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## SEX AND RELIGION: UNHOLY BEDFELLOWS

Mary-Rose Papandrea\*

SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY. By *Geoffrey R. Stone*. New York and London: Liveright Publishing Corporation. 2017. Pp. xxxii, 529. \$35.

### INTRODUCTION

In a lecture delivered in 2008, University of Chicago professor Geoffrey Stone<sup>1</sup> confessed to the audience that he had been working on a book tentatively titled “Sexing the Constitution,” a project of “reckless ambition.”<sup>2</sup> Almost ten years later, the book has hit the stands, renamed *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century*, at a time when debates about sex and religion are more heated than ever. Beginning with a survey of law and sexuality in Greek and Roman times, the book ends with an analysis of the Supreme Court's same-sex marriage decisions and their aftermath. The breadth of the work is staggering.

Stone covers so much territory in this book, including (but definitely not limited to) Saint Augustine's role in the evolution of Christianity's views on sexuality and sin; Anthony Comstock's role in the widespread passage of repressive laws banning pornography, birth control, and abortion; the limited role *Roe v. Wade*<sup>3</sup> actually played in fermenting the rise of the pro-life movement; the history of the gay rights movement in the United States; the dramatic increase in public toleration for same-sex relationships and marriages; changes in communications technology that have undermined efforts to control explicit sexual images; methods of constitutional interpretation—the list goes on and on. Any of these topics could be—and have been—the subject of their own books. In the final analysis, though, Stone's primary thesis becomes clear: religious groups and individuals have, at various times throughout Western history, used the secular law to foist their beliefs upon nonbelievers.

Stone suggests that he disapproves of this religious influence in the law, but he wisely recognizes the limits of any argument that this influence is

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1. Edward H. Levi Distinguished Service Professor of Law, University of Chicago Law School.

2. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 *UCLA L. REV.* 1, 2 (2008).

3. 410 U.S. 113 (1973).

unconstitutional. The Supreme Court has never struck down a law because religious groups and individuals have advocated for the law on religious grounds, and Stone contends that to do so would violate both the Free Exercise and the Freedom of Speech Clauses of the First Amendment. He argues that courts should—and do—consider whether there is any justification for a law aside from religious reasons, and some laws will fail under this inquiry. But he recognizes that the universe of such cases is very small. His most ambitious argument is that laws that are based on “morality” alone are unconstitutional “[b]ecause of the clear religious overtones implicit in such ‘moral’ justifications” (p. 331). But this leaves open the possibility that laws will survive constitutional scrutiny as long as the government can come up with some other justification.

A second, much less developed theme that emerges from the history Stone shares with us is that many of the laws discussed in the book reflect anxiety and apprehension about the appropriate gender roles of men and women. Many organized religions, especially those that are most active and influential in our political debates, reflect rigid views of sexuality and gender. This suggests that rather than attack sex-related laws as attempts by religious groups to foist their beliefs on secular society—an endeavor Stone himself recognizes is largely doomed to failure—it may be more productive to attack these rigid conceptions of gender roles directly through equal protection challenges. Although this approach will not necessarily lead to the results that progressives desire in every case, it is more promising as a practical matter.

Part I of this Review focuses on Stone’s attempt to correct some common misunderstandings regarding the history of laws relating to sex. Stone’s focus on history naturally raises the larger issue of what role history should play in interpreting the Constitution. This Part focuses specifically on some unresolved questions regarding the proper role of history in the Court’s freedom-of-expression jurisprudence. Part II turns to Stone’s examination of the role that religion and religious organizations have played in the political process and sometimes the judicial process. Part III argues that Stone’s history of laws relating to sex reflects anxiety about the proper roles of men and women in society and supports a more robust role for the Equal Protection Clause as a means of attacking laws relating to sex.

## I. THE ROLE OF HISTORY

The first half of Stone’s book focuses on the history of laws relating to sex centuries before the Supreme Court issued a single decision in this area. Very readable and endlessly fascinating, Stone’s historical work is a treasure trove of information for any scholar, law student, or interested citizen wondering how we got where we are today.

In addition to the pure educational value of this history, the most obvious reason a constitutional law scholar would dive into the history of sex-related laws is that this history is arguably relevant for interpreting the Constitution. And as Stone has said elsewhere, if that history is going to matter,

we should get that history correct.<sup>4</sup> Stone's book points out various historical errors the Court has made, while also making the case for a more expansive view of fundamental liberties that does not rest on the identification of narrowly defined traditions for support.

Because Stone's book sweeps broadly to include a discussion about laws restricting the freedom of expression, his history covers laws restricting obscenity, child pornography, profanity, and nudity. While Stone does argue that there is no relevant historical tradition prohibiting sexually explicit speech, Stone does not specifically address what role history should play, if any, in interpreting the First Amendment. To date, the Court has not been clear what role history should play in determining the scope of the First Amendment. Frequently, the Court has ignored or discounted history and has instead relied more heavily on various theories that justify protections for speech and expressive activities. In recent decisions, however, history has played a greater role. If this trend continues, the Court's First Amendment jurisprudence could change dramatically.

#### A. Correcting History

Debates about the role of history with respect to substantive due process and, to a lesser extent, equal protection, have played a significant role in the Court's decisions and in the scholarly literature. Even the Court's progressives have frequently said that history is a starting point for constitutional interpretation, even if it is not determinative.<sup>5</sup> One of the goals of Stone's book is to set us all straight on the history of laws relating to sex.

In the case of sex-related laws, the relevant history helps progressives in some instances but not others. In many instances, the usefulness depends on whether the relevant history is the time of the nation's founding or when the Fourteenth Amendment was ratified. For example, as Justice Blackmun recognized in his summary of the history of abortion laws in *Roe v. Wade*, restrictions on abortion, at least before "quickening," did not exist at the founding;<sup>6</sup> in dissent, Justice Rehnquist pointed out that the majority of states did have laws against abortion when the Fourteenth Amendment was ratified.<sup>7</sup> Although the Court did not discuss the history of laws banning contraception in *Griswold v. Connecticut*,<sup>8</sup> Stone points out that, at the time

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4. "Whether you fancy yourself an originalist or an interpretivist, a champion of a living Constitution or a dead hand," and whatever constitutional provision or issue you are analyzing, "it helps to know the truth about the Framers, about what they believed, and about what they aspired to when they created this nation." Stone, *supra* note 2, at 25–26.

5. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").

6. *Roe*, 410 U.S. at 129–41 (summarizing the history of abortion laws in England and the United States).

7. See *id.* at 177 (Rehnquist, J., dissenting) ("There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted.").

8. 381 U.S. 479 (1965).

of the nation's founding, there were no laws banning the use of contraceptives; like laws banning abortion, however, such laws became common during the Second Great Awakening.<sup>9</sup>

In other cases, members of the Court have disagreed about what the relevant history is or how to characterize it. In *Bowers v. Hardwick*, the majority, rejecting a constitutional challenge to Georgia's antisodomy law, explained that laws against sodomy had "ancient roots" and existed in all or most states both at the time of our founding and when the Fourteenth Amendment was ratified in 1868.<sup>10</sup> In *Lawrence v. Texas*, however, Justice Kennedy explained in his opinion for the majority that "there is no long-standing history in this country of laws directed at homosexual conduct as a distinct matter."<sup>11</sup> In some instances, the history is not at all helpful for progressives—for example, there is an almost total lack of history of same-sex marriages until relatively recently. In such instances, the more progressive justices have embraced a broader view of fundamental rights rather than the specific laws or traditions that existed at our founding.<sup>12</sup>

As these foregoing examples illustrate, even if history matters, determining what the relevant history is can be debatable. Historical inquiries are often inherently difficult, and as an institution, the Court is not particularly competent at undertaking these inquiries. But one possible takeaway from Stone's book is that liberals should not be too quick to concede that history and tradition are against them, because in many instances, history and tradition are on their side. This is particularly true if the relevant history is what was going on when our nation was founded (and not what was going on in 1868, following the religious fervor of the Second Great Awakening).

Stone argues that in the sexual-expression cases where the Court has looked to history for guidance, it has often gotten that history wrong or at a minimum misinterpreted it. For example, the Court has declared that history and tradition support its recognition of obscenity as a category of unprotected speech.<sup>13</sup> In *Roth v. United States*, Justice Brennan, writing for the Court, explained that at the time of the adoption of the First Amendment, thirteen of fourteen states allowed for the prosecution of libel and all states criminalized blasphemy and profanity.<sup>14</sup> Brennan conceded that at the time the First Amendment was adopted, "obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to

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9. See pp. 127–28, 147.

10. 478 U.S. 186, 192–93 (1986).

11. 539 U.S. 558, 568 (2003). Justice Scalia countered that what is relevant is that sodomy has always been criminalized. *Id.* at 596 (Scalia, J., dissenting) ("Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it was criminalized . . .").

12. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

13. *Roth v. United States*, 354 U.S. 476, 481–85 (1957).

14. *Id.* at 482.

show that obscenity, too, was outside the protection intended for speech and press.”<sup>15</sup>

Stone casts significant doubt on the historical basis for obscenity as a category of unprotected speech. Until the 1700s, he tells us, the only time people ever got in trouble for their sexually explicit speech was when it also was “blasphemous, seditious, [or] heretical” (pp. 55–59). In the eighteenth century, obscenity prosecutions in England were “sporadic,” even though London “was awash” with “sexually-explicit” literature, prints, and sex manuals (pp. 63–64, 67). In the colonies, the situation was similar. Despite the widespread availability of sexually explicit books and erotic fiction, “[t]here were no prosecutions for obscenity during the entire colonial era,” (p. 83), and at the time the Constitution was adopted, “there were no laws in the United States against obscenity” (p. 127). The first American obscenity prosecution did not occur until 1815 (p. 146). Stone later concludes that Justice Brennan “was simply wrong” when he determined in his majority opinion in *Roth* that the original understanding of the First Amendment excluded obscenity (p. 273).

Similarly, Stone suggests that the Court arguably misinterpreted history in its nude-dancing cases. In *Barnes v. Glen Theatre, Inc.*, the Court relied on the long-standing history of laws banning public nudity to uphold the application of a state antinudity law to nude dancers at the Kitty Kat Lounge.<sup>16</sup> Writing for the Court, Chief Justice Rehnquist argued that “[p]ublic indecency statutes of this sort are of ancient origin” and “[p]ublic indecency was a criminal offense at common law.”<sup>17</sup> As Stone explains, however, the history of laws banning nude erotic dances is hardly clear. In ancient times, nude dancing was common, and even though the Christian church cracked down on nude dancing in the seventh century, by the seventeenth and eighteenth centuries, stripteases had become very common throughout Europe (p. 327). Stone does not make clear whether nude dancing was forbidden at our nation’s founding, but he does explain how erotic dancing and burlesque performances were very common in the late nineteenth and early twentieth centuries, casting doubt on the claim that nude dancing has always been criminalized (pp. 327–28).

#### B. *History and the Freedom of Speech*

Although debates about history have played a big role in the Court’s decisions relating to abortion, sodomy, and same-sex marriage, the Court has more inconsistently paid attention to history in its First Amendment decisions. More often, the Court has relied on various theories of the First Amendment—such as self-government and the marketplace of ideas—to

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15. *Id.* at 483.

16. 501 U.S. 560 (1991).

17. *Barnes*, 501 U.S. at 568.

justify its decisions.<sup>18</sup> In addition, when the Court or its various members have invoked history (or relied on some form of originalism), it is often to support a robust reading of the First Amendment.

The earliest First Amendment decisions from the Court, which largely dealt with speech that advocated unlawful conduct, quickly abandoned history as a tool for determining the scope of protection for expressive rights. In *Schenck v. United States*, the first decision in which the Court considered the meaning of the First Amendment, the Court noted that “it may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose.”<sup>19</sup> The Court did not, however, let this original understanding be determinative.<sup>20</sup> Although the Court concluded that the speech at issue was not protected, the Court indicated that the speech “would have been within [the defendants’] constitutional rights” if it had not been uttered in wartime.<sup>21</sup>

The Court has also downplayed the importance of the Sedition Act of 1798. In his famous dissent in *Abrams v. United States*, Justice Holmes rejected the government’s argument that the First Amendment does not protect criticism of the government, despite the common law of seditious libel and the passage of the Sedition Act in 1798, because in his view, “the United States through many years had shown its repentance” for this law by repaying fines that were imposed under it.<sup>22</sup> In *New York Times Co. v. Sullivan*, the Court did not let the widespread common law acceptance of libel law deter it from holding that defamatory statements about public officials are constitutionally protected unless they are made with actual malice.<sup>23</sup> In addition, the Court actually used the Sedition Act of 1798 to support its holding, stating that although the Court had never ruled on its constitutionality, “the lesson to be drawn from the great controversy” over that Act demonstrates a consensus that the First Amendment protects criticism of the government.<sup>24</sup> The *Sullivan* Court ultimately rested its conclusion on theories of self-governance and the marketplace of ideas.<sup>25</sup> The Court has also not let history

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18. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”); *id.* at 353 (noting that a campaign-finance restriction “interferes with the ‘open marketplace’ of ideas protected by the First Amendment” (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008))); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”).

19. *Schenck v. United States*, 249 U.S. 47, 51–52 (1919).

20. *Id.*

21. *Id.*

22. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

23. *Sullivan*, 376 U.S. 254.

24. *Id.* at 273–74.

