I. Introduction.

There has been much discussion about the constitutionality of laws that prohibit same-sex marriage. Most of the focus of this discussion has been on substantive due process (right to marry) and equal protection arguments. Another argument that seems to be attracting attention recently is that bans on same-sex marriage violate the Establishment Clause. According to this position, bans on same-sex marriage can only be explained by the “religious” view that marriage is inherently heterosexual and that it violates the Establishment Clause for these “religious” views to be embodied in legislation. I think this argument is deeply mistaken. The argument lacks support in the Establishment Clause doctrine and is inconsistent with the long history of permitting “religious” convictions to play a role in policymaking.

II. Establishment Clause

The idea that laws that prohibit same-sex marriage are constitutionally suspect because of these laws connection to “religion” is expressed in a variety of ways. There are two different, although closely related, Establishment Clause arguments against laws banning same-sex marriage. One argument is that these laws sometimes lack the secular purpose required by the Lemon Test. The second argument relates more to the content of laws banning same-sex marriage as distinguished from the allegedly “religious” purpose behind the laws or the “religious” motivations of the law’s supporters. This second argument states directly that laws banning same-sex marriage are unconstitutional because these laws can only be explained by a “religious” view and that it violates the Establishment Clause for “religious” views to be embodied in secular legislation.

The first argument—that laws banning same-sex marriage lack a secular purpose—has received a fair amount of attention in recent scholarship. The first prong of the Lemon test has been controversial, and
the Court has only relied on this argument in a handful of cases. I think a close examination of those cases indicates that this argument is a bit of a distraction from the core issue involved in this debate.

The Court has relied on the purpose prong of Lemon in six cases—Epperson v. Arkansas, Stone v. Graham, Wallace v. Jaffree, Edwards v. Aguillard, Santa Fe Independent School District v. Doe, and McCreary County v. ACLU of Kentucky. In these cases, the Court did focus carefully on the religious purpose behind the governmental actions being challenged and on the religious motivations of those supporting the governmental actions in question.

That exercise—of closely examining the motives of the law's supporters-- is fraught with peril. One need only recall the litigation in Harris v. McRae when Henry Hyde was followed into Mass in order to seek evidence that his pro-life legislative efforts were influenced by the teachings of the Catholic Church.

But, as I have explained elsewhere, it is important not to read too much into the Court’s decisions that have relied on the religious purpose behind the laws under scrutiny. All of the cases can be explained by the Court’s concern about the character of the action being challenged and not the religious purpose involved. Epperson and Edwards involved evolution, which the Court viewed as a religious doctrine. In Stone, a key focus was that “the Ten Commandments are undeniably a sacred text.” McCreary County also emphasized the same point. Wallace and Santa Fe both involved the government promoting “prayer,” a quintessential religious activity.

These cases do not firmly support the idea that an otherwise unobjectionable (i.e., secular) law is unconstitutional because of the taint of a religious purpose. The holdings in these cases depend on the religious nature or character of the practice being challenged. With regard to the same-sex marriage issue, then, the focus must necessarily be on whether the laws prohibiting same-sex marriage are an expression of religious doctrine. The motives of the supporters are not really the determinative issue.
The second Establishment Clause argument against laws banning same-sex marriage is based on the idea that states are not permitted to rely on religious reasons for action. Since the opposition to same-sex marriage is thought to reflect an expression of a “religious” view, laws banning same-sex marriage are unconstitutional. The same basic argument has arisen in the substantive due process context. In that context, the argument works on this fashion. Under whatever level of scrutiny that applies, the state must come forward with an interest (legitimate, important, or compelling) to justify the law being challenged. Some contend that religiously informed moral judgments cannot be taken into account in support of the constitutionality of legislation because such judgments do not constitute “secular” interests that the government may advance. Another version of this position relies directly on the Establishment Clause. Under this view, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it violates the Establishment Clause for “religious” views to be embodied in secular legislation.

