

ARTICLES

GAY EQUALITY, RELIGIOUS LIBERTY, AND THE FIRST AMENDMENT

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“Homosexual activity, like adulterous relationships, is clearly condemned in the Scriptures We believe that homosexuality is a deviation from the Creator’s plan for human sexuality.”

—National Association of Evangelicals¹

“[N]o credible case against homosexuality or homosexuals can be made from the Bible unless one chooses to read scripture in a way that simply sustains the existing prejudