist Convention, “Sexuality,” <http://www.sbc.net/aboutus/pssexuality.asp> (Accessed July 30, 2012).

that the Bible condemns it as sin. However, Baptists do not consider homosexuality to be an unforgivable sin, but that the same redemption available to all sinners is available to homosexuals.¹⁵⁷

3.3.3 Catholic Discourse

The Catholic Church claims to base its teachings regarding marriage on God's revelation in Scripture, and in the meaning of the human person, made male and female in the image of God.¹⁵⁸ It is argued that male-female complementarity is at the very heart of marriage and part of its authentic definition. From this perspective, marriage wouldn't be marriage without a man and a woman, a husband and a wife. Catholics argue that adding alternative adjectives to the word "marriage" (i.e., "same-sex," "gay," etc.) produces not another "variety" of marriage, but a different thing entirely that radically alters what marriage is in its very essence.¹⁵⁹ Moreover, marriage is not made up by human society or religion, but rather it springs from the body and is thus available to everyone.¹⁶⁰

It is argued that, sexual behavior between two men or two women can never arrive at the oneness experienced between husband and wife, nor can these acts be life giving in the literal and physical sense of the word. It is further contended that sexual behavior between persons of the same sex is harmful and always wrong, as it is incapable of authentically expressing what it means to be *imago dei* through the creative conjugal

¹⁵⁷ Ibid.

¹⁵⁸ United States Conference of Catholic Bishops, "Marriage: Unique for a Reason," <http://www.marriageuniqueforareason.org/> (Accessed July 30, 2012).

¹⁵⁹ United States Conference of Catholic Bishops, "Made For Each Other: Sexual Difference is Essential to Marriage." <http://www.marriageuniqueforareason.org/sexual-difference-video/> (Accessed November 24, 2012).

¹⁶⁰ Ibid.

love of mind, body and spirit that results in the miracle of procreation.¹⁶¹ Additionally, sexual difference is not just important to conceiving a child, it is also important throughout the child's life.¹⁶² A mother and a father provide the optimal environment for the healthy emotional, psychological and spiritual growth of the child. Thus, Catholics claim that children raised by same-sex parents are deprived of mothers and fathers, and those sexual lifestyles that disregard marriage as the union of one man and one woman are particularly destructive.

While Catholics agree that civil rights are unmistakably important, they argue that the “right to marry” is the right to enter into a very particular kind of relationship having distinct characteristics that serve important social purposes.¹⁶³ Thus, the “right to marry” is not the right to enter a relationship that is not a marriage, and then force others by law to treat that relationship as if it were a marriage. Far from serving the cause of civil rights, redefining marriage thusly would threaten the civil right to religious freedom by compelling everyone—even those opposed in conscience to same-sex sexual conduct—to treat same-sex relationships as if they represented the same moral good.

3.3.4 Mormon Discourse

According to the Latter Day Saints (LDS) Handbook, the Mormon Church teaches that homosexuality is a violation of God's commandments, that it is contrary to the purposes of human sexuality, and, moreover, that it deprives people of the blessings

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ United States Conference of Catholic Bishops, “The Common Good and Human Dignity FAQ's.” <http://www.marriageuniqueforareason.org/the-common-good-faq/#q1> (Accessed July 30, 2012).

that can be found in family life and in the saving ordinances of the gospel.¹⁶⁴ Furthermore, it is argued that homosexual behavior should be subject to discipline, but that it also can be forgiven through abstinence and sincere repentance. The Mormon Church also maintains that marriage—as between a man and a woman—is essential to the Creator’s plan and eternal destiny of his children. Thus, sexual relations are proper only between a man and a woman who are legally wedded as husband and wife.¹⁶⁵

Although opposing homosexuality, Mormons claim to reach out with understanding to people afflicted with unnatural same-gender attractions. The Church encourages those suffering from same-gender attraction to live a life of chastity and to control unrighteous thoughts in order to receive Church callings, to hold temple recommends, and to receive temple ordinances.¹⁶⁶ Some Mormons choose to live a life of chastity, or marry someone of the opposite-sex, in order keep from indulging in unrighteous behavior.¹⁶⁷ The Mormon Church also encourages reparative therapy, and excommunicates gay members in some of the more conservative congregations.

However, the church has also softened its tone toward gay members, particularly in the wake of protests criticizing its role in supporting California’s Proposition 8. Church leaders in Utah have even held several meetings with gay rights advocates, and supported a 2009 anti-discrimination ordinance in Salt Lake City that protected people on the basis

¹⁶⁴ Latter Day Saints, “21.4.6 Homosexual Behavior and Same-Gender Attraction” and “21.4.10 Same-Gender Marriages,” Policies on Moral Issues, *Handbook 2: Administering the Church*. <http://www.lds.org/handbook/handbook-2-administering-the-church/selected-church-policies/21.4#21.4.6> (Accessed July 29, 2012).

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Max Perry Mueller, “Can You Be Both Mormon and Gay? When a Religion Notorious in the Gay Community Might be Evolving,” *Slate*. June 13, 2012. http://www.slate.com/articles/life/faithbased/2012/06/mormons_and_gays_why_the_lds_church_might_be_evolving_single.html#pagebreak_anchor_2 (Accessed July 29, 2012).

of sexual orientation.¹⁶⁸ Furthermore, a small but growing number of Mormons dissent from official doctrinal teachings regarding same-sex relationships. Over 300 Mormons marched in the 2012 Utah Pride Parade, and several affirming organizations for LGBT Mormons are also popping up.¹⁶⁹ Still, there are generally only three options for LGBT Mormons: celibacy for life, heterosexual marriage or excommunication. Mormons also openly support reparative therapy treatment.

3.3.5 LGBT Affirmative Discourse

A growing number of churches now affirm same-sex couples and the LGBT community. While affirming churches represent a small minority, they are spread across virtually every denomination—and even in the most conservative traditions. Notably, in 2012, Episcopalian bishops approved an official prayer service for blessing same-sex couples, as well as the ordination of transgender individuals. The rite is called "The Witnessing and Blessing of a Lifelong Covenant," and it includes a conscience clause, explicitly stating that no one in the church would be forced to perform the ceremony or punished in any way for barring its use.¹⁷⁰ The movement is a provisional trial to be observed over three years. The initiative represents the first major denomination to declare a church-wide policy of official acceptance of same-sex couples and LGBT people in the United States. Some dioceses have already ordained transgender individuals, with many others elected to positions of parish leadership. Among LGBT

¹⁶⁸ Ibid.

¹⁶⁹ Elizabeth Tenety, "Some Mormons Separate Gay Marriage Rights from Church Rites," *The Washington Post*. June 8, 2012. http://www.washingtonpost.com/blogs/under-god/post/for-mormons-gay-marriage-rights-vs-marriage-rites/2012/06/08/gJQAuhUAOV_blog.html (Accessed July 29, 2012).

¹⁷⁰ Rachel Zoll, "Episcopalians Set to be First Big U.S. Church to Bless Gay Marriage," *WSBT.com*. <http://www.wsbt.com/news/wsbt-episcopal-church-affirms-transgender-ordination-20120709,0,1304873.story> (Accessed July 29, 2012).

affirmative congregations, gender identity and sexual orientation do not disqualify one from being moral or from being Christian.

3.4 Rhetoric, Understanding and the Transcendental Approach

The preceding survey provided a brief overview of contemporary political and religious rhetoric regarding same-sex marriage in the United States. Overall, the examination reveals the close-knit relationship between theological understandings, and religious and political moralities on both sides of the debate. This emphasizes the fact that it is very hard to divorce political positions regarding same-sex marriage from moral positions regarding the same-sex relationships in general. Unfortunately, many arguments focus on rhetoric and asserting a position already held, instead of coming to a new or better understanding by transcending one's own horizon, which is ultimately the objective of a transcendental approach. Rather, many jump from a preconceived notion or commonsense understanding of same-sex relationships in forming opinions regarding marriage, without any real reflection on how one comes to understand, and how one deals with the totality and limitations of relevant data in order to justify a particular position. Thus, for the average person, justification does not come from hard proof, logical consistency, or an arduous self-correcting process of learning, but rather from spontaneous gut feelings and intuitive confirmations based on preconceived ideologies.

While the answer to the question of same-sex marriage may seem evident to some, how one responds stems from subjective life experiences that are often taken for granted. Nevertheless, they contribute to shaping deep personal convictions that are often considered "true" and "correct" without being given much second thought. This attitudinal preference is particularly acute in moral arguments and political rhetoric

regarding same-sex marriage, which emphasizes the need for heightened attention to the ethical dimensions of language and its role in constructing meaning and understanding. In order to overcome some of the challenges of rhetorical discourse, arguments need to be substantiated and verified, and both sides need to be willing to engage with claims and criticisms that may be contrary to personal convictions or communal doctrines. Moreover, people need to be open to revision in light of new evidence. This requires an intentional transcendental awareness and the commitment to broaching the subject attentively, intelligently, reasonably and responsibly.

As with the historical investigation, a more complete and transcendental understanding of discourse requires a deeper look at not only the object of study, but also of the processes involved in generating a particular outcome or point of view. Contrary to the “principle of the empty head”—which claims a naïve acceptance that one can interpret and understand objectively simply by seeing what is there without imposing biases—one always embarks from some prior knowledge about “the way things are,” which colors and biases the examination. Thus, the concern of a transcendental investigation of discourse is to avoid a blind selection of particular arguments, insist on their importance and primacy, and to neglect the rest. By following a transcendental approach, one is also able to answer relevant questions about the process and tasks required to arrive at a particular position or argument. Attention to the ethical dimensions and logical consistency of language is particularly important, especially when communicating results and justifying one’s position in light of competing perspectives.

3.5 Logical Consistency of Claims and Empirical Likelihood

It is important to clarify a few points regarding the logical consistency of rhetorical arguments. For a claim to be logically consistent to the point where it is considered “actual” evidence, the variables must be shown to be related in order to cause something to occur. In other words, the variables $X + Y$ must be shown logically and causally to produce Z . However, the substantiation of causal claims must have some basis in reality. For example, the causal claim that “grey monkeys live on the moon, and that’s why the moon looks grey” does not make the claim true. Ironically, claims and arguments in same-sex marriage debates frequently argue in such a manner; however, they often do not constitute an established logic, nor do most “reasons” given qualify as “actual” evidence or as logically consistent “reason” *per se*. Although such claims may appear logical and explanatory, they often require belief rationalizations, axiomatic assumptions, and leaps in logic in order to be accepted. To establish evidence using logic and reason requires more than intelligent or systematic thinking—it also requires substantiation in empirical reality.

Falsifiability of Claims

One of the main problems of logical consistency, which underlines the foundational dialectic of same-sex marriage debates, is the problem of falsifiability. In its basic form, falsifiability means that any hypothesis must be inherently testable before it can become accepted as a theoretical “fact.” Moreover, for an argument to be testable in must have some basis in empirical reality. An example of this would be the claim that according to the Bible same-sex marriage is wrong. Since the Bible is silent on the issue of same-sex marriage, a more complete version of such a claim is that the Bible is the

authority on same-sex relationships (X), and that it states that homosexuality is always wrong and immoral (Y), and therefore same-sex couples should not be allowed to marry (Z). While many people ascribe to this view, it does not establish any of the claims through rigorous examination, logical consistency, or empirical evidence. Rather, for the claim to be considered true it must be assumed to be true based on faith in doctrinal readings that are themselves assumed to be true based on similar faith belief rationale. This does not necessarily mean that the claim is untrue, but that further evidence and questions need to be explored in order to substantiate the claim. For example, one must substantiate the justifications given for (1) why the Bible is the ultimate authority, (2) how the particular interpretation is indeed “correct,” and (3) how this information constitutes legitimate evidence in denying same-sex couples the right to marry.