25. *Id.* at 269.

constrain it in a number of other decisions, including decisions relating to commercial speech<sup>26</sup> and child pornography.<sup>27</sup>

History appears to play a greater role in the Court's recent First Amendment opinions. In *United States v. Stevens*, for example, the Court rejected the government's argument that the Court could recognize new categories of unprotected speech by balancing the value of speech against its costs.<sup>28</sup> Calling this proposed test "startling and dangerous,"<sup>29</sup> the almost-unanimous Court declared that unprotected categories of speech must be based on history and tradition.<sup>30</sup> The Court relied on *Stevens* in *Brown v. Entertainment Merchants Ass'n*, where it struck down imposing restrictions on the sale of violent video games to children.<sup>31</sup> Writing for the Court, Justice Scalia held that there is no "longstanding tradition" restricting children's access to violence.<sup>32</sup> Scalia did not give evidence about minors' consumption of violent materials at the nation's founding but instead gave a laundry list of books children traditionally read in this country, from *Grimm's Fairy Tales* to Homer's *The Odyssey*.<sup>33</sup> He brushed aside efforts from the 1800s to the 1950s to restrict minors' access to dime-store novels, movies, comic books, television, and music lyrics.<sup>34</sup> Scalia did not explain why these various efforts to protect children are irrelevant,<sup>35</sup> but he did note that most of them failed. Although it is tempting to dismiss this reliance on history as simply consistent with Justice Scalia's usual penchant for tradition, it is important to note that almost all the justices joined Scalia's opinion. Although it is hard to know for certain the Court dynamics behind these decisions, it seems at least plausible that a majority of justices could have written separate opinions that did not rely so heavily on history.

Justice Thomas is particularly fond of historical arguments. In his *Brown* dissent, Justice Thomas argued for a different historical approach and a categorical exclusion of "speech to minor children bypassing their parents."<sup>36</sup> This dissent mirrored his concurrence in *Morse v. Frederick*, in which he advocated for overturning *Tinker*.<sup>37</sup> At least one scholar has criticized

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26. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that commercial speech is entitled to some First Amendment protection, even though commercial speech was historically not protected).

27. *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (recognizing child pornography as a category of unprotected speech, despite lack of historical tradition).

28. 559 U.S. 460, 470 (2010).

29. *Stevens*, 559 U.S. at 470.

30. *Id.* at 468. Only Justice Alito dissented. *Id.* at 463.

31. 564 U.S. 786, 792 (2011).

32. *Brown*, 564 U.S. at 795.

33. *Id.* at 795–96.

34. *Id.* at 797–98.

35. *See id.* at 798.

36. *Id.* at 822 (Thomas, J., dissenting).

37. 551 U.S. 393, 410–12 (2007) (Thomas, J., concurring) (discussing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).



Thomas's historical analysis, pointing out that "[t]here is no mention of ratification debates, framer understandings of the text of the First Amendment, or any historical source even remotely connected to the framing and ratification of the Bill of Rights or the Fourteenth Amendment."<sup>38</sup> Thomas has also made lengthy historical arguments in other cases such as *Virginia v. Black*, where he discussed the connection between cross burning and intimidation.<sup>39</sup>

It is unclear how important history will be for the Court as it continues to confront knotty First Amendment issues. The way history is used will make a big difference in the future of the Court's First Amendment jurisprudence. If the Court continues to invoke history on an ad hoc basis, the direction of the Court is obviously unpredictable. If history is used in a narrow, restrictive way to demonstrate what speech was—or wasn't—protected at our founding, then there may be a dramatic change in the First Amendment landscape down the road. On one end of the extreme, if the Blackstonian view of the First Amendment explains the true original meaning of the First Amendment, "then arguably 90 percent of modern free speech jurisprudence—which goes well beyond Blackstone's prohibition against prior restraints—is intellectually dishonest and historically illegitimate."<sup>40</sup> Even if the Blackstonian view is rejected (either because it does not accurately represent the views of our founders or because embracing it would be inconsistent with *stare decisis*), incorporating history into a First Amendment analysis would change the way the Court makes decisions in this area. At the very least, the Court's decisions pertaining to obscenity and libel are subject to revision, and new laws, like laws against blasphemy and profanity, might be constitutional.

If history matters, the Court is likely to find itself struggling to find analogies between historical practices and modern-day questions that were unthinkable to our framers. This is the approach Scalia took in *Brown*, where he discussed *The Odyssey* when analyzing protections for violent video games.<sup>41</sup> In other instances, the Court might twist the historical narrative in a way to suit a desired outcome. Justice Thomas took this approach in his *Morse* dissent, where he argued that educators have historically exercised great control over their students' speech, even though very few public schools existed at the founding, and when the Fourteenth Amendment was ratified, public schools were only just opening.<sup>42</sup>

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38. Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 *COMM. L. & POL'Y* 329, 344 (2012).

39. 538 U.S. 343, 389–91 (2003) (Thomas, J., dissenting).

40. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 32 (1992).

41. *Brown*, 564 U.S. at 795–99.

42. *Morse*, 551 U.S. at 410–12 (Thomas, J., concurring).

As the Court grapples with new challenges to its current freedom of expression jurisprudence, which includes less protection for certain categories of speech and strict scrutiny for content-based speech restrictions,<sup>43</sup> it might be appealing to cling to history as an alternative and seemingly certain mode of interpretation. Stone teaches us, however, that various members of the Court might not like the history they discover. In addition, a historical analysis fails to take into account the broader purposes of the First Amendment or the value (or harm) certain types of speech can cause. All the usual criticisms of looking to historical tradition in substantive due process cases apply with equal if not greater force when determining the scope of protections for speech under the First Amendment.

## II. RELIGION, SEX, AND POLITICS

In addition to correcting the historical record on specific sex-related laws, Stone has a much bigger historical theme: demonstrating how, throughout Western history, religion (especially Christianity) has been the driving force behind laws banning or restricting sexual practices or speech relating to sex or sexuality. Stone clearly regards this religious influence to be inappropriate at best and unconstitutional at worst. At the same time, Stone is aware that there is no easy solution to this problem.

### A. *The History of Sex-Related Laws from Ancient Greece to Obergefell*

One reason for examining ancient Greece and Rome in a book about the U.S. Constitution is that this history suggests to us prudish Americans that there is nothing “natural and inevitable” about our nation’s attitude toward sex; instead, Christianity is to blame. In the very first chapter, which examines laws governing sex in ancient Greece and Rome, Stone argues that the Western world did not always regard sex as “bound up with questions of sin, shame, or religion” but rather regarded sex as “a natural and positive part of human experience” (p. 4). As Stone says of the ancient Greeks, “*eros* was a primal force which permeated all facets of life” (pp. 5, 7). Prostitution, pornography, masturbation, sex toys, and premarital and extramarital affairs were prevalent. Abortion and contraceptive use in ancient Greece and Rome was common (pp. 7, 11). Married and unmarried men alike had sexual relationships with adolescent boys (p. 7). Although not as public as male same-sex behavior, women also had same-sex relationships in the ancient world (pp. 8, 11). Stone almost gleefully tells us about the bawdy, graphic art and literature of ancient Greek and Roman times and even includes some photographs of the artwork in case we doubted him.<sup>44</sup> In an interview about this

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43. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

44. See, e.g., pp. 5–9.

book, he said that the ancient times look “a lot more like our world today” than we might have imagined; the 1950s are not the historical norm.<sup>45</sup>

One complication in the historical argument that the ancient Greek and Romans embraced sexual freedom is that there were some limits. For example, same-sex relationships between men were celebrated, but only when one of the partners was an adolescent boy (p. 8). Stone states that there is some evidence of same-sex marriages in Rome but admits that such evidence is “inconclusive” (p. 9). Stone’s analysis of ancient Hebraic law reveals similar limitations. Although that law said nothing about masturbation, oral or anal sex, contraception, pornography, or abortion, this tradition, like the Greek and Roman traditions, forbade adultery by married women in order to protect “the husband’s property rights and the need to protect a family’s inheritance from illegitimate heirs” (p. 12). Indeed, such a transgression was not merely criminal; it was subject to the death penalty (p. 13). After the Jewish exile in the eighth century BCE, Jews adopted many more rules and rituals, including the condemnation of same-sex sex, although Stone reports there is little evidence this behavior was ever subjected to serious or systematic punishment (pp. 12–13).

Stone recognizes that early Western civilizations had some limits on sexual freedom, but these limits do not undermine his broader thesis that there was never anything inevitable about Western culture’s adoption of more restrictive views on sex and sexual expression. What appears to be to blame is the rise of Christianity: “As the Church expanded its power and influence, sex was transmogrified from a natural part of life into something shameful and filthy” (p. 40). Stone focuses particularly on Saint Augustine, who “crystallized the early Christian understanding of sex and who, in so doing, ultimately helped shape traditional American views of sexuality more than a millennium later” (p. 17). Augustine argued that it was essential for Christians to repudiate the sexual desire that led to the fall of man in the Garden of Eden. (pp. 18–19). Augustine’s “bleak vision of human nature” (p. 23), which “condemned all sexual desire and pleasure—for the married and unmarried alike,” took root in the western Christian tradition (pp. 20–21).

By the Middle Ages, “attitudes toward sex reflected an uneasy mix of severe repression and earthy lust” (p. 29). The church condemned all forms of “unnatural sex,” including incest, oral and anal sex, bestiality, and masturbation (pp. 29–30). The only sanctioned sex was between married people for reproductive purposes, and only when performed in the missionary position (p. 29). Because sex was permissible for reproductive purposes only, contraception was forbidden, and abortion was not allowed forty days after conception (when it was believed to have obtained a soul) (p. 34). Initially, Christianity condemned all forms of sodomy, regardless of the sex of the

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45. Interview by Michael Gerhardt with Geoffrey Stone in Philadelphia, Pa., at 6:55 (Mar. 31, 2014), <https://constitutioncenter.org/blog/live-video-12-p.m.-geoffrey-stone-sex-religion-and-the-constitution> [<https://perma.cc/F6CZ-RUPR>].

partners involved, but then came to regard male same-sex sodomy as particularly condemnable (pp. 34–39). In the Middle Ages, through the Renaissance, and especially during the Reformation, sodomy between men was often punished with death (p. 39). At the same time, laypeople continued to engage in sex outside marriage, and literature was full of descriptions of human sexuality of all stripes (p. 29).

During the Enlightenment, the pendulum swung back to a more permissive attitude to sexuality. Stone tells us that the English common law was concerned with only very limited types of sexual activity, such as sex acts involving children, animals, the use of force, or that occurred in public (p. 49). Prostitution, adultery, and pornography were prevalent as the British embraced the innate sexual nature of human beings (pp. 50–51). Abortion was permitted until “quicken[ing]” (p. 53). Although sodomy was outlawed, the crime was not limited to male same-sex relations, and in any event, the law was rarely enforced (p. 53). The first obscenity prosecution in 1708 ended with a dismissal of the indictment; the rest of the seventeenth century saw only a handful of prosecutions and minimal punishments. (pp. 59–61).

The Puritans believed the civil law should be much more restrictive, and they brought this view with them to the United States (pp. 49–50, 76–77). For the Puritans, religion played a crucially important role in the legal system. The law was used to “control[ ] social deviancy,” and the punishment for transgressions emphasized “retribution, humiliation, and shame” (p. 74). Any sex outside of marriage was condemned; capital punishment was imposed for adultery, sodomy, and bestiality (p. 77).

Over time, however, the Puritans’ efforts to impose rigid moral laws through the secular law began to fail. Newcomers to the colonies resisted attempts to rein in sexual sinning through secular laws (p. 79). Prostitution blossomed; adultery became much more common (pp. 79–80). In addition, pornographic publications flooded their shores, contributing to—or at the very least reflecting—the Puritans’ losing battle against sexual sins (p. 80). During the Great Awakening of the 1730s and 1740s, evangelical ministers attempted to renew the condemnation of sexual vices, but these efforts ultimately failed (p. 81). By the time of the nation’s founding, the secular law often still prohibited things like adultery and sodomy, but the crimes were never (or hardly ever) invoked in prosecutions.<sup>46</sup> Pornography was widely available and not subject to any legal limitations, even though the law prohibited blasphemy and heresy (p. 83).

A central argument of Stone’s work is that Puritans did not actually dominate our country at the time the framers were writing the Constitution. By the time of the founding, the Puritans had lost their battle to constrain sexuality through secular law. Many of the central framers were deists. Religion and churchgoing were important to them, but they did not adhere to rigid religious laws or seek to impose their religious values on others

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46. See, e.g., p. 85.

through the secular laws.<sup>47</sup> Instead, the tide had shifted yet again to a much more tolerant approach to sexuality, where, as in ancient Greece and Rome, sex was regarded “as a natural part of human life,” and the government “abandoned the use of the criminal law to enforce moral and religious sexual norms” (p. 87). Stone concludes that it is therefore inaccurate to argue that the United States is a “Christian nation.”

After the Civil War, however, the religious zeal of the Second Great Awakening gave rise to the evangelist Anthony Comstock, who successfully advocated for restrictive laws on abortion, sex toys, obscenity, contraception, and prostitution (pp. 158–59). One of the great contributions of Stone’s book is to connect the development of obscenity laws with the rise of other sexually restrictive laws and to connect both sets of laws with religion. Quoting with approval from Louis Henkin’s famous article on obscenity from 1963, Stone reports that the idea of the government banning obscene expression “was rooted in ‘aspirations to holiness’ and was directly related ‘to laws against sacrilege and blasphemy.’”<sup>48</sup> Laws against obscenity developed during the Second Great Awakening from roughly the 1790s to the 1840s, at the same time evangelical Christians developed the narrative that America is a “Christian nation” and successfully lobbied for the passage of laws that reflected their repressive religious doctrine on matters pertaining to sex (pp. 134, 145–48).