This second argument has also been much discussed in the literature. There is, though, not much judicial precedent for the argument. In the context of substantive due process, the argument has been made in certain opinions in cases such as Thornburgh v. American College of Obstetricians and Gynecologists, Bowers v. Hardwick, and Cruzan v. Director, Missouri Department of Health. For example, in Thornburgh, Justice Stevens, in rejecting the view that the state had a compelling interest in protecting the unborn child throughout pregnancy, stated “I recognize that a powerful theological argument can be made for that position, but I believe that our jurisdiction is limited to the value of secular state interests.” In Bowers, Justice Blackmun’s dissent claimed that “the assertion that ‘traditional Judeo-Christian values proscribe’ the conduct involved…cannot provide an adequate justification for [the statute]….The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.” In Cruzan, Justice Stevens (in dissent) rejected the view that the State of Missouri had an interest in protecting the life of Nancy
Cruzan. Justice Stevens stated that the state’s definition of life to include Nancy Cruzan (who was in a persistant vegetative state) could only be based on “some theological abstraction.” And, according to Justice Stevens, “to posit such a basis for the State’s action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.”

The “religious” aspect of this is not the most important element. This seems, rather, to reflect a broader debate about the legitimacy of “morals” legislation. That debate is important but, at least as matter of doctrine, seems more properly considered under substantive due process. In that context, the Court has been quite receptive to the argument that morality is not a sufficient justification for legislation. The Court’s opinions in Planned Parenthood v. Casey and Lawrence v. Texas are the principal examples. Although the cases are not entirely clear on this point, the view that morality is not a sufficient justification to support the constitutionality of the laws being challenged largely depends on the prior conclusion that there is a fundamental right involved. That judgment—is there a fundamental right at stake—seems separate from the “religious” aspect of the controversy.

In this context, the “religious” label seems to principally serve to delegitimize the positions under attack. For example, Geoff Stone (who I think it is fair to say is one of the most prominent constitutional scholars in the country) made the same sort of argument in his critique of the Supreme Court’s decision to uphold the federal ban on partial birth abortion in Gonzales v. Carhart. Stone complained that the five Catholic Justices in the majority “failed to respect the fundamental difference between religious belief and morality” and threatened the separation of church and state. One comment on Stone hit the nail on the head—“playing the religion card is worse than silly because it shows how intellectually lazy the ...defense of Roe has become....Rather than developed reasoned responses...[,] critics resort to the mystical for easy answers. They suggest that irrational religious faith or pure Catholic doctrine handed
down from the Vatican drives the Justices. It is much easier to dismiss your opponents as driven by mysterious forces than to do the hard work of developing arguments based on human reason. This religious critique recalls the nativist fear of Catholicism that too often appears in U.S. history."

The Establishment Clause version of this argument has received even less treatment in the cases. The principal example is Justice Stevens’s dissent in Webster. In Webster, Justice Stevens took the position that the preamble to Missouri’s abortion statute violated the Establishment Clause. The preamble stated that “the life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being.” The preamble required that all Missouri statutes be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Constitution and Supreme Court precedent. According to Justice Stevens, “the absence of any secular purpose for the legislative declaration that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause.” That conclusion was based on Justice Stevens’s conviction “that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose.” Moreover, Justice Stevens noted that his view that the state of Missouri had provoked political division along religious lines by endorsing the view of a particular religious tradition supported his Establishment Clause analysis.

But Justice Stevens’s Establishment Clause argument was expressed in dissent. The Court’s holdings don’t seem sympathetic to this argument. The Court has continually rejected the idea that a law violates the Establishment Clause because it “happens to coincide or harmonize with the tenets of some or all religions.”