As a means to avoid debates around the falsifiability of claims, people often “agree to disagree” on things that they cannot see eye to eye on. This does little to reconcile conflict and rather relativizes claims as if all arguments are equally valid, or that everyone’s opinion is equally worthy of consideration. However, this simply is an avoidance of taking the time to follow through with all relevant questions, and a denial of being open to revision. Moreover, this negates the reality that many arguments can be established as more or less likely than others, based on observable evidence and logical consistency. As with the case motioned above, this does not necessarily mean that the religious and theological claims are untrue; rather, in such instances further questions and alternative explanations need to be explored in order to determine their validity—and their applicability in the political sphere.

3.6 Theological Discourse and Biblical Interpretation

It is arguable that theological discourse and biblical interpretation play a significant role in same-sex marriage debates. This is an important factor to acknowledge because theological interpretations of biblical texts have served as a primary impetus behind the prohibitive and punitive treatment of same-sex relationships for millennia. However, in recent years, evolving theological understandings and interpretations of biblical texts have also served as the catalyst for the affirmation of same-sex relationships. As a result, many Christians accept same-sex relationships and many LGBT Christians are learning to reclaim their faith heritage. Thus, it would be a mistake to assume that all Christians believe that same-sex relationships are wrong and immoral.

The fact is that alternative interpretations of Christianity exist in just about every denomination. For example, Black Protestants with a more liberal orientation often affirm the right of same-sex couples to marry on the basis of civil rights equality; whereas many of their conservative counterparts often take offense at the attempt to link same-sex marriage with the Civil Rights movement, citing biblical texts on the immorality of same-sex relationships as clear evidence on the matter. American Baptists have also been debating the issue of homosexuality for decades, with conservative members demanding punishment and excommunication for any church attempting to affirm the LGBT community, while liberal supporters affirm the right and autonomy of individual congregations to minister to their respective communities.

In response to the theological discourse surrounding same-sex marriage, liberal Christian perspectives tend to argue that there are a variety of interpretations of biblical texts, and that biological and empirical evidence calls into question traditional

interpretations and doctrines. From this perspective, ecclesial unity is not achieved by imposing a “one doctrine fits all” policy, but rather it comes from nurturing the reality of the diverse manifestations of the Christian witness. Thus, liberal perspectives tend to be pluralistic and open to evolving understandings, and further call for dialogue and to avoid divisiveness. In contrast, conservative perspectives often take a decidedly different stance regarding same-sex marriage, arguing for the primacy and unchanging nature of traditional doctrines, and a literalist approach to biblical interpretation. Thus, many conservative Christians claim that the Bible is clear regarding homosexuality, and that the matter is not open to interpretation. From this point of view, homosexuality is not a valid lifestyle because the Bible condemns it; thus, it is wrong and immoral. However, homosexuals can be forgiven, provided that they repent and live a life of abstinence.

It could be argued that the fundamental differences in theological interpretation that fuel same-sex marriage debates have not only been going on for a few decades, but in many respects for centuries and millennia. This dialectical conflict is threaded throughout the history of the “Christian witness,” between those who call for evolving interpretations of scripture that challenge traditional doctrinal readings, and those who insist on the primacy of doctrinal authority and a fixed and inerrant meaning of scripture. This dialectic has existed since the birth of Christianity, as it did with the Jewish communities that came before them.

At the heart of the Christian debate about scriptural and doctrinal interpretation, is one fundamental difference: the difference between those who emphasize “faith” belief in the literal death and resurrection of Jesus as the only knowledge that leads to salvation, and those who emphasize Jesus’ message and its ability to enlighten as the primary path

to salvation (such was the conflict between the Gnostics and Proto-Orthodox Christians in the development of the early church). Similarly, in the early United States, humanists like Thomas Jefferson and Ralph Waldo Emerson faced divergent views about doctrine, biblical interpretation and the meaning of salvation.¹⁷¹ Notorious for the *Jefferson Bible*, which cut out most of the miracle stories—including the virgin birth and resurrection stories, Jefferson was clearly not one to subscribe to the inerrancy of Scripture, focusing instead on Jesus’ ethical teachings. Emerson was also quick to criticize his community’s strict doctrinal interpretation and the dependency that created a reliance on the church and Jesus for salvation, arguing instead that salvation comes from awakening the divine provocation in the soul, which manifests in self-reliance and just social action.¹⁷²

3.7 Religious Politicking and Same-Sex Marriage

Christianity represents roughly 75% of the religious population in the United States, with Protestant sects accounting for roughly half of the total religious demographic, and Catholics accounting for roughly a quarter.¹⁷³ Given the theo-political landscape, it would be shortsighted to dismiss the correlation between religion—and more properly theological doctrines and interpretations—and contemporary same-sex marriage politics. For one thing, such factors have had everything to do with shaping the laws and moral condemnation that prohibited “sodomy.” Conservative religious groups have also played the leading role in the argument against same-sex marriage, and in motivating voter behavior, without which there would likely be little serious opposition.

¹⁷¹ Hans Koester, “Thomas Jefferson, Ralph Waldo Emerson, Gospel of Thomas, and the Apostle Paul.” Pages 195-206 in *Paul & His World: Interpreting the New Testament in Its Context*. Minneapolis: Fortress, 2007.

¹⁷² Ibid.

¹⁷³ Pew Forum on Religion and Public Life, “Statistics on Religion in America Report,” <http://religions.pewforum.org/reports> (Accessed November 27, 2012).

However, many Christian groups have also risen to the defense. Just as the theological disagreement about same-sex marriage stems from arguments over the “correct” doctrines and appropriate interpretations of the Bible, so too do political arguments stem from debates about the “correct” interpretation of the U.S. Constitution, and the appropriate “due process” of the law.

This underscores the fact that the heuristic structures governing religious and political concerns are not necessarily mutually exclusive, but rather, as was demonstrated in the previous chapter, people tend to rely on the same heuristic structures to “interpret” and “understand” in general. Thus, Christians who advocate for “traditional” or literalist interpretations of the Bible are also likely to argue for a traditional or literalist reading of Constitutional law, without the need for heightened scrutiny or further judicial review. Those who take this view tend to see themselves as “textualists,” meaning that because they assume to take the traditional, face value wording of the law, they therefore interpret it accurately. In contrast, Christians who are open to evolving understandings of biblical texts often call for scrutiny and possible revision of laws, in light of new evidence and changing circumstances.

Proponents of same-sex marriage often argue that if same-sex marriage is about religion, then DOMA is unconstitutional because it represents a violation of the First Amendment, freedom of religion clause. Many minority religious groups choose to sanction same-sex marriages, and supporters maintain that the government must remain neutral respecting diversity of religious expression. However, opponents often cite the same democratic freedom in support of the right to object and to politicize against same-sex marriage, as a matter of religious conscience. While the First Amendment assures

freedom of religion, it does not mean that there are no laws that inhibit the full freedom of some religions, and it also does not mean that religions are exempt from abiding by laws that do.

As a democracy, the government of the United States must consider public opinion when making policies. Thus, people must be free to assemble and politicize their opinions about public policies—even if those opinions stem from religious rationale. This freedom came about largely because the authors of the Constitution and Bill of Rights were especially concerned with protecting minority religious perspectives against the preferential treatment and establishment of a state church, which they saw as a leftover of European conflict and domination. However, when religion becomes political, it stops being about religious morality and starts being more about power, dominance and control. Although people are free to believe what they want, when those beliefs manifest in social conventions and laws that infringe upon the rights and freedoms of fellow human beings—especially when the same rights and freedoms are routinely afforded to others—then they need to be subject to substantiation, reevaluation and possibly even revision. In this respect, religious beliefs are not beyond scrutiny, and are subject to the same hermeneutical principles that govern all interpretation.

3.8 Concluding Remarks

If there is one thing that the differing arguments demonstrate regarding same-sex marriage, is that the issue, which is largely a matter of interpretation, can hardly be said to be clear. Out of the debate has sprung many questions and responses; however, not all of them are equally logical or likely. It is the observation of this study that opponents of same-sex marriage often speculate about unfalsifiable possibilities—such as the claims

that same-sex marriage will lead to the demise of traditional marriage and human civilization, that children will be endangered, or that opposite-sex couples and their families deserve the legal protection of marriage more than same-sex couples and their families. In comparison, it can be demonstrated empirically and with high levels of logical consistency that same-sex couples and their families face tangible and quantifiable discriminations as a direct result of inaccessibility to rights, protections and benefits under the law—the same rights and protections that are routinely afforded to opposite-sex couples and their families. While these points of logic do not determine correctness or wrongness *per se*, they have nevertheless done much to inform the ethical, judicial decision making process in recent court cases involving the constitutionality of DOMA, as shall be demonstrated in the following chapter.

4—Process Tracing and DOMA

Using process tracing techniques, the following sections examine the four recent federal court cases from California, Massachusetts, New York and Hawaii, involving the constitutionality of DOMA or DOMA like laws. The overarching objectives in doing so are (1) to demonstrate how an empirical, cross-case study examination of same-sex marriage discourse can be conducted in relation to actual events and outcomes; and (2) to further show how process tracing techniques help to identify, circumscribe and address foundational dialectic. It is important to note that while legal circumstances play a part in framing the analysis, this study is concerned with examining public discourse in response to the proceedings, by drawing from both conservative and liberal media sources.

The first step in conducting process tracing analysis consists of delineating a historical-narrative framework, much like a story unfolding, for each case in question. This requires understanding the basic observable events of each case, delineating boundaries, as well as outlining the intervening variables that contribute to the development of events and outcomes. This is very similar to approaches in historical and literary studies; however, a primary difference is that process tracing is strictly concerned with outlining and interpreting observable data and the causal mechanisms between events and outcomes. Once the narrative and intervening variables are established, then opposing responses are outlined in relation to corresponding events. This requires outlining competing claims and evidence, which attempt to explain and account for matters of “fact.” In the final step, both conservative and liberal accounts are contrasted, in order to identify key points of dialectical conflict.

4.1 California

Although same-sex couples were able to marry for a brief period in California, a voter initiative known as Proposition 8 effectively banned same-sex marriages. However, this presented problems regarding the recognition of same-sex marriages that were solemnized before Proposition 8 went into effect. In February of 2012, after lengthy legal proceedings, a federal court ruled that Proposition 8 is unconstitutional, citing that it “serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians...and to reclassify their relationships and families as inferior to those of opposite-sex couples.”¹⁷⁴ The ruling did not directly address whether same-sex couples have a federal right to marry. Instead, the ruling focused on how LGBT Californians had the right to marry, which Proposition 8—backed by a marginal majority vote—took away. Essentially, the judgment ruled that the taking away of rights was not allowed. Notably, the ruling also stated that by targeting a minority group, without a legitimate reason for doing so, Proposition 8 violated the “Equal Protection Clause” of the federal Constitution. The three-judge panel was split 2 to 1.

Conservative responses maintained that Proposition 8 seeks to uphold the traditional definition of marriage in California, and that the court undercut the democratic process by “taking the power to preserve marriage out of the hands of the people.”¹⁷⁵ Although the court ruled Prop 8 to be unconstitutional, it also decided that further same-sex marriages were not permitted until the matter was settled, pending appeals. However,

¹⁷⁴ Robert Barnes, “California Proposition 8 Same-Sex Marriage Ban Ruled Unconstitutional,” *The Washington Post*. February 7, 2012. http://www.washingtonpost.com/politics/calif-same-sex-marriage-ban-ruled-unconstitutional/2012/02/07/gIQAMNwkwQ_story.html (Accessed July 28, 2012).

¹⁷⁵ Matthew Cortina, “California’s Proposition 8 Ruled ‘Unconstitutional,’” *The Christian Reporter*. February 7, 2012. <http://www.christianpost.com/news/californias-proposition-8-ruled-unconstitutional-68906/> (Accessed July 28, 2012).

the court ruled that the marriages that were performed during the brief time that same-sex marriage was legal remain valid.

The case of same-sex marriage in California is important for several reasons. First of all, many LGBT communities have long since made California their home, so there is a strong and vibrant LGBT friendly population. Secondly, for the past few decades, California has also had a bustling scientific economy that has attracted many highly educated, liberal democrats, who have become some of the strongest supporters of same-sex marriage equality. As a result, many same-sex relationships have become normalized in Californian society, with many couples living in committed relationships, buying homes together and even having children. Although still a minority, any discrimination against the LGBT community in California would be far less likely to go unnoticed or unchallenged. Furthermore, the case of Proposition 8 is one of the most highly scrutinized by the full and due process of the law. This means that instead of looking simply at precedence, the reasoning for different treatment needed to be justified, and also proven to advance a legitimate state interest. Having gone through the court systems twice the case is one of the most developed, and covers many significant points that could possibly arise from a DOMA like law.

Conflicting Narratives: California

Variables/ Outcomes	Proponent Response	Opponent Response	Dialectical Conflict
Same-sex couples seek to marry in so they apply for marriage licenses	Claim: Same-sex couples who choose to marry should have the right, and these relationships should be treated equally to opposite-sex relationships under the law. Evidence: Same-sex couples	Claim: Same-sex couples are seeking special rights to marriage that they did not have prior. Evidence: Same-sex couples seek special benefits that the law does not permit. Rather, the law states	Equal Rights vs. Special Rights *Proponents argue that same-sex couples should be treated equally under the law, and that same-sex couples do not want to create new laws or new rights, only to remove restrictions that are principally aimed at denying equal access and protection under the law. *Opponents argue that same-sex

	want to commit to each other, and to have their relationships and their families treated the same in civil law.	that marriage is between one man and one woman.	couples are seeking special rights, which do not apply to them. Legal precedence only permits marriage between one man and one woman. Thus, any deviation represents a new and special status that was not available previously.
Licenses granted and same-sex couples marry	<p>Claim: The granting of licenses reflects a community’s desire for same-sex marriage. Even though same-sex marriage was not legal prior, the inability of same-sex couples to have their relationships recognized as equal by the state violates constitutional equal protection clauses.</p> <p>Evidence: Same-sex couples were not permitted to marry, which created inequality; however, to correct this, licenses were granted equally to same-sex couples and opposite-sex couples alike.</p>	<p>Claim: The issuing of licenses to same-sex couples is not allowed. The activist clerk disregarded precedence and broke the law. Evidence: There is no precedence for issuing marriage licenses to same-sex couples. Moreover, the law expressly forbids it. This is because same-sex relationships are not the same as opposite-sex relationships, particularly since same-sex couples cannot produce children together, which is what marriage is ultimately for.</p>	<p>Same-Sex Relationships vs. Opposite-Sex Relationships</p> <p>*Proponents argue that legalizing same-sex marriage reflects a growing desire among same-sex couples to live openly in committed relationships. Moreover, these relationships are deserving of the same rights and protections as opposite-sex couples. Existing laws exclude same-sex couples and are therefore contrary to equal protection principles.</p> <p>*Opponents contend that marriage licenses cannot be granted to same-sex couples precisely because they are not opposite-sex relationships. Because opposite-sex relationships are distinctly different, the matter is not about equal protection, but about special protection—which same-sex couples are not entitled to because they cannot engage in procreative activity. It is the state’s interest to support procreative relationships, not relationships that are ultimately self-serving.</p>
Opponent groups initiate legal dispute to challenge the validity of same-sex marriages	<p>Claim: Conservative groups oppose same-sex marriage based on moralistic religious beliefs that have no objective basis. The goal is to keep same-sex couples and their families oppressed and to deny them social acceptance and equality, by limiting access to the existing institution of marriage, along with its privileges and protections.</p> <p>Evidence: Conservative religious groups</p>	<p>Claim: The granting of licenses represents a departure from traditional marriage and the law, by redefining marriage into something it is not. Evidence: Same-sex marriages are not legally permissible. The defining hallmark of marriage is the unique procreative complementarity of opposite-sex unions. This procreative union between a mother and a father is ultimately what needs protection under the</p>	<p>Marriage Equality vs. Traditional Marriage</p> <p>*Proponents argue that the primary source of contention lies in the denial of equality, not in protecting traditional marriage. It is contended that legalizing same-sex marriages will not affect the legalization or rights of opposite-sex marriages. Conversely, actions to keep marriage strictly between one man and one woman are achieved only by negating the needs and rights of same-sex couples and their families.</p> <p>*In contrast, opponents argue that there is no traditional precedence for same-sex marriage, but there is precedence to make the distinction against it. Same-sex couples cannot do what opposite-sex couples can:</p>

	often lead the opposition to same-sex marriage claiming to “protect” traditional marriage. However, this is achieved primarily by creating inequality and by negating the needs of same-sex couples and their families.	law.	procreate together. Thus, same-sex relationships do not mean the same thing as opposite-sex relationships; they are not equal and therefore, they do not deserve equal treatment. Rather, same-sex marriage represents a new movement that devalues traditional precedence, and thereby devalues traditional parenting and traditional family values.
State Supreme Court rules denial of equal treatment unconstitutional, therefore same-sex marriage is legal	Claim: The constitution must be interpreted to guarantee the basic right of marriage equally to all people. Evidence: Laws regarding sexual orientation should be treated with heightened scrutiny. This means that (1) the law must advance an important governmental interest, (2) the intrusion must significantly further that interest, and (3) the intrusion must be necessary to further that interest. Using heightened scrutiny measures, rationale for denying equal access and protection under the law fails to meet constitutional equality provisions.	Claim: Activist judges are imposing a radical version of marriage on the public. Evidence: Not everyone agrees with or wants this version of marriage. Everyone already has access to traditional marriage. Moreover, it is sufficient to deny same-sex marriage on the basis of precedence and probable doubt, meaning that same-sex couples should not be allowed to marry if there is any suspicion that same-sex marriage will be detrimental to society.	Regular vs. Heightened Scrutiny *From the proponent perspective, interpretations of civil marriage must be based on civil law, and civil law guarantees the basic civil right of marriage to all people. Denying the right for same-sex couples to marry must be proven to advance an important government interest. However, denial of same-sex marriage is typically founded on moral beliefs and sectarian religious ideology that perceives same-sex couples as corrupt and bankrupt. This basis does not adequately prove a government interest and fails reasoned scrutiny. *Opponents argue that activist judges dismiss traditional precedence. Moreover, because there is perceived doubt, then that is sufficient to err on the side of caution by denying same-sex marriages.
Opponent groups start voter initiative Prop 8 to amend state constitution to define marriage as strictly between one man and one woman	Claim: Opponents seek to deny same-sex couples equal access to basic civil rights and equality, by attempting to pass a voter amendment through majority rule, in order to override reasoned scrutiny and judicial authority. Evidence: Religious groups unite with other conservative	Claim: Defining marriage should be left up to the legislators and voters, not the courts. Traditional marriage needs to be protected, and this can be achieved by writing into the state constitution that marriage is strictly between one-man and one-woman. Evidence: As a	Judicial Authority vs. Voter/Legislative Democracy *The proponent argument claims that conservatives seek to override judicial authority and reasoned scrutiny, and to deny same-sex couples equal rights by legislating discrimination in the constitution. Majority rule does not mean democracy, especially when it is used to restrict, impinge or deny civil rights and freedoms. Voters may have the power to create laws, but judges are tasked and have the authority to determine how that law

	<p>organizations to override the judicial ruling with a voter initiative that would amend the state constitution with a strict definition of marriage. The objective in doing so is to prohibit same-sex marriages.</p>	<p>democracy, the people should have a say in the construction of their own reality, which is reflected in the values of the majority vote.</p>	<p>is applied, and whether or not it is constitutional. *In contrast, opponents argue that defining marriage should be left up to the voters, especially when judicial activists refuse to defend the will of the people. As a democracy the people have a right to pursue a voter initiative and to create laws to define marriage as strictly between a man and a woman, by amending the state constitution.</p>
<p>Prop 8 succeeds by narrow margin, 52-48</p>	<p>Claim: While Prop 8 succeeded by a narrow margin, it imposed sectarian, conservative religious values on all citizens. Evidence: Prop 8 succeeded by a narrow majority. It is widely regarded that the main proponents and financial backers of Prop 8 were conservative churches, including Catholic, Mormon, and Southern Baptist denominations.</p>	<p>Claim: The majority of people voted to keep marriage strictly between one-man and one-woman. The law should correspond to the will of the people. Evidence: The vote tallied 52-48 in favor of amending the constitution to define marriage traditionally. Thus, any other definition is an attempt to change and redefine what the majority has established.</p>	<p>Majority Vote vs. Minority Protections *Proponents argue that Prop 8 imposes the conservative religious values of a narrow majority, headed by Catholic, Baptist, and Mormon churches, onto a minority population who do not ascribe to those views. This results in a loss of rights for same-sex couples, and compromises democratic minority protections. *In contrast, opponents argue that a democracy means that the majority vote represents the will of the people, who ultimately have the final say in the matter. Any other definition of marriage is an attempt to change and redefine what the people have already established democratically.</p>
<p>Proponent groups initiate legal dispute to challenge the validity of Prop 8 at the federal level</p>	<p>Claim: By denying rights, Prop 8 unfairly denies equal rights under the US Constitution. Evidence: Prop 8 takes away rights, and violates the 14th Amendment, equal protection clause of the US Constitution. In contrast, allowing same-sex marriage does not take away rights.</p>	<p>Claim: Same-sex proponents continue to seek special rights, and to impose a minority perspective through judicial legislation. Evidence: Proponent groups initiate a legal dispute to invalidate the voting rights and will of the voting majority, in order to redefine marriage to give same-sex couples special rights.</p>	<p>Judicial Rulings vs. Voter Majority *Proponents contend that Prop 8 unfairly takes away and denies equal rights provisions in the US Constitution. Equal marriage rights had already been established judicially in California, thus the amendment takes away rights and is therefore not allowed. *Opponents argue that same-sex couples seek special rights to an institution that has been established by tradition and the will of the voting majority. Moreover, it is undemocratic for a handful of activist judges to force the majority of people to accept a definition of marriage that they do not agree with.</p>

Federal court rules Prop 8 unconstitutional because it denies rights, but ruling stayed pending appeal process	Claim: Prop 8 unconstitutional. Evidence: The taking away of existing rights, which Prop 8 does, is not allowed.	Claim: Activist judges overrule the will of the people, who voted to define and to protect marriage as between one man and one woman. This invalidates the voting rights of the majority of voting citizens Evidence: The ruling invalidates the will and rights of the majority of voting citizens.	Constitutional Equality Provisions vs. Voter Majority *From the proponent perspective, constitutional provisions express that the enumeration of rights cannot be interpreted to take away rights already held. *However, the opponent position contends that activist judicial interpretations do not override the will of the voting majority. In a democracy, people must be allowed to vote, and that vote must be accounted for. Furthermore, equality provisions to not apply since same-sex relationships and opposite-sex relationships are different. Therefore, the limited definition of traditional marriage is not unconstitutional.
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4.2 Massachusetts

In May 2012, the *Defense of Marriage Act* was declared unconstitutional by a federal appeals court in Boston, in the case of *Massachusetts vs. the U.S. Department of Health and Human Services*. The court initially had difficulty in finding precedence on how to evaluate the constitutionality of DOMA, and finally settled on using a heightened standard of review.¹⁷⁶ As in California, applying a heightened standard of review is less about how the court should receive DOMA, and more about the reasons why the legislature passed it in the first place. Thus, the court would be required to carefully scrutinize the nature and strengths of the reasons that Congress gave, as to why the federal definition of marriage had to be limited to opposite-sex unions. Upon review, the court determined that the legislature's reasons, which were based on moral discrimination, were insufficient, because the Supreme Court now deems moral