Stone makes fascinating connections throughout the book between the adoption of laws restricting sexuality with laws restricting the dissemination of speech relating to sexual matters, including but not limited to sexually explicit materials. For example, he reports that during the late 1800s, Boston had the strictest censorship laws in the nation owing to that area’s “distinctive Catholic identity” and the Catholic Church’s aggressive condemnation of sexual expression (p. 167). In the 1930s, Catholic organizations were behind the passage of the “Hays Code,” a voluntary code for movies that the MPAA adopted to provide a uniform national standard of “decency” restrictions (p. 173). And in 1934, a committee of Catholic bishops established the “Legion of Decency” that threatened national boycott of films that did not “conform to the accepted and traditional morality upon which the home and civilization are founded” (p. 173). In the 1920s, “an array of religious and culturally conservative organizations—including the Protestant Episcopal Diocese, the Catholic Club, the Boy Scouts, and the Knights of Columbus”—worked together for the passage of new laws in New York that would reverse judicial decisions that limited the definition of obscenity (p. 169). And in response to a Mae West play depicting the culture of New York’s gay underground, the state legislature amended its obscenity laws so that they applied to any work “depicting or dealing with the subject of sex degeneracy or sex perversion,” which was a direct attack on depictions of homosexuals (p. 171).

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47. See chapter 5.

48. Pp. 277–78 (quoting Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393–94 (1963)).

Stone offers countless examples of how organized religious groups, like the Catholic Church and Protestants, have had an overwhelming impact on the political process. For example, the Catholic Church was very effective in its efforts to stop states from repealing their laws restricting contraception (p. 205) and sodomy (p. 249). The Catholic Church joined forces with white evangelicals and African American Baptists to fight what they regarded as a threat to traditional and religious values (p. 259). These groups also have led the fight for laws restricting abortion, obscenity, and same-sex marriage.

Stone is highly critical of the role religion has played in the development of laws regulating sexuality and suggests that there was nothing inevitable about Christianity's approach to sexuality. For example, he examines the traditional interpretation of the Biblical stories of Onan and Sodom and concludes that the core meaning of these stories was not about condemning same-sex sex (p. 13). The story of Onan, whom God killed when he refused to ejaculate inside his brother's widowed wife, is not a condemnation of "coitus interruptus, contraception, and masturbation," as the Church later claimed, but rather "about obedience to the law, complying with God's command to be 'fruitful and multiply,' and honoring one's family" (pp. 13–14). Similarly, Stone asserts that early Christians likewise did not understand the story of Sodom to condemn same-sex sex but rather viewed it as "a moral about the duty of hospitality" to strangers (p. 14). Even Jesus himself did not embrace a repressive view of human sexuality; his criticisms of adultery, divorce, and lust are more properly regarded as concerns about "offenses against the marital relation" (p. 15). Christians also did not always condemn abortion and contraception in the kind of absolutist terms they do today. Until relatively recently, Catholics prohibited abortion only after "quickenings," when they believed "ensoulment" had occurred (p. 53).

The thesis of these examples is clear: the Bible and Christianity are not innately opposed to sex and sexual freedom. When we read later in the book about how Catholics and Protestants alike invoke the story of Sodom to justify their condemnation of sodomy (p. 43), Stone does not have to remind us that this Biblical story does not necessary mean what they say it means. Rather, influential Christians like Saint Augustine and Thomas Aquinas encouraged the development of Christianity's repressive views of sex and sexuality (p. 36).

### B. *The "Nettlesome Question"*

Stone convincingly demonstrates that religion has played an outsized role in shaping laws and beliefs regarding sex and sexuality throughout the history of the Western world, especially in the United States. It is therefore not surprising that a "nettlesome question" throughout the book is "how courts should cope with that history in a nation committed to the separation of church and state" (p. xxvii). Stone implies—and sometimes directly states—that there is something inappropriate and maybe even unconstitutional about religious people and organizations playing a significant role in

shaping our laws.<sup>49</sup> Stone recognizes the difficulty of nullifying laws that are consistent with religious beliefs, but he suggests that it would be at least theoretically possible to determine that a law violates the Establishment Clause because it is a secular manifestation of religious views (p. 331).

Stone is hardly the first to express concern about this dynamic, but it is rare to find a scholar who “has seriously proposed and defended” a constitutional principle that would result in the invalidation of laws when religious organizations have lobbied for them.<sup>50</sup> The cumulative effect of Stone’s litany of examples about the interference of Christian churches in the political process seems to suggest he would embrace this approach, but he never does directly, and in other works he has made clear that he does not.<sup>51</sup>

The Court has long grappled with this issue in its Establishment Clause jurisprudence and has made clear that the Constitution “does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of all or some religions.”<sup>52</sup> In *McGowan v. Maryland*, the Court explained that it is entirely possible that Congress or state legislatures would pass Sunday closing laws for the “general welfare of society, wholly apart from any religious considerations.”<sup>53</sup> After all, the Court pointed out, lots of laws—including laws against murder, fraud, theft, polygamy, and adultery—are also in keeping with the dictates of the Judeo-Christian tradition, but that does not make them unconstitutional.<sup>54</sup> Although *McGowan* rejected a challenge to a Sunday closing law, Stone suggests that the case’s inquiry into legislative motivation offers some promise for a check on the power of religious groups to impose their beliefs on society at large. Requiring the government to come up with a nonreligious reason for a law is a worthwhile and meaningful exercise.

Relatedly, Stone argues that morality can never be a legitimate government interest because it is too often “closely bound up with religious beliefs” (p. 331). The Court’s jurisprudence on the sufficiency of morality has not been a model of clarity. Although the Court has struck down laws against sodomy, abortion, contraception, and same-sex marriage, the Court has not yet overruled its obscenity cases, in which the police powers of the state to

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49. Epilogue, pp. 532–33.

50. See KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 251 (1988) (noting that the author is “not aware of anyone who has seriously proposed and defended” a “constitutional principle” based on “the gross threat posed by political activities of religious organizations”).

51. Geoffrey R. Stone, *The Perils of Religious Passion: A Response to Professor Samuel Calhoun*, 57 UCLA L. REV. DISCOURSE 15, 17 (2010), <https://www.uclalawreview.org/pdf/discourse/57-2.pdf> [<https://perma.cc/QRW4-VS6D>] (asserting that he does not believe that the framers thought religious influences should be barred from public debate).

52. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (rejecting challenge to a Sunday closing law).

53. *Id.*

54. *Id.*

regulate morality played a significant role.<sup>55</sup> This tension in the Court's jurisprudence has existed for decades. Indeed, the same Term the Court decided *Roe v. Wade*, the Court decided in *Paris Adult Theatre I v. Slaton* that it was constitutional to ban the sale or exhibition of obscenity to consenting adults in order to "maintain a decent society."<sup>56</sup> In his dissenting opinion, Justice Brennan argued that "[l]ike the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion."<sup>57</sup> In *Bowers v. Hardwick*,<sup>58</sup> the majority rejected arguments that *Stanley v. Georgia*, which held that laws against the mere possession of obscenity are unconstitutional,<sup>59</sup> had any application to a criminal case charging people with engaging in sex acts in their own home. In *Stanley*, the Court had declared, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."<sup>60</sup> In *Bowers*, the Court refused to extend *Stanley* to apply to laws restricting sexual conduct. Holding that *Stanley* "was firmly grounded in the First Amendment," the Court concluded that morality alone was a legitimate government interest.<sup>61</sup> In 1991, a majority of the Court relied on *Bowers* to uphold restrictions on nude dancing, holding that the government's interest in "protecting the societal order and morality" was sufficient to defeat the expressive interests at stake.<sup>62</sup> But in 2003, the Court declared in *Lawrence v. Texas* that "moral disapproval" is not a legitimate state interest.<sup>63</sup> Notably, the opponents to same-sex marriage did not even make a morality argument to the Court in *Obergefell*.<sup>64</sup>

But as Justice Scalia quite accurately noted in his *Lawrence* dissent, many of our laws pertaining to sex are based on morality.<sup>65</sup> Although the Supreme Court has not yet ruled on whether laws prohibiting incest, bigamy, adultery, polyamory, polygamy, and prostitution are constitutional, these laws are also subject to challenge to the extent that they rest on primarily on

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55. See *Miller v. California*, 413 U.S. 15, 25, 30 (1973) (stating that "it is not [the Court's] function to propose regulatory schemes for the States" and "[t]o require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility").

56. 413 U.S. 49, 59–60 (1973) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

57. *Slaton*, 413 U.S. at 109 (Brennan, J., dissenting).

58. 478 U.S. 186 (1986).

59. 394 U.S. 557 (1969).

60. *Stanley*, 394 U.S. at 565.

61. See *Bowers*, 478 U.S. at 189, 195–96.

62. *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560, 569 (1991).

63. See 539 U.S. 558, 578, 582 (2003) (O'Connor, J., concurring).

64. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

65. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.").



moral grounds, at least when they were first passed. To be sure, in some instances, the government might be able to argue that the law serves a government interest apart from morality. For example, laws prohibiting bestiality are likely to withstand a constitutional challenge because of the potential harm to defenseless animals. Laws banning bigamy and adultery might be justified as helping preserve and protect the marital union. It may be harder, however, to justify some of these other laws. For example, incest generates a strong “ick” factor, but a state interest in protecting against birth defects rests on shaky scientific evidence, especially beyond the immediate family relation.<sup>66</sup> Laws criminalizing prostitution might be serving the state’s legitimate interest in prohibiting sex trafficking, but it is not clear that the government could not meet this goal by preventing sex trafficking directly rather than all consensual but commercial sexual relationships. The same can be said for polygamy. Although in *Obergefell*, Kennedy seemed to go out of his way to emphasize that marriage is the union of two people,<sup>67</sup> it is hardly obvious why two is the magic number. Perhaps Stone would be just fine striking down laws against incest, prostitution, and polygamy, but he does not directly address the full ramifications of his argument that morality alone is never a legitimate government interest.

Stone also suggests that judges should keep their religious beliefs separate from their judicial decisions. Throughout the book, Stone makes occasional comments suggesting that religious beliefs have driven the votes of some justices. For example, when talking about Justice Scalia, Stone goes out of his way to explain that Scalia was a Roman Catholic who brought to the Court his traditional religious values in cases involving sex (pp. 413–14). In contrast, Stone sets out Justice Brennan, for whom he clerked, as a model of a judge who kept his religion out of his job. Stone tells us Brennan struggled to reconcile his religious beliefs with his role as a Supreme Court justice but that Brennan said, “[I]t never crossed my mind—never, not the slightest—that my faith had a damn thing to do with how I decided the abortion case [*Roe v. Wade*]” (p. 395 n.\*).

Stone’s analysis of Justice Kennedy appears to have evolved over time. When Stone discusses Kennedy for the first time, he mentions that Kennedy was raised in an Irish Catholic family but also that Kennedy boasts that he does not have a “rigid ideology” and instead just tries “to get it right” (p. 417). Justice Kennedy joined Justices O’Connor and Souter to “save” *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>68</sup> but he later authored the majority opinion in *Gonzales v. Carhart*, which rejected a constitutional challenge to a certain type of abortion procedure commonly known as “partial-birth abortion.”<sup>69</sup> Stone tells us Kennedy felt strongly that

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66. Sarah Kershaw, *Shaking Off the Shame*, N.Y. TIMES (Nov. 25, 2009), <http://www.nytimes.com/2009/11/26/garden/26cousins.html> (on file with the *Michigan Law Review*) (discussing scientific studies).

67. *Obergefell*, 135 S. Ct. at 2594, 2596.

68. 505 U.S. 833 (1992).

69. 550 U.S. 124 (2007).

the Court should defer to the legislature's medical decisions and felt that he had been "had" when he was convinced to join the plurality in *Casey* (p. 422). Stone then writes, "The decision in *Gonzales* raised awkward questions about the possible influence of religious belief in judicial decisions" because five Catholic justices had cast the determinative votes (p. 427).

But unlike the controversial op-ed Stone wrote about the decision in 2007,<sup>70</sup> Stone here does not argue that religion was, in fact, driving Kennedy's vote in this case. Indeed, when Stone discusses Kennedy's vote in *Whole Women's Health v. Hellerstedt*<sup>71</sup> a few pages later, Stone states that his "best guess" is that "*Casey* in fact best reflects Kennedy's own view of the right, and that he shifted from that view in *Gonzales* largely because he was so personally revolted by what he saw as the particular brutality of a partial-birth abortion" (pp. 339–40). It is hard to argue that Kennedy allows his Catholic beliefs to interfere with his decisions, given that Kennedy, the author of the Court's landmark opinions in *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell*, is the hero of the gay rights movement.<sup>72</sup> In addition, in these opinions, Kennedy has gone out of his way to assert that religious groups cannot use the law to impose their beliefs on others, precisely the argument Stone makes in his book.<sup>73</sup>

With his discussion of Kennedy, Stone misses a chance to offer an explanation of why the justice's Catholic values actually help explain his decisions. Although the official stance of the Catholic Church is to condemn homosexuality and same-sex marriages, the Church also embraces the principle that all people have dignity.<sup>74</sup> Kennedy's opinions in *Lawrence*, *Windsor*, and *Obergefell* are full of references to "dignity."<sup>75</sup> Although Kennedy's vote in *Gonzales* might appear inconsistent with his vote in *Casey*, he may have thought that the procedure at issue in *Gonzales* was inconsistent with the "dignity" that we should give human life (or at least potential life). The recognition of how religion can play a positive role (even for those who embrace a progressive agenda) would go a long way to countering the criticism that Stone appears to be antireligious—or at least anti-Catholic.

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70. Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB. (Apr. 20, 2007), [http://articles.chicagotribune.com/2007-04-30/news/0704290277\\_1\\_partial-birth-four-justices-abortion](http://articles.chicagotribune.com/2007-04-30/news/0704290277_1_partial-birth-four-justices-abortion) [<https://perma.cc/6VCR-4JXX>].

71. 136 S. Ct. 2292 (2016).