The Court’s holdings are well supported and reflect a much more sensible interpretation of the Establishment Clause. There is something to the idea that the government should not be declaring
religious truth. And so we don’t want the government to be taking sides on questions such as the nature
of the Trinity or the doctrine of transubstantiation. But, in this context, the Establishment Clause
argument only works if it is proper to label a particular position (a law banning abortion or assisted
suicide or same-sex marriage) as “religious.” It is quite telling that these arguments are typically
underdeveloped. For example, Justice Stevens repeatedly expressed the view that his view of the nature
and value of human life was “rational” and “secular” but he never really explained why the contrary
position was “religious” or “theological.” In my opinion, Justice White’s response to Justice Stevens was
devastating. In Thornburgh, Justice White noted: “It is self-evident that neither the legislative decision to
assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as
compelling constitutes an impermissible ‘religious’ decision merely because it coincides with the belief
of one or more religions. Certainly the fact that the prohibitions of murder coincides with one of the Ten
Commandments does not render a State’s interest in its murder statutes less than compelling, nor are
legislative and judicial decisions concerning the issue of the death penalty tainted by their
 correspondence to varying religious views on that subject. The simple matter is that in determining
whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to
some religious beliefs and contradict others. The same is true to some extent with respect to the choice
this Court faces to characterize an asserted state interest in fetal life, for denying that such an interest is
a ‘compelling’ one necessarily entails a negative resolution of the ‘religious’ issue of the humanity of the
fetus, whereas accepting the State’s interest as compelling reflects at least tolerance for a state decision
that is congruent with the equally ‘religious’ position that human life begins at conception.”

As Justice White notes, the contending positions on these hotly debated moral issues are either both
“religious” or both “secular.” Since the state cannot avoid taking a position (neutrality is not really
possible), neither position ought to be beyond the power of the state. It just won’t do to say that one
position is religious, and therefore illegitimate, and the other is entirely permissible. The Iowa Supreme
Court opinion on same-sex marriage was quite revealing and entirely unconvincing in this regard. After a lengthy treatment of other issues, the Court explained that the case was really about religion. And, the Court continued, it was clear that the religious views of those who favored the traditional understanding of marriage that was reflected in the legislation being challenged could not be accepted. At the same time, the Court endorsed what it clearly stated were the “religious” views on the other side.

The more sensible position is to acknowledge that a broad spectrum of moral views may legitimately be considered in the public debate on contentious social issues. That view, which is supported by the Court’s cases, is consistent with our history of accepting the active involvement of religious individuals and their moral views (which may be formed by their religious perspectives) in public debates. It is well worth recalling our debates over slavery, civil rights, poverty, health care, and the death penalty.

Some contend that “The Establishment Clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith. As an embodiment of these Enlightenment values, the Establishment Clause requires that the political influence of religion be substantially diminished.” But this rigid separation between religion (in all its dimensions, including moral views that are religiously influenced in some way) and government has very little support as an interpretation of the Establishment Clause or as a reading of the role of religion (broadly understood) in American history.

As Michael Perry noted, scholars who take the position that religion ought to be privatized “are trying to conscript the nonestablishment norm to serve their own conception of the proper relation between morality and religion—a contestable and widely contested conception that should not be accorded constitutional status in a country most of whose citizens believe that their most fundamental moral judgments cannot stand independently of their religious faith.”
In my view, it would be better for those who support the view that religion can only be legitimately thought of as a hobby, in the words of Stephen Carter, and that the only legitimate religion is a privatized faith to defend this position on its merits, rather than conscript the nonestablishment norm in an attempt to delegitimize the views of those who hold a contrary position.

As noted briefly above, the real debate on this topic is often whether, as one scholar has phrased the issue, moral relativism is a constitutional command. There are some who take that position, and some of the Court’s cases—such as Casey and Lawrence—can be read to support that position. But I think that argument ought to be defended on its merits. Playing the religion card doesn’t really advance the argument.

In sum, I don’t believe that the Establishment Clause ought to play any role in resolving the question we are considering. There is an ongoing debate about marriage but the contending moral positions ought to be evaluated through the normal process of democratic deliberation. That is true, I’d contend, even if the moral positions are (on both sides) influenced for many by their religion. That is the position that is most consistent with a proper construction of the Establishment Clause and with the important and accepted role that religion (broadly understood) has played in American history in the debate on contentious issues.