¹⁷⁶ Paul J. Larkin Jr., "Court Strikes Down the Defense of Marriage Act," *The Foundry*. May 31, 2012. <http://blog.heritage.org/2012/05/31/court-strikes-down-the-defense-of-marriage-act/> (Accessed July 28, 2012).

disapproval of homosexual preferences as an insufficient basis for discrimination in the law. Furthermore, the court deemed that the disparity in access to federal benefits because of the provisions in DOMA meant that the law's definition operated in a discriminatory fashion.¹⁷⁷

The court noted that if DOMA is left intact, then same-sex couples that are legally married will continue to be denied federal benefits routinely provided to opposite-sex couples. The court also stated that denying federal benefits to same-sex couples lawfully married in Massachusetts, has not been adequately supported by any permissible federal interest, and thus the law cannot withstand heightened legal scrutiny.¹⁷⁸ While the court admitted discrimination in the original reasoning of the law, it also acknowledged that the law was not mainly motivated by anti-homosexual fervor, but from a desire to preserve the heritage of traditional marriage.¹⁷⁹ However, the court also argued that the federal government had historically left the definition of marriage to the states. The court also ruled that section three of DOMA (which defines marriage as between one-man and one-woman) violates the equal protection principles of the U.S. Constitution, because it denies federal benefits. However, the court did not decide on section 2 of DOMA and whether states would need to recognize same-sex marriages, because the case did not raise the issue.¹⁸⁰

In response to the ruling, the Massachusetts Attorney General stated, "The landmark ruling makes clear once again that DOMA is a discriminatory law for which

¹⁷⁷ John R. Ellement, Martin Finucane and Milton J. Valencia, "Federal Appeals Court in Boston Rules Defense of Marriage Act Unconstitutional," *Boston.com*. May 31, 2012. <http://www.boston.com/metrodesk/2012/05/31/federal-appeals-court-boston-rules-defense-marriage-act-unconstitutional/cAEWI0tDSz8m1lsLN5fwAN/story.html> (Accessed July 28, 2012).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Paul J. Larkin Jr., "Court Strikes Down the Defense of Marriage Act."

there is no justification. It is unconstitutional for the federal government to create a system of first and second-class marriages, and it does harm to families... [A]ll Massachusetts couples should be afforded the same rights and protections under the law.¹⁸¹ The court also stated that “the elected Congress speaks for the entire nation...and [is] entitled to the utmost respect...but a lower federal court...must follow its best understanding of the governing precedent knowing that...the Supreme Court will correct mis-readings.”¹⁸²

The case of Massachusetts is important because it underscores the disparity that DOMA creates in the way state and federal governments treat citizens. Essentially, federal employees with same-sex spouses residing in Massachusetts were not allowed the same benefits as employees with opposite-sex spouses. Because state law requires that all employers engaging in business in the state of Massachusetts must recognize same-sex marriages for purposes of spousal benefits, the state ruled that federal employers doing business in the state must also comply. This is particularly problematic since the federal government was required to conform to state provisions, and to act in a manner contradictory to its own federal law.

Conflicting Narratives: Massachusetts

Variable/ Outcome	Proponent Response	Opponent Response	Dialectical Conflict
Mass. Attorney General files suit against DOMA	Claim: Same-sex spouses who are legally married in Massachusetts are denied federal benefits routinely provided to opposite-sex couples. This is	Claim: The activist Attorney General of Mass. attempts to override federal law through judicial mandate, in order to impose a minority definition of marriage	State Recognition of Marriage vs. Federal Recognition of Marriage *Proponents argue that same-sex spouses who are legally married at the state level are treated unequally and unfairly at the federal level. Federal discrimination not only denies them equal access to benefits

¹⁸¹ John R. Ellement, Martin Finucane and Milton J. Valencia, “Federal Appeals Court in Boston Rules Defense of Marriage Act Unconstitutional.”

¹⁸² Ibid.

	<p>discriminatory treatment and interferes with the state's right to regulate marriage. Evidence: The federal government, as an employer, denies spousal benefits to employees who are legally married. This is discriminatory treatment under state law.</p>	<p>on the federal government, and by extension the whole country. Evidence: The liberal Attorney General files suit, even though the case lacks precedence.</p>	<p>within their own state, which recognizes the marriages as legal, but it also interferes with the state's right to regulate marriage. *Opponents argue that liberal activists want to override federal law to accommodate the will of the minority, without legal precedence.</p>
<p>Court rules section 3 unconstitutional using heightened standard of review</p>	<p>Claim: The law is built on moral prejudice, and works in a discriminatory fashion. Evidence: Applying heightened scrutiny measures, the moral rationale for the law does not withstand a reasoned legal examination.</p>	<p>Claim: Minority activist judges override the will of Congress, the President and the people. Evidence: Judges rule unanimously against DOMA.</p>	<p>Judicial Scrutiny vs. Moral Majority *The proponent argument concentrates on the discriminatory basis of the law, which does not withstand reasoned legal scrutiny. *However, the opponent perspective argues that acts of Congress and the President should not be overturned lightly, especially on the whims of activist judges who happen to disagree with the reasons for the law.</p>
<p>Case appealed</p>	<p>Claim: DOMA is unconstitutional so the ruling should stand. Evidence: The courts already applied a heightened review process that determined that DOMA is based on moral discrimination, and that it fails to provide sufficient reason to protect traditional marriage, by denying access to same-sex couples, as a legitimate government interest.</p>	<p>Claim: Activist judges do not speak for the whole country. The people's decision, Congress's decision and the President's decision need to be accounted for. Evidence: Activist judges invalidate the will of Congress, the President and the majority of voters in the country, because they do not agree with the reasons for the law's enactment.</p>	<p>Standard Review vs. Heightened Review *Proponents contend that DOMA cannot withstand heightened scrutiny because it denies equal rights to same-sex couples based on sectarian morals and religious beliefs, and does not advance a legitimate government interest. *Proponents argue that the majority of people and the government have decided to enact DOMA and other similar laws with valid precedence that should not be rejected just because a minority population wants special rights.</p>
<p>Court rules unanimously to uphold previous ruling, but stays decision pending an appeal with the US Supreme Court</p>	<p>Claim: Court upholds the previous ruling, validating the use of heightened scrutiny. Evidence: The law fails the heightened scrutiny test, acts in a discriminatory fashion, and interferes with the</p>	<p>Claim: More activist judges deny DOMA's legitimacy, which is not reflective of Congress or the will of the people. Evidence: All the states that have voted for amendments have passed them; thus, activist judges</p>	<p>Judicial Authority vs. Voter Majority *Proponents argue that the judicial branch, as part of a democracy, is put in place as part of the system of checks and balances, to ensure that enacted laws are constitutional and legal. Even though laws are enacted, it does not mean that they are not discriminatory, or that the people—especially disenfranchised minority</p>

	state's right to regulate marriage.	invalidate precedence and do not speak for the people.	groups—cannot file a grievance. Just because the majority wants traditional marriage, does not mean that it is constitutional. *Opponents argue, however, that democracy and constitutionality stops with the will of the voting majority, and that the judicial branch, acts against democracy if it does not validate the will of the majority.
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4.3 New York

Another federal court ruled that DOMA is unconstitutional, in June 2012. The case centered on an 83-year-old woman who was subject to substantial inheritance taxes when her wife died, and the federal government would not recognize the marriage.¹⁸³ Married in Canada, the couple lived together for 44 years, and New York state law recognizes their marriage. The plaintiff sued for a refund of the tax, arguing that DOMA violates the equal protection principles of the U.S. Constitution. Upon review, the court ruled that DOMA acts in a discriminatory fashion, and infringes upon the state's business of regulating domestic relations.¹⁸⁴

The 83-year-old plaintiff was quoted saying that she was “thrilled at finally having the government recognize how unfair it is for the government to have treated us as though we were strangers.”¹⁸⁵ The American Civil Liberties Union (ACLU) also stated that the ruling “adds to what has become an avalanche of decisions that DOMA can't survive even the lowest level of scrutiny by the courts,” and that it is “another

¹⁸³ Lucas Grindley, “Defense of Marriage Act Loses in Court Yet Again,” *Advocate*. June 6, 2012. <http://www.advocate.com/politics/marriage-equality/2012/06/06/defense-marriage-act-loses-court-yet-again> (Accessed July 28, 2012).

¹⁸⁴ Stoyan Zaimov, “NYC Judge Rules DOMA Unconstitutional and ‘an Intrusion of States Affairs,” *Christian Post*. June 7, 2012. <http://global.christianpost.com/news/nyc-judge-rules-doma-unconstitutional-and-an-intrusion-of-states-affairs-76245/> (Accessed July 28, 2012).

¹⁸⁵ Lucas Grindley, “Defense of Marriage Act Loses in Court Yet Again,” *Advocate*. June 6, 2012. <http://www.advocate.com/politics/marriage-equality/2012/06/06/defense-marriage-act-loses-court-yet-again> (Accessed July 28, 2012).

example of the judiciary trend continuing to see that treating same-sex couples differently than their heterosexual counterparts is not only wrong but goes against the laws of equality and justice here in the United States.”¹⁸⁶

The New York case is important because it establishes a significant financial penalty that same-sex spouses incur because of the discriminatory nature of DOMA. The case further suggests that, aggregately, similar tax penalties could total millions of dollars each year. The plaintiff’s age and long-standing relationship with her wife further raises awareness about the equality of long-term, committed same-sex relationships. Arguments built upon the premise of biological and procreative differences between same-sex couples and opposite-sex couples are very hard to uphold in the face of an 83-year-old woman who just lost her wife and life partner of 40 years.

Conflicting Narratives: New York

Variable/ Outcome	Proponent Response	Opponent Response	Dialectical Conflict
Proponent groups file a case against DOMA, stating that it treats same-sex spouses, who are legally married, unfairly and unequally.	Claim: Widow forced to pay tax almost \$400K in penalties because the federal government does not recognize the marital status of same-sex couples, even though the state does. DOMA violates equal protection principles and causes financial losses to same-sex spouses and their families, and infringes upon the state’s jurisdiction in regulating marriage. Evidence: The case provides strong evidence that same-	Claim: A lesbian woman wants special access to marriage rights, to avoid paying taxes like everyone else. Evidence: Same-sex marriages are not legal under federal law. If the plaintiff wanted to avoid paying federal taxes, she should have married a man. Same-sex relationships are different, and therefore do not require the same treatment as opposite sex marriages. Until the law changes, she	Federal vs. State Marriage/Taxation *The proponent argument claims that same-sex spouses are forced to pay additional taxes because the federal government does not recognize their marital status, even though they are considered legally married by the state. DOMA creates unequal treatment of couples, even in states where same-sex couples and opposite-sex couples are treated equally, and infringes upon the state’s right to regulate marriage *Opponents argue that same-sex couples want special privileges and that same-sex couples are not considered legally married by federal law for valid reasons. Those reasons are why laws like DOMA are put into place, and why they should be

¹⁸⁶ Stoyan Zaimov, “NYC Judge Rules DOMA Unconstitutional and ‘an Intrusion of States Affairs.”

	sex couples are able to marry and have loving, committed families just like opposite-sex couples. Moreover, the widow was unfairly penalized during a time of crisis, on the basis of the spouses' genders. This simply does not happen to opposite-sex couples.	should be subject to the law just like everyone else.	upheld. Furthermore, the federal government has intervened in state marriages in the past, specifically regarding polygamy.
Court rules DOMA section 3 unconstitutional	Claim: DOMA violates the equal protection clause of the 14 th Amendment. Evidence: Same-sex marriage recognized by the state is not recognized by the federal government, which causes inequality in the treatment and application of tax laws.	Claim: Minority activist judges rule against DOMA, in order to destroy traditional marriage and undermine the family by redefining it to include same-sex spouses. Evidence: The law is not discriminatory because same-sex relationships and opposite sex relationships are two different things. The federal government does not recognize same-sex marriages. Thus, the lesbian is not being denied a right that she had previously. Rather, she is treated equally and the same under the law.	Marriage Equality vs. Traditional Marriage *Proponents argue that the law should recognize same-sex marriages equally in order to negate the inequalities that have resulted from DOMA's enactment. *Opponents argue that liberals want to redefine marriage and destroy traditional marriage. Traditional marriage is equal and available to all. Same-sex relationships have never been recognized as equal, so there is no reason to do so now, especially when the majority has voted and does not want it.

4.4 Hawaii

In contrast to the previous three rulings, the case in Hawaii resulted in the judge upholding the state's DOMA like law, on the grounds that any changes to the law should be made by lawmakers, or by voters through a constitutional amendment process.¹⁸⁷ In

¹⁸⁷ Ian Millhiser, "Regan-Appointed Judge Upholds Marriage Discrimination in Hawaii," *Think Progress.org*. August 9, 2012. <http://thinkprogress.org/justice/2012/08/09/664861/reagan-appointed-judge-upholds-marriage-discrimination-in-hawaii/> (Accessed August 16, 2012).

his 117-page opinion, the judge ruled that the Constitution does not provide same-sex couples the same rights as opposite-sex couples. The conservative judge based his decision on precedence against same-sex couples, while simultaneously dismissing the need for heightened scrutiny measures, stating that there is no precedence for applying such added scrutiny in cases related to same-sex marriage.

In response, liberal sources accused the judge of intentionally biasing legal precedence in the least favorable light for same-sex couples, and negating the need for a heightened standard of scrutiny that would require evaluating the justification given for the law.¹⁸⁸ Without needing to evaluate the justifications given for the law, the judge stated that it is not beyond rational speculation to conclude that fundamentally altering the definition of marriage to include same-sex unions might result in undermining the societal understanding of the link between marriage, procreation and family structure. While the case proves a setback for same-sex marriage proponents, it is important nevertheless, since it establishes and evaluates precedence—which, as the presiding judge pointed out, has often resulted in unfavorable rulings for same-sex couples. Thus, the case provides the best arguments for traditional marriage.

Conflicting Narratives: Hawaii

Variable/ Outcome	Proponent Response	Opponent Response	Dialectical Conflict
Proponents claim state laws and constitutional amendment are discriminatory	Claim: The law discriminates against same-sex couples, by denying them the equal access to freedoms, rights and protections. Evidence: Same-sex couples do not have the freedom to marry	Claim: There is no need for heightened scrutiny, only the upholding of precedence. If there is reason to doubt same-sex marriage, especially regarding the well-being of children and families,	Regular Review and Precedence vs. Heightened Scrutiny *Proponents argue that the nature of the discrimination require heightened scrutiny measures in order to address the conflict in the law. *However, Opponents argue that heightened scrutiny measures have no precedence in same-sex marriage cases. Thus, it is possible to

¹⁸⁸ Ibid.

	<p>their partners even though there is no reasoned, observable evidence that same-sex couples should not be allowed.</p>	<p>then that is enough to establish a state interest in denying it. Evidence: There is no precedence for heightened scrutiny; thus, there is no need to start now. Regular review reveals precedence against same-sex marriage; thus it can be concluded that traditional marriage provides the best conditions for raising children, whereas same-sex marriages could lead to family instability and social decline.</p>	<p>rationally conclude through regular review, which relies on precedence, that same-sex marriages could potentially be harmful to marriage, families, and society.</p>
<p>Judge rules to uphold traditional marriage</p>	<p>Claim: The ruling essentially denies same-sex couples rights on the basis that they did not have them to begin with. Evidence: The ruling unfairly biases evidence against same-sex couples, by favoring precedence and denying the allowance of reasoned evidence to be considered.</p>	<p>Claim: The ruling upholds the law and the will of the people, and correctly positions same-sex relationships as different. Evidence: There is little to no precedence in support of same-sex marriage; however, there is significant precedence against it.</p>	<p>Precedence vs. Heightened Scrutiny Ultimately the ruling reflects a case where the law is intentionally biased toward traditional interpretations, in order to see what can be rationally concluded, without heightened scrutiny, based on precedence alone.</p>

4.5 Concluding Remarks

The preceding sections demonstrated how process tracing techniques can be used to situate discourse within an empirical framework, in order to circumscribe, identify and address relevant dialectical conflict. There are several advantages to using process tracing as a compliment to discourse analysis. First of all, process tracing provides a way to circumscribe a manageable portion of discourse, which usually involves immense amounts of data, in a manner suitable for systematic analysis. Secondly, situating

discourse in relation to historical events and outcomes provides a way to focus on points that are relevant to observable processes, as compared to speculative or hypothetical argumentation. Moreover, by situating discourse thusly, it becomes easier to compare, analyze and make generalizations about competing narratives that attempt to account for the unfolding of events. Lastly, process tracing provides a way to pinpoint relevant dialectical conflict, and further provides diagnostic tools for assessing the empirical likelihood of claims in decision-making process. This is important when determining which competing claim or narrative is more likely—and therefore more appropriate in a given case. As explained in chapter two, process tracing offers four possible outcomes in establishing the likelihood of claims, which can build confidence in a theory of causation, by asking the degree to which evidence is sufficient *and* necessary in producing the outcome purported (see §1.6 “Evaluating Claims and Inferring Causation”).

Overall, this brief examination focused on public discourse surrounding four judicial cases involving DOMA or DOMA like laws, in California, Massachusetts, New York and Hawaii. Because of the lack of precedence, the first three rulings relied on heightened scrutiny measures, which required using scientific logic and observable evidence to establish a legitimate government interest in denying rights. In each case, the reasons for denying rights were unable to withstand heightened scrutiny measures; therefore, DOMA was determined to be in violation of basic constitutional equality provisions. However, the case of Hawaii dismissed the need for heightened scrutiny, relying solely on precedence in the law. Based on this approach, it was determined that the denial of rights was constitutional, and that axiomatic belief rationale was sufficient for establishing a state interest in denying rights to same-sex couples.

Eight points of dialectical conflict were identified as the result of the process tracing analysis. This includes competing perspectives regarding (1) equal rights versus special rights, (2) marriage equality versus traditional marriage, (3) religious discrimination versus religious persecution, (4) constitutional versus unconstitutional, (5) voter legislative majority versus judicial authority, (6) regular review versus heightened scrutiny, (7) rationale versus reason, and (8) federal versus state marriage. Each point is discussed in more detail in the following chapter.

**PART III—“MOVING FORWARD”
DISCUSSION OF FINDINGS AND CONCLUSIONS**

5—Discussion of Relevant Dialectical Conflict

Having examined or “retrieved” same-sex marriage discourse via historical considerations, discourse analyses and process tracing techniques, the study can now proceed to the task of “moving forward,” by addressing salient points of dialectical conflict. The following sections discuss eight main points of dialectic identified as a result of the process tracing analysis in the previous chapter, with additional considerations for democratic and judicial processes in the United States.

5.1 Equal Rights Versus Special Rights

In its basic form, the political debate around same-sex marriage is about civil rights. Supporters of same-sex marriage claim that same-sex couples simply want to get married and to be treated equally under the law just like opposite-sex couples. From this perspective, it is contended that same-sex couples do not want to create new laws or new rights, only to remove restrictions to existing laws that are principally aimed at denying same-sex couples equal access. In contrast, opponents of same-sex marriage argue that same-sex couples seek special rights that they did not have prior. At the heart of the argument is the belief that the right to true marriage is only permissible between a man and a woman, and that same-sex relationships are not the same as opposite-sex relationships.

It is interesting to note that arguments against same-sex marriage often take a page out of the religious defense of traditional marriage, practically *verbatim*, based on conservative theological doctrines about the nature of the body and what it means to be *imago dei*—in other words, to be able to create new life in the image of God. As the argument goes, same-sex relationships are not equal in their procreative complementarity.

Consequently same-sex couples cannot provide a child a home with both biological parents present, nor can they provide an adopted child with a mother and a father. As such, same-sex relationships are different from opposite-sex relationships in a very distinct way, and therefore the dissimilar relationships are not equal and do not need to be treated the same. However, while male-female complementarity is necessary for procreation, the idea that this is a prerequisite for accessibility to the civil institution of marriage is highly arguable, primarily because it cannot be tested or falsified empirically, and consequently must be accepted as true based on axiomatic belief.

A close examination of the arguments reveals a deeper argument based on a prior claim to rights, or lack thereof. Suzanne Pharr addresses this argument stating that

[a]t its simplest, this means that if you weren't there when the original document (the Constitution, for instance) was written or when the organization was first created, then you have no right to inclusion. Since those who wrote the Constitution were white male property owners who did not believe in the complete humanity of either women or blacks, then these two groups have had to battle for inclusion. If women and people of color were not in business (because of the social and cultural restrictions on them) when the first male business organizations were formed, then they now have to fight for inclusion. The curious thing about lack of prior claim is that it is simply the circumstances of the moment that put the original people there in every case, yet when those who were initially excluded begin asking for or demanding inclusion, they are seen as disruptive people, as trouble makers, as no doubt anti-American.¹⁸⁹

While same-sex marriage would undoubtedly create new accessibility to rights, it seems a stretch to suggest that same-sex couples want special rights, particularly since the rights sought after currently exist and are routinely afforded to others. Moreover, it is unfair to limit and deny access to rights and create laws on the basis of belief, and then blame those who do not fit within the imposed limits for seeking access to rights that they did not have prior.

¹⁸⁹ Ibid., 57.

Rather than seeking “special rights” that do not apply to them, it seems more realistic to assume that same-sex couples seek access to existing rights and institutions from which they are excluded. Thus, by insisting that marriage is defined by limited and fixed conditions set forth by the “opponents” of same-sex marriage, underscores the fact the only ones seeking “special” rights are the opponents themselves, by keeping the benefits, protections and privileges of the institution of marriage exclusive to heterosexual relationships—precisely by arguing for its specialness. While this is most certainly true, it is a leap in logic to insist that this condition necessarily bars access to same-sex couples. The fact of the matter is that while it may present a sufficient reason to deny access, it does not present the necessary condition. Rather, the necessary condition ultimately occurs in the collective meaning-making processes and societal choosing whether or not to extend access to existing rights.

5.2 Marriage Equality Versus Traditional Marriage

Supporters of same-sex marriage equality argue that the issue is ultimately about whether or not society, and the law, should regulate same-sex marriages in the same manner that it does opposite-sex marriages. This argument appeals to strong sentiments in American discourse around equality, liberation and freedom. In contrast, traditional marriage supporters argue that the issue is ultimately about protecting the traditional definition of marriage as between one man and one woman, which they claim is ordained by God as revealed in empirical procreative reality of the male-female relationship. In short, there is simply no other relationship like it.

Although western history has undeniably favored marriage to be between a man and a woman, the official wording that is being contested is only as old as 1996—with

the enactment of DOMA. Similarly, many state provisions that are currently being contested only date as far back as the 1970's, when conservative groups started lobbying to institute gender distinctions into state laws and constitutions. It was claimed that traditional opposite-sex provisions were implicit in the law, and that by enacting DOMA and other DOMA like laws, they were only augmenting the language of the law to remove confusion and to reflect that implicit understanding. While opponents often argue that same-sex couples are trying to "redefine" marriage, and that the traditional definition of marriage is under attack, the observable evidence reveals that traditional marriage supporters are the ones who have changed the literal, *verbatim* wording of law, far more often than not. Moreover, it begs the question of why doing so was necessary.