72. Adam Liptak, *Gay Rights Groups Seek One More Win from Justice Kennedy*, N.Y. TIMES: SIDEBAR (July 17, 2017), <https://nytimes.com/2017/07/17/us/politics/gay-rights-kennedy-supreme-court.html> (on file with the *Michigan Law Review*) (describing Justice Kennedy as "the greatest judicial champion of gay rights in the nation's history").

73. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

74. See U.S. CONFERENCE OF CATHOLIC BISHOPS, MINISTRY TO PERSONS WITH A HOMOSEXUAL INCLINATION: GUIDELINES FOR PASTORAL CARE 1, 4 (2006), <http://www.usccb.org/issues-and-action/human-life-and-dignity/homosexuality/upload/ministry-persons-homosexual-inclination-2006.pdf> [<https://perma.cc/A3DX-GHH8>] (encouraging clergy to respect the "fundamental dignity possessed by each person as created by God," while at the same time clearly stating that "[h]omosexual acts also violate the true purpose of sexuality").

75. See, e.g., *Obergefell*, 135 S. Ct. at 2594–96, 2599; *United States v. Windsor*, 133 S. Ct. 2675, 2681, 2689 (2013); *Lawrence v. Texas*, 539 U.S. 558, 567, 574–76 (2003).

The role of religion and morality in political debate has occupied scholars for decades. Stone does not attempt to resolve the knotty question of how it is possible for a religious person to separate her religious beliefs from her political beliefs, whether on the bench or in public debate. It is hardly clear how people with religious beliefs can keep religion entirely separate from their thinking about various political issues; some have argued that asking religious people to try to do this is asking them to become someone else.<sup>76</sup> Mark Tushnet once wrote, “As far as I can tell, I am a Jew down to the ground, and I cannot imagine a political decision that I could make without reference, at some level of my being, to my Jewishness.”<sup>77</sup> As Richard John Neuhaus has argued, “In everyday fact, people do not and cannot bifurcate themselves so at one moment they are thinking religiously and at another secularly, so to speak.”<sup>78</sup> While the strict separation of church and state in public discussion might be desirable, it is not realistically possible.

One possible answer, in addition to refusing to credit a bare state interest in “morality,” might be for courts to be less deferential to the government when reviewing laws relating to sex. In his chapter about *Roe*, Stone argues that one reason the Court may have struck down the abortion law in *Roe* is because they “clearly understood the central role that religion played in the opposition to abortion, and this concern may well have made them more reluctant than usual to defer to the ‘ordinary’ workings of the legislative process” (p. 398). This level of deference can make a big difference to the outcome of a case. For example, in *Gonzales v. Carhardt*, Justice Kennedy unquestionably accepted the government’s specious arguments that the procedure at issue was not medically necessary to protect the health of women and that women come to regret their abortions.<sup>79</sup> In *Obergefell*, in contrast, Kennedy was not as deferential to the arguments that same-sex marriage would undermine the institution of marriage and cause harm to children.<sup>80</sup>

### III. FOCUS ON SEX ROLES AND EQUAL PROTECTION INSTEAD

Although Stone’s primary focus is on the role that religion has played in shaping laws relating to sex, another theme emerges, although somewhat less

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76. MICHEAL SANDAL, *LIBERALISM AND THE LIMITS OF JUSTICE* 10–11 (1982).

77. Mark Tushnet, *Religion in Politics*, 89 COLUM. L. REV. 1131, 1131 (1989) (reviewing GREENAWALT, *supra* note 50).

78. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 25 (1984).

79. 550 U.S. 124, 161–64 (2007). In the past, Stone has criticized Justice Kennedy’s acceptance of questionable government arguments in *Gonzalez*: “Among Congress’s clearly erroneous ‘findings’ were its assertions that no medical schools provide instruction on intact D & E [dilation and evacuation], that intact D & E is never necessary to safeguard the health of the woman, and that intact D & E is less safe than alternative procedures. Each of these ‘findings’ was and is false.” Stone, *supra* note 70.

80. *Obergefell*, 135 S. Ct. at 2588, 2594 (recognizing that the belief that same-sex marriage “would demean a timeless institution” is held “in good faith by reasonable people” but placing much more emphasis on the viewpoint of the petitioners who “seek [marriage] for themselves because of their respect—and need—for its privileges and responsibilities”).

overtly: the role societal understandings of sex and gender roles has played in the development of sex-related laws throughout Western history.

The differences between the sexual freedoms of men and women are apparent from the beginning of Stone's book. Although women (and their partners) may have historically enjoyed the right to use contraception and obtain abortions (at least before quickening), they enjoyed much less sexual freedom than men.<sup>81</sup> Only Greek men were allowed to have premarital and extramarital affairs; married women could not because they needed to bear heirs for their husbands (p. 7). Although Greek literature portrayed women as "immoderately fond of sex," Greek men primarily obtained their sexual pleasure outside of marriage (p. 7). Stone tells us that male same-sex adult-to-youth relationships were considered the ideal sort of love because "women were inferior beings who were inappropriate objects of the finer feelings. A man who wanted to love truly had to love another male" (p. 8). Early Romans regarded the Greeks as "effeminate" (p. 9).

We also learn that the ancient cultures had very rigid views on sex roles. We learn in Stone's history that the reason same-sex couplings between adult men were regarded as disgusting was because in such a relationship, one man was penetrated like a woman (pp. 8, 10). This cultural attitude that "men should be men" permeated the society. Stone tells us that the Greeks condemned men who acted or appeared effeminate because such a bearing was "incompatible with a man's role as defender of the state" (p. 8). The Romans ridiculed men as "mollis" (soft) if they "curled their hair or used depilatories, lavish oils, and perfumes" (p. 10).

The dual standard for men and women continued throughout most of the history Stone covers. In the Enlightenment, for example, men were expected to have sexual experience before their marriages, while women were "expected to be virgin[s] on [their] wedding night" (p. 68). The Puritans treated sex between a married woman and a man not her husband much more severely than sex between a married man and a single woman (p. 77).

The idea of women as the temptress Eve pervades Western history. In the Middle Ages, when much more repressive attitudes towards sexuality dominated, women were regarded as sexually insatiable, irrational, and lacking in self-discipline (p. 32). Their carnal natures posed a moral danger to men and had to be strictly controlled (p. 32). Evangelists in the Second Great Awakening used the vision of Eve to argue for laws banning birth control, arguing that without the fear of pregnancy, women would be unable to control their lustful natures (p. 146).

Interestingly, Stone's history shows that sex between women was not regarded with the same kind of condemnation as sex between men. The medieval church did not seem particularly concerned about sex between women; indeed, Stone tells us that although there were a handful of prosecutions, most men regarded female same-sex sex as "amusing" because they thought women needed a man's penis to be truly satisfied (p. 39). In the

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81. It might be worth mentioning that Greek mythology celebrates Zeus's rape of various women.