Looking at the impetus for the creation of DOMA and other similar laws, it is clear that they arose from both a desire to keep marriage between one man and one woman, as well as a response to the initial attempts of same-sex couples to marry. Such preemptive actions to stop same-sex marriage and to limit its legalization before it could happen undeniably stemmed from both a preferential view of the male-female relationship *and* a moral aversion to same-sex relationships. It is also undeniable that these sentiments are based primarily on theological doctrines and resulting moral distain. After all, such has unequivocally been the case throughout the majority of Western history for thousands of years.

5.3 Religious Discrimination Versus Religious Persecution

The issue of religious freedom and discrimination surfaces frequently in same-sex marriage debates. On one hand, proponents of same-sex marriage argue that prohibition is fundamentally a form of religious discrimination whereby the government

discriminates against religious groups who choose to sanction same-sex marriages. This limits the freedom of religious groups to fully participate in the church-state relationship in bestowing the sacraments of marriage unto same-sex unions. On the other hand, opponents claim that legalizing same-sex marriage denies the religious liberty of those who object to homosexuality by forcing them to accept as morally good what is contrary to deeply held religious convictions. It is contended that people have the right to object as a matter of moral conscience, and that legalizing same-sex marriage would unfairly stigmatize opponents as bigots for their personal convictions.

It seems wholly antithetical in a democracy to prohibit individuals and groups from practicing religion or from politicizing initiatives based on faith beliefs. However, when those beliefs are unfalsifiable then the situation becomes highly problematic—one can neither prove nor disprove such claims. It becomes further problematic when these beliefs infringe upon the rights and freedoms of others. Moreover, if one group is free to politicize and discriminate solely on the basis of belief and the absolute freedom of religion, then any religion can politick and impose any belief so that it becomes the law. Without some system of evaluating claims and substantiating laws that accounts for plurality of perspectives *and* minority religious freedoms, then the United States would always run the risk becoming a sectarian theocracy.

This is the same problem the colonists left behind in Europe, and what the founders of the United States faced when they wrote the Constitution, and the First Amendment. It is further why there was so much concern about limiting the government's ability to legislate any law "respecting an establishment of religion or prohibiting the free exercise thereof," so that the government could not establish one

church over another—as had been the case in Europe with centuries of war between Catholic and Protestant governments. Thus, the law was written so that the various interpretive church communities could live together, yet still be able to practice their respective faiths in relative peace.

It is clear that the impetus behind DOMA and other similar laws implicates religious beliefs, which begs the question whether or not the conflict regarding same-sex marriage should be treated as a religious issue. The heavy involvement and politicking of virtually every church denomination only serves to emphasize this fact. That same-sex marriage is a religious issue is further confirmed in the claims of religious liberty violations, both in the desire to sanctify the marriages of same-sex couples and in the freedom to object to them. Additionally, one of the strongest arguments against same-sex marriage is that if it is legalized, then many people will be branded as bigots for having the religious convictions that they do. While this suggests that the freedom of religion is heavily implicated in same-sex marriage politics, it remains questionable whether politicizing against the rights and freedoms of others—based on religious beliefs—constitutes a legitimate religious liberty.

To determine whether a law does or does not implicate religion, the courts in the United States often refer to the “Lemon Test,” which states that the law (1) must have some secular, or non-religious legal purpose; (2) must neither promote nor inhibit the practice of religion; and (3) must not foster "an excessive government entanglement with religion." While the Lemon Test provides a framework for evaluating the law, it also provides a template from which to present arguments in such a way as to circumvent

religious implications, which potentially belies disingenuous attempts to obscure the deeply religious and theological nature of the conflict.

5.4 Constitutional Versus Unconstitutional

In many ways, the United States Constitution provides the guiding legal framework for the nation, which unites all the states under a common, constitutional law. However, federalism in the United States grants each state and local legislature the right to create laws that reflect the needs and desires of regional communities. Thus, not all state laws are the same, nor do federal and state laws always coincide. Still, all civil laws must ultimately comply with the basic, fundamental rights and freedoms expressed in the federal constitution, which in certain respects retains the final word on all civil matters.

There are three constitutional laws that are frequently cited in contemporary same-sex marriage debates. The first is, of course, the First Amendment—which enumerates various freedoms of expression, the right to grievance and to peacefully assemble. The First Amendment also includes the “Establishment Clause,” which deals with religious liberty and the relationship between religion and government. The second constitutional law implicated is the Ninth Amendment, which states that the enumeration of rights in the constitution cannot be interpreted to deny or disapprove of rights already held. The last is the Fourteenth Amendment, which enumerates the due process and equal protection of the law for all citizens. Thus, any legal consideration of the constitutionality of DOMA must take great care not to (1) privilege one religion over another, or entangle the government in religion, (2) deny or disparage existing rights, and (3) create or perpetuate inequality.

The primary question in contemporary same-sex marriage debates is ultimately whether or not DOMA, and other similar laws that limit marriage, are constitutional. This will ultimately be determined by deciding whether or not the law operates in a discriminatory fashion. Opponents of same-sex marriage often argue that DOMA was enacted before same-sex couples had the right to marry, and therefore the law did not deny or disparage rights, nor was it unconstitutional at the time of its enactment. However, DOMA did not expressly stop the creation of rights or the legalization of same-sex marriage at the state level. Rather, it preemptively stopped the federal government and any state from being forced to recognize the legality of same-sex marriages should they be solemnized by other states, when and if that ever happened. It is true that DOMA did not deny rights or act in a discriminatory fashion when it was created because there were no existing same-sex marriages to deny. However, it is possible to argue that DOMA began operating in a discriminatory fashion by denying rights and equal treatment the moment same-sex marriages were legalized.

Moreover, while DOMA did not technically deny or disparage existing rights, it did deny the due process of the law. Same-sex couples had already initiated cases fighting for the right to marry prior to DOMA, but these cases were cut short by similar legislative actions that undercut the democratic judicial process and the right to minority grievance. Additionally, it could be argued that if “protecting” traditional marriage was so important that it required enacting a federal law and changing state constitutions to stop same-sex couples from having the freedom to marry, then same-sex couples deserve to have their grievance heard through the full and due process of the law.

Furthermore, opponents often advocate for an amendment to the federal constitution; however, since same-sex marriage rights have now been created and recognized as legal, any new federal constitutional amendment to define marriage as between one man and one woman would necessarily need to be construed as denying and disparaging those rights. According to this line of logic, if an attempt to amend the federal constitution would fail on the basis of disparaging existing rights, as it did in California, then it begs the question of DOMA's constitutionality on those same grounds. Conversely, if DOMA is determined to be constitutional by the U.S. Supreme Court, then there is nothing to stop a similar amendment limiting the definition of marriage to one man and one woman from being ratified into the United States Constitution.

5.5 Voter Legislative Majority Versus Judicial Authority

Opponents of same-sex marriage often argue that defining marriage should be left up to the voters and the legislatures, and that as a democracy the people have a right to pursue initiatives to defend and uphold traditional marriage. In the recent federal court cases overturning DOMA, it is contended that many people are losing their voting rights, largely because of so-called activist judges who dismiss the will of the people. However, it must be acknowledge that the creation of a law alone does not establish that the law is constitutional. If constitutionality were established by simple majority vote, then it would be possible to legislate any law, without any minority right to grievance. Thus, while democracy is about majority vote, it is also about equal treatment and protections that guard against unjust minority discrimination.

Additionally, to claim that recent judicial rulings against DOMA are the result of the political preferences of a activist judges—who dismiss the will of Congress, the

people and the acting President who signed the bill into law—is a strong accusation to make, and suggests that judges base their rulings on superficial opinions and personal whimsy. While opponents raise a legitimate concern that past legislative acts should not be overturned lightly, it seems unlikely and even disrespectful to suggest that judges would rule without considerable respect for the fair and due process of the law.

The judicial branch, as part of a democracy in the United States, is put in place as part of the democratic system of checks and balances, to ensure that enacted laws are not only upheld, but are also constitutionally and legally applied. Even though laws can be enacted by majority vote, it does not mean that laws are not discriminatory or that the laws are not open to scrutiny. Moreover, it does not mean that the people—especially disenfranchised minority groups—cannot ask that the law be reevaluated. Voters and legislatures may have the power to create laws, but judges are tasked and have the authority to determine how that law is applied, and whether or not the law functions within constitutional parameters.

While judges are only human, it is more likely that they act with great care and earnestness. Judges realize that people are genuinely divided on the issue of same-sex marriage, that circumstances should be examined thoroughly, and that the matter cannot be settled by one judicial ruling alone. This is why they have typically utilized heightened scrutiny measures, knowing that ultimately the United States Supreme Court, as part of its democratic mandate, will be responsible for settling the issue of DOMA's constitutionality.

5.6 Regular Review Versus Heightened Scrutiny

The American judicial system is characterized by its focus on precedence, otherwise known as the “regular review” process. This is quite useful in determining the fair outcome and equal judicial treatment of common court cases, which occur with some frequency. Regular judicial review relies largely on the rationale that prior cases have already worked out most of the details and reasoning for the law, as well as how the law should be applied in corresponding cases. Thus, the particulars of each case need only be situated within the existing framework, which is assumed to be just and appropriate. However, this approach presents some problems in new or unusual cases where there is little to no precedence. Such is the case with DOMA and same-sex marriage.

The basic argument of those opposing the legalization of same-sex marriage is that there is no U.S. Supreme Court precedence for using heightened scrutiny measures regarding same-sex relationships. Therefore, it is argued that there is no reason to apply such measures now. Thus, based on regular review, it is contended that there is sufficient precedence to deny same-sex marriage. Moreover, without heightened scrutiny measures, it is possible to rationalize through the regular review process that the mere suggestion of harm is sufficient enough to stop same-sex marriages from being legalized. However, it seems particularly dismissive to intentionally reject the use of heightened scrutiny with such a controversial issue that has little to no precedence, but that will undoubtedly have widespread ramifications.

In cases where there is little to no precedence, the court must find or design diagnostic tools that are appropriate for establishing new precedence. Since new judicial decisions have huge implications for future rulings, it follows that they should be treated

with great care and heightened scrutiny. Under heightened scrutiny measures, a law such as DOMA would need to justify how restricting access to rights (1) advances an important government interest, (2) is *sufficient* to significantly further that interest, and (3) is also *necessary* to further that interest.

The issue of deciding which judicial review process is appropriate is particularly pertinent, because how the U.S. Supreme Court decides to proceed—whether it chooses to rely on regular review processes or heightened scrutiny measures, will set the tone for future cases—not only regarding same-sex marriage, but more generally regarding the legal treatment of same-sex couples and the LGBT community. Conversely, as a highly religious issue, it will also say much about how the courts deal with the scrutiny of moral discourse in the public sphere. This emphasizes the ethical and moral relationship between religion and politics, whereby religious discourse not only impacts and shapes political outcomes, but also whereby political outcomes impact and shape religious discourse.

In other words, if the court sides with regular review processes, it will be much easier to assert religious beliefs, whether or not such beliefs are shown to be causally necessary in leading to the claims and outcomes they assert. In this scenario, claiming that the Bible says same-sex relationships are wrong and therefore same-sex marriages should be discouraged is a completely legitimate claim, even though the claim cannot be proven nor disproven as empirically necessary. On the flip side, if the court decides to apply heightened scrutiny measures it will be much harder to assert claims based on belief. Rather religious and theological assertions—particularly regarding the morality of same-sex relationships—will also need to be substantiated by providing empirical

evidence and necessary conditions, and by following through with all the relevant questions to their logical conclusions. This latter approach is much more consonant with the “critical” or “transcendental” engagement, which calls for a thorough investigation not only of the facts, but also how they are used as evidence.