Enlightenment, sex between women did not meet with religious condemnation because, lacking the involvement of a penis, it was not regarded as sex at all (p. 55). Sodomy between men was still largely regarded as “repugnant,” while depictions of sex between women appeared in popular literature without a stir (p. 69). Even the sodomy statute at issue in *Bowers* did not apply to lesbian activity until it was amended in 1968.<sup>82</sup>

This double standard for men and women pervades the entire historical telling. Stone tells us that the right of men to control their wives dictated prosecutorial priorities in the Middle Ages. Although during this time fornication of almost all kinds (except in marriage for procreative purposes) was condemned, fornication was prosecuted only when it implicated “the rights of other men to the faithfulness of their wives or the virginity of their daughters” (p. 32). And more often it was the women who were prosecuted, not only because pregnancy made it easier to prove the crime but also because women were considered more blameworthy than their male partners (p. 32). Although we are told that “[e]ven wives openly committed adultery” in the late 1600s (p. 50), openly sexual women were regarded as “wantons and whores” (p. 68).

Concerns about female homosexuality arose only in the late nineteenth century. Notably, experts concluded that as women became more financially liberated and demanded equality, they were more likely to act on their “in-born homosexual tendencies” (p. 217). With Eve as the model for all women, evangelists argued that contraception must be banned because women needed to have a “fear of pregnancy” in order to control their natural lustiness (p. 146). Laws against obscenity also were aimed at protecting girls. The New York Society of the Suppression of Vice, for example, lamented that unless movies were banned, “the downfall of young girls is not remote” (p. 173).

The religious right’s plea that restrictions on abortion, contraception, and obscenity are necessary to protect “family values” reflect concerns about the changing status of women in society. In resisting the Equal Rights Amendment, social conservatives argued that it would undermine “notions of femininity” and collapse the separate spheres for men and women (pp. 402–03). The Moral Majority, which President Ronald Reagan embraced, argued that curbing abortion rights would “put women back in their place” (p. 405).

Although Stone’s main thesis—as the subtitle of his book suggests—is the inappropriate role religion has played in the passage of restrictive laws relating to speech, he could have just as easily concluded that religion shows a history of discrimination against women and anxiety about the “proper” gender roles for the sexes. One possible way to reconcile Stone’s explicit focus on religion and his less direct focus on gender discrimination is to be more explicit that many religions embrace traditional roles for the sexes. This opens up another avenue for attacking some of the laws Stone examines

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82. GA. CODE ANN. § 16-6-2 (2017); James J. Bromberek, Casenote, *Bowers v. Hardwick: The Constitutionality of Georgia’s Sodomy Statute*, 20 J. MARSHALL L. REV. 325, 332 (1986).

in his book. Rather than attack laws as inappropriately reflecting an attempt of religious groups to foist their beliefs on the rest of society—which Stone himself recognizes is almost never possible—it is possible to attack laws on equal protection grounds.

Of course Stone is aware that many of the laws he discusses could be attacked on equal protection grounds. For example, Stone notes that one of the many criticisms of *Roe v. Wade* is that it focused more on how restrictive abortion laws interfere with the role of a doctor rather than on the right of women to control their bodies and their larger destinies (p. 397). The problem with abortion laws is that “they reinforced traditional sex-role stereotypes and turned women’s capacity to bear children into a serious personal, social, and economic disadvantage” (p. 397). Stone helpfully notes that one reason the Court may not have taken that route in 1973 was that the Court was still figuring out how to deal with laws that expressly discriminated against women (p. 397 n.\*).

Today, it is well established that laws discriminating against women are entitled to intermediate scrutiny (or even an “exceedingly persuasive justification”),<sup>83</sup> and discrimination on the basis of sexual orientation or gender identification should be subject to the same heightened standard. While it may remain unclear whether morality alone is a sufficient government interest when the standard of review is rational basis—*Lawrence v. Texas* did not explicitly embrace a heightened level of scrutiny—morality has never been sufficient when a law is subject to heightened scrutiny. The equal protection arguments in *Obergefell* were quite persuasive and would have permitted the Court to avoid the problems of holding that the right to same-sex marriage is a fundamental right when such a right had never existed in any society until relatively recently.

Determining that discrimination based on sexual orientation is entitled to heightened scrutiny would not have been a particularly big leap for the Court in *Obergefell*. This is not merely because there is a clear history of discrimination against people on the basis of sexual orientation but because this kind of discrimination is so closely tied to discrimination based on sex. Stone’s history helpfully illustrates that throughout Western history, there has been an effort to use the law to enforce traditional understandings of women’s and men’s roles in marriages, in sexual relationships, and in society generally.

For whatever reason, the Court has yet to embrace heightened scrutiny for sexual orientation discrimination. Stone could have done more to call Justice Kennedy to task for this failure in *Lawrence*, *Windsor*, and *Obergefell*. Stone observes that Kennedy’s *Lawrence* opinion “was vague on its precise rationale and scope” (p. 488), but he seems to praise it for “open[ing] the door” to the legalization of same-sex marriage (p. 489). Stone concedes that “[b]oth the precise rationale and the implications” of his *Windsor* opinion “were unclear,” but Stone concludes that “[n]o doubt, this was intentional”

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83. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)).

because Kennedy did not want to move “too far, too fast” (p. 509). Stone also argues that equal protection would be a “more compelling rationale” for the decision in *Obergefell* but charitably suggests that Kennedy (and perhaps the other justices in the majority) wanted to leave that issue for another day (pp. 520–21). No doubt, like the liberal justices who joined Kennedy’s opinion, Stone is probably grateful that Kennedy voted in favor of same-sex marriage, no matter what his reasoning. At the same time, Stone does recognize that a decision on equal protection grounds would have been very useful for the gay rights movement, which has to continue to fight for equality on a number of other fronts post-*Obergefell*.

Embracing heightened scrutiny in all cases involving discrimination based on sex, sexual orientation, or gender identity is not a panacea. Some issues, like abortion, involve competing government interests that are not readily dismissed as based solely on morality or religious beliefs. But in many cases, equal protection arguments would allow the Court—and us as a nation—to grapple directly with the lessons of our history of discrimination against individuals on the basis of their sexual identity.

#### CONCLUSION

As Justice Brennan so famously stated in a line Stone quotes at both the beginning and end of his book, “Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages.”<sup>84</sup> Next to sex, perhaps the next most fascinating subject of absorbing interest to mankind throughout the ages is the role of religion in politics. Stone’s monumental work convincingly demonstrates that religion has played a major role in shaping our laws relating to sex and sexual expression.

Ultimately, Stone’s recommendations for addressing the unholy relationship between organized religion and laws relating to sex are limited, but his impressive historical study of the laws relating to sex provides the basis for another, potentially more useful way of attaching these laws: the Equal Protection Clause. Although equal protection arguments will not necessarily lead to the invalidation of laws religious groups embrace, such an approach is more likely to allow the Court to avoid the difficult question of whether morality alone is a sufficient government interest and provide us with an occasion to confront—and remedy—our lengthy history of discrimination on the basis of sex, sexual orientation, and gender identity.

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84. P. ix, Epilogue, p. 531 (quoting *Roth v. United States*, 354 U.S. 476, 487 (1957)).