5.7 Rationale Versus Reason

It is the observation of this study that much of the dialectical conflict regarding same-sex marriage, both political and theological, occurs between claims that are based on belief rationale, and claims that are based on empirical evidence and “scientific” reason. While reason and rationale are often used synonymously, the issue of same-sex marriage raises a distinction that is increasingly being made between the two.¹⁹⁰

On one hand, claims based on belief rationale often appear to follow a rational order—they are both intelligent and systematic. However, conclusions are often based on faith premises that are assumed to be true axiomatically. This means that they are based on precedence or arguments that are presumed to be self-evident and true, but that nevertheless remain unquestioned or unsubstantiated for the claim in which they are used. On the other hand, claims based on empirical-scientific reasoning are based on observable and testable premises that are shown empirically to be more *likely* true than competing arguments. This means that conclusions are based on the results of logical operations that are further substantiated by establishing the necessary conditions for producing an outcome. In other words, claims that appeal to “scientific” logic and reason do not just occur in the processes of a thinking mind, they must also be subject to confirmation in empirical reality and proven to be necessary in leading to the outcome

¹⁹⁰ A good example of this is the recent court case in Dover, Pennsylvania that clarified sharp distinctions between Evolutionary Theory and so-called Creation “Science.”

that they purport. These distinctions also serve as the primary basis for the difference between regular review and heightened scrutiny measures in judicial processes, which incidentally also correspond with the diagnostic tools of process tracing (see §1.6 “Evaluating Claims and Inferring Causation”).

5.8 Federal Marriage Versus State Marriage

A significant inequality that can be demonstrated empirically, which has surfaced as a result of DOMA, is with how the federal and state governments treat marriage for everyone. As pointed out earlier in the discussion, the enactment of DOMA did not stop states from legalizing same-sex marriage through democratic processes; rather, it only stopped the federal government from recognizing those marriages. Thus, the question is not whether to permit same-sex marriages—because the right for same-sex couples to marry already exists. Rather, the issue is ultimately whether and how to recognize them under federal law.

DOMA essentially mandates that the federal government intentionally limit the protective umbrella of the law to “traditional” opposite-sex couples, thereby excluding “non-traditional” same-sex couples from participating in existing institutions. Conversely, a federal policy based on marriage equality would not invalidate or exclude opposite-sex couples, but rather extend the protective umbrella of the law to include opposite-sex couples and same-sex couples alike. Although DOMA did not stop the legalization of same-sex marriage, the law undeniably infringes upon a state’s right to treat same-sex couples equally. It does so precisely by requiring the federal government to intentionally delegitimize the legal marriages of same-sex couples, by treating them as

if they are not really married. Thus, it is very difficult to deny that DOMA operates in a discriminatory fashion.

It is a point of great irony that “protecting” traditional marriage by restricting the law did nothing to augment or improve the institution of marriage for opposite-sex couples. Rather, the exclusion resulted in a strong counter movement to address the impact on the rights and freedoms of same-sex couples in the United States. Moreover, excluding all non-heterosexual relationships with the intent to “clarify” meaning and to reduce confusion only resulted in the generation of several new institutions (e.g., civil unions, domestic partnerships, etc.) and a plethora of varying federal and state laws nationwide in order to accommodate the growing need of non-traditional same-sex couples and their families. Thus, the unfortunate reality is that the conflict and confusion has only worsened.¹⁹¹ To add insult to injury, the numerous laws and institutions created to govern the needs of same-sex couples are largely modeled after the same laws governing the institution of marriage.

In comparison, repealing DOMA and other DOMA like laws would essentially instate a genderless definition of marriage. The law could then be more easily interpreted in light of changing needs and circumstances to apply to both opposite-sex and same-sex couples equally. If this change occurs, with the express intent to include same-sex couples in the legal understanding of marriage, then much fewer laws need to be created. Rather, as with other countries where same-sex marriage is legal, all the existing laws and forms governing marriage and relationships for opposite-sex couples could also be applied to the marriages and relationships of same-sex couples. For legal purposes, there

¹⁹¹ One is reminded of similar circumstances with Prohibition in the United States in the early 20th century.

is very little distinction other than gender. Same-sex couples have all the same problems, concerns and needs as opposite sex couples by virtue of their common and shared humanity—including the need to have their families, their spouses and their children protected and treated equally under the law.

6—Conclusions: Moving Ethically Toward the Future

The preceding research presented an exploration of discourse regarding same-sex marriage in the United States, *circa* 2012-2013. Overall, the study investigates different methods and approaches for identifying and addressing relevant foundational conflicts. Adapting the framework of the transcendental method posited by Bernard Lonergan, the study (1) provided a brief overview of the historical foundations of debate, (2) offered considerations regarding contemporary interpretive rhetoric, and (3) demonstrated techniques for circumscribing manageable portions of discourse suitable for dialectical conflict analysis. While the study does not claim to have “set the record straight” about the correct course of action, it nevertheless offers many considerations for an ethical and systematic examination that is essential for judicial and democratic decision making processes. This includes techniques and diagnostic tools that are increasingly implicated in the evaluation of moral claims regarding same-sex relationships and in general.

One of the primary arguments of this thesis is that “faith” belief underpins a good portion of the moral and political conflict regarding same-sex marriage. This is not only because the most vocal opposition comes from religious circles, but also because political arguments on both sides of debates often adopt a “belief” rationale when making claims about same-sex marriage. Although the Supreme Court may settle the matter regarding DOMA, it is contended that conflict regarding the morality and legal equality of same-sex marriage is likely to persist until the underlying causal issues are addressed, particularly regarding claims of religious discrimination, moral relativity and religious freedom. The following sections highlight some of the main points of interest that surfaced during the investigation, with reflections for “moving the conversation forward.”

6.1 Changing Paradigms and the Transcendental Engagement

Contrary to just a few years ago, contemporary circumstances highlight the fact that coming to conclusions regarding same-sex marriage involves more than just asserting belief claims, personal preference or traditional precedence. Rather, it requires establishing evidence and causal logic that supports the claims that are being asserted. While there is no singular systematic or universal approach for arriving at the “correct” understanding regarding same-sex marriage, one thing is certain—a critical approach means more than simply taking a bias-free look at the “facts” and letting them speak for themselves. It also means more than just politicizing opinions or beliefs, and deciding matters based on majority consensus.

An important distinction that needs to be made is that, while competing perspectives regarding same-sex marriage may be rational or reasonable in the colloquial sense, they often fail to meet the heuristic criteria of critical “reason.” In contemporary same-sex marriage debates people often assert the veracity of personal convictions, in an attempt to present faith or belief as a form of legitimate reasoning. From this perspective, belief provides one “theoretical” approach among many, which provides an equally viable alternative to all other claims. Thus, it is presumed that so long as one is thinking intelligently and systematically, then one is therefore thinking logically and rationally. However, empirical logic is increasingly understood as not simply thinking intelligently or systematically, but also that which is confirmed, supported, and constrained by the empirical reality of the world around us.

Over the past few centuries, Western societies have seen a shift from a Cartesian view (I think, therefore I am) of what can properly be called “reasonable” or “rational,”

to a postmodern empirical-scientific view of what can properly be called “reasoned logic.” For example, the former paradigm posits that if one can think intelligently and rationally about the existence of God, then this qualifies the idea as sufficiently rational to be construed as possible or logical. However, this opens up logic and rational thinking to include anything and everything that one can think of, including the supernatural and a whole plethora of things that cannot be falsified or observed in empirical reality. Such a view does little to inform a practical understanding of reality. In comparison, contemporary empirical-scientific reasoning calls for the weighing of claims based on observable evidence and logical consistency, which is further constrained by limits of empirical reality. At the heart of the contemporary, postmodern, empirical-scientific heuristic is the basic requirement that (1) calls for openness to correction and revision, and (2) the understanding that the most fundamental nature of reality is such that everything is subject to change and *evolution*.

It can be argued that evolutionary explanations, which require revision and an empirical-scientific heuristic, provide the best available understanding of reality because the theories it has generated increasingly have a strong presence and practical impact on every day life experiences. Moreover, evolutionary paradigms work irrespective if one agrees with them or not. Thus, to hold onto outdated theological paradigms based on fixed, classicized understandings of the universe—that no one really thinks about or uses except during Sunday mass—simply separates God from everyday reality. Worse, it requires axiomatic faith belief to continue adherence to doctrines rather than subjecting them to verification, substantiation and possible revision.

It is often argued that such evolutionary, empirical-scientific models only explain reality, and that they cannot answer questions that are more properly the domain of theology, morality and ethics; however, this is not the case. Rather, empirical science has much to say about informing theology, morality and ethics (and vice versa), because each often deals with similar issues and sometime the very same things—such as the creation of the universe, why we are here, where we are going, and yes, even same-sex marriage. In this respect, both theological and scientific thinking act as mechanisms that participate in and inform the creation of discourse and understanding about reality. The fact that both engage in a collaborative process, which aims to clarify and create meaning, further underscores the ethical responsibility of both theology and science to produce objects of knowledge that are consistent with reality, as compared to false conceptions. This begs the question whether the two are necessarily mutually exclusive at all, or if they are more aptly described as two sides of the same coin.

Ultimately, it can be argued that the conflict regarding same-sex marriage lies in the difference between perspectives that are rationalized and based on belief assumptions, and perspectives that are reasoned and based on empirical evidence and scientific logical consistency. This does not necessarily mean that the difference is between “faith” and reason or science and religion. Not all religious faiths rely on rationalizations or adhere to doctrines that are incongruent with scientific understandings. Such doctrines that are founded on a critical understanding of “reason” are not just relative on whether one has belief in them; rather they are supported by what is consistently revealed in the everyday world. Thus, there is a growing postmodern affirmation that faith does not mean simply believing in things that may or may not be true. Rather, it also means using the best

reasoning capacities available, in order to understand and put faith in line with the best understanding of reality—as “two eyes make one in sight.”

In order for both theology and empirical science to be heuristically compatible, this means that both will need to adopt more of a transcendental approach, which is concerned with openness to revision, self-transcendence and the ethical dissemination of knowledge. This requires letting go of old paradigms and illusory conceptions of exclusivity—in order to make room for each other in addressing relevant concerns. This means that, on one hand, theological schools of thought will need to be open to revising doctrines and evolving understandings to coincide with empirical reality, instead of trying to conform understandings of empirical reality to millennia old doctrinal assertions. In particular, many churches will need to stop treating doctrines regarding same-sex relationships and same-sex marriage dogmatically, and rather be open to revision. On the other hand, science will need to account for the moral and ethical dimensions of how new understandings impact and challenge every day lived perceptions, particularly those that challenge deeply held traditional beliefs. Thus, scientists will need to develop better strategies for disseminating knowledge and “ministering” to the wider population accordingly.

While the compatibility of theology with empirical science may seem extremely challenging, and perhaps even antithetical to some, this linking is nevertheless occurring in the midst of several contemporary crises, including, among others, debates about evolutionary theory and same-sex marriage. Furthermore, while arguments presented on social media platforms often reflect the polarized ends of the spectrum, the creative dynamic of the dialectical conflict is challenging people to rethink old and familiar

ideologies in a new way. This is resulting not only in new understandings and mass conversions regarding same-sex marriage, but it is also contributing to shifting societal attitudes away from the old exclusivist paradigms that tended to separate and polarize theology and science, to new postmodern paradigms that are finding a place where science and theology can coexist and even compliment one another.

The Transcendental Engagement

Any transcendental endeavor in addressing same-sex marriage must begin with the acknowledgement that *all* investigators are subject to bias, and that all explanations and claims are really just sophisticated extensions of the best available commonsense understandings, *which are almost always incomplete and adjustable*. Moreover, overcoming biases and other shortcomings requires the constant application of a transcendental awareness, and the intentional endeavor to be attentive, intelligent, reasonable, and responsible in one's investigative approach. Additionally, all claims and theories must be subject to criticism and scrutiny in light of their scientific, philosophical, and theological bases.

By following a transcendental approach, one will be able to answer relevant questions about the processes and tasks required to arrive at a particular position or argument. Thus, instead of cutting conversations short and relativizing arguments by "agreeing to disagree," any transcendental engagement requires one to muster all one's capacities to systematically address limitations, to work out appropriate systems of conceptualization, to arrange and categorize data accordingly, and to remove apparent inconsistencies. Attention to the ethical dimensions and logical consistency of language is particularly important, especially when communicating results and justifying one's

position in light of competing perspectives. More importantly any transcendental investigation of “facts” should include a long and honest examination of one’s own heuristic approaches.

One of the principle benefits of a such a self-transcending, revisionist engagement is that in the process there lies the potential to discover something about one’s self that was previously unknown, and for one to grow from it and transcend an old problem or outdated paradigm. One also learns something about the foundations and horizons of competing perspectives, and the deeper origins of ideas and arguments. This requires a close attention to (1) the way one uses language to make a claim; (2) the way one judges the merit of claims and evidence; and (3) the nomenclatures and adjectives one uses not only to describe reality, but also to criticize and stereotype competing perspectives.

6.2 The Constitutionality of DOMA and the Definition of Marriage

Ironically, if opponents of same-sex marriage had not asserted their right to politick for laws that essentially limited accessibility to rights, by instituting gender distinctions, it is quite possible that the court system may have dropped the issue of same-sex marriage “for lack of a substantial question,” as the U.S. Supreme Court once did many years ago. This underscores the creative dimensions of dialectical conflict—in pushing to prohibit “gay” marriage by creating laws and constitutional amendments preemptively, opponents have inadvertently made same-sex marriage possible and a legitimate legal concern. Moreover, if protecting traditional marriage was so important that it required enacting a federal law and changing state constitutions to stop same-sex couples from having the freedom to marry, then it seems fair to say that same-sex couples deserve to have their grievance heard through the full and due process of the law.

If there is one branch of the political system where same-sex couples can have their case heard with some measure of reasoned scrutiny and fairness, it is the judicial branch. Since the question of DOMA's constitutionality lacks precedence, and any new judicial decision will have huge implications for future rulings, it follows that the case should be treated ethically with great care and heightened scrutiny. As a highly polarized and controversial issue, to insist that the courts treat the case without heightened scrutiny measures means to deny the full and due process of the law, and to turn a blind eye to empirical evidence and scientific reason. Moreover, it also allows for the constitutionality of laws to be built solely upon axiomatic acceptance of precedence and faith belief.

While both camps have presented many points, the debate ultimately boils down to the wording and definition of marriage in the law. The fact that language and discourse evolves is quite evident; however, some people would still argue that the definition of marriage, as strictly between one man and one woman, is fixed and unchangeable. This, however, increasingly goes against how humans understand the nature of reality and meaning making, which is increasingly characterized in evolutionary terms. If the meaning of laws and language never changed, then we would still be speaking ancient dead languages and governing society by Hammurabi's code. That the meaning and definition of marriage—as a human social-linguistic convention—is ultimately what we collectively choose it to be is further confirmed by the fact that many states and countries already allow same-sex marriage—with little to no substantiated consequence.

While moral discourse and dialectical conflict has contributed to shaping political debates, a U.S. Supreme Court ruling will invariably contribute to shaping the future of moral discourse and dialectical conflict regarding same-sex relationships. This

underscores a creative process whereby public morality not only manifests in conceptions of justice and the law, but also where justice and the law contribute to the creation of public morality. While the court faces the additional challenge of dealing with the issue without settling doctrinal disputes, a decision will undoubtedly have far reaching implications not only for the treatment of same-sex relationships, but also the treatment of moral discourse and “faith” reasoning in the public sphere.

By deciding on DOMA, the United States Supreme Court will inadvertently be casting judgment on whether certain doctrinal understandings regarding same-sex relationships fit within the constitutional framework—particularly with respect to whether or not distinctions that separate opposite-sex and same-sex relationships on the basis of religious belief and theological doctrines are discriminatory, or whether they are protected as a legitimate religious freedom. The greatest negative effect of legalizing same-sex marriage seems to be in the creation of a social climate where it is hard to object to the morality of same-sex relationships on the basis of unsubstantiated religious convictions and moral beliefs. However, it is not unreasonable to ask that such convictions and beliefs be justified and substantiated.

6.3 Same-Sex Marriage, Religious Liberty and Moral Politicking

While the fundamental question of debates is whether or not DOMA operates in a discriminatory fashion, the dialectical conflict runs much deeper, to also implicate the question of whether or not same-sex marriage should be legal. The answer to these questions has everything to do with how one views the moral and legal equality of same-sex relationships, particularly in relation to opposite-sex relationships. Those who believe that same-sex coupling is immoral and incomparable to opposite-sex coupling, also

believe that same-sex marriages should not be legal and that DOMA is not discriminatory. Conversely, those who believe that same-sex relationships are morally acceptable and equal to opposite-sex relationships, also believe that same-sex marriage should be legal and that DOMA acts in a discriminatory manner. Thus, understanding how people come to view the morality of same-sex relationships is essential if one is to attempt to resolve the root of the conflict, and to move the conversation forward constructively.

One of the most serious problems with moral discourse regarding same-sex marriage is not merely the reliance on unsubstantiated belief and claims that are unfalsifiable, but also the assertion that a claim is righteous precisely because it is what God, as the highest moral authority, thinks and wants. It is an illusion to think that one speaks for God, and that one can understand “correctly” by having direct access to fundamental truths through “divine revelation,” without ever reflecting on the process of understanding. In this sense, theological interpretations and religious “beliefs” do not escape the general hermeneutical rules and requirements of all interpretive discourse and meaning-making processes. Moreover, when one claims superiority or righteousness by virtue of divine revelation one has the beginnings of an ideology, and worse—an ideology that requires unquestioned belief in unsubstantiated claims that are nevertheless asserted as divine law. Those who ascribe to such a religiously ideological attitude often defend unconditionally their own reading, interpretation, or understanding by refusing any change or alternative point of view.

With respect to same-sex marriage, this is most evident in theological arguments that claim that the Bible is clear on the matter, and that the correct interpretation is not

open for debate. Such assertions are reflective of fundamentalist rhetoric, which often includes claims of being the sole possessor of salvific knowledge, or of having exclusive access to the original and undistorted truth—which includes the true definition of marriage and the correct interpretation of the Bible. Unfortunately, because of the rigidity and lack of openness to revision, those who ascribe to beliefs based on divine revelation often respond divisively and apocalyptically when confronted with competing understandings that do not conform to doctrinal assertions.

Interestingly, some fundamentalist denominations are beginning to espouse a more tolerant image toward the LGBT community, claiming that being homosexual itself is not a sin, but that acting upon it is. In an effort to appear more tolerant, the tendency has been to change the focus from curing and eradicating causes of homosexuality, to caring for sick and pathologically afflicted individuals. This reveals the fact that the conservative religious treatment of “homosexuals” is evolving, with some groups now accepting gay identified individuals, so long as they do not practice “unrighteous” behavior. While discrimination is still present, the shifts suggest that, rather than being fixed and dogmatic, doctrines regarding same-sex relationships are open to interpretation and subject to change, even among the most conservative religious opposition.

Although attitudes are undoubtedly changing, many people still firmly believe that the defining hallmark of marriage rests on procreative differences in gender. However, such understandings belie theological doctrines about the nature of the body and what it means to be created *imago dei*—in other words, to be able to create life in the image of God. Such theological discriminations in public debate are often asserted as a constitutional freedom. While seemingly harmless, such claims often require a leap of

faith to be accepted as “truth,” not only that marriage is defined on the basis of such understandings, but also that gender differences constitute a valid reason for denying same-sex couples access to the institution—along with its rights, protections and privileges. Moreover, to assert procreative differences without reference to religious language often belies a disingenuous attempt to repackage the “Adam and Eve, not Adam and Steve” argument, in order to assert theological doctrines and religious presuppositions through the back door. This raises the question whether or not the conflict regarding DOMA, and by extension same-sex marriage, should ultimately be treated as a religious issue.

In response, it is often argued that it is a constitutional right to politick for laws and policies on the basis of religious beliefs and moral convictions, because in a democracy both religion and moral conscience must be free. Moreover, to deny this is a violation of religious liberty and an attempt to remove faith from the public sphere. However, claiming a constitutional right to politick on religious grounds is problematic. Freedom is not absolute. There is a difference between the freedom to say and believe something, and the freedom to oppress others and to deny rights on the basis of those convictions. While people should be free to pursue politics in light of faith values, they also need to be responsible and able to defend those values beyond the argument that such convictions are valid or appropriate simply because one is free to believe in them. The conscience must be free, but also educated and informed, and above all it must be accountable for proving itself beyond claims of moral relativity that are based on unobserved or unobservable assumptions—especially when they are politicized in a way that is clearly meant to deny rights and to perpetuate unequal treatment. While the

constitution prohibits any law that would infringe on the free exercise of religion, it does not mean that the discriminatory behavior toward another group on the basis of moral “belief” is permissible as a constitutional right. Asserting the absolute freedom of religion to justify infringing upon the life, liberty and happiness of others, belies a disingenuous attempt to override the moral responsibility of having to justify and substantiate claims.

Thus, discriminating against same-sex couples on the basis of religious conviction does not readily constitute a legitimate religious freedom—especially when it is demonstrated that such actions are meant to intentionally deny existing civil rights that are routinely granted to others. Establishments of religion must be free to speak and believe what they want, but there must be a limit when those beliefs are founded on doctrinal assumptions about “homosexuals” that are not substantiated or justifiable. In a court of law, moral reason, not moral rationalizations, must rule the day. This requires specific ways of weighing observable claims and evidence, to ensure that one does not, in effect, bear false witness against another.

6.4 Final Remarks and Avenues for Future Research

As a consequence of contemporary dialectic, it is posited that political conflict regarding same-sex marriage is reflective of the postmodern attempt to clarify the ethical role of empirical-scientific approaches in the evaluation of moral claims—particularly in the production of claims and outcomes that coincide with observable reality as far as possible, as compared to “unfalsifiable” or unlikely conceptions. In order to curtail ongoing debates and resolve foundational conflicts regarding same-sex marriage, without settling doctrinal disputes, it is argued that distinctions need to be made between claims based on empirical-scientific reason, and claims based on belief rationale. Rather than a

secular separation of reason and faith, or a removal of religion from the public sphere, the conflict regarding same-sex marriage underscores a robust and evolving relationship between religion and politics, and religion and science, which is represented by a creative postmodern movement away from exclusivist separatisms and unfalsifiable “belief” ideologies. Looking at the bigger picture, this is resulting in changing “church-state” relationships and the creation of novel “faith” paradigms that increasingly call for (1) openness to revision and (2) the substantiation of both moral and political claims using empirical-scientific reasoning.

The full extent of the conflict regarding same-sex marriage is only beginning to surface, as countries around the world debate the issue and problems with religious discrimination and religious liberty become increasingly harder to ignore. This demonstrates the need to deal with issues pertaining to the relationship between religion and government, as well as the empirical limits of religious liberty in democratic regimes, both with respect to the right to object on the basis of religious belief as well as the empirical effects of same-sex marriage in constraining religious expression. Further cross-case study of discourse that considers the international ramifications is therefore needed, in order to circumscribe the bigger picture, and to bring up to date the totality of data over the past dozen years or so since same-sex marriage has been legal. Such a comprehensive study is needed now more than ever, as countries set legal precedence that will undoubtedly have widespread ramifications for years and decades to come.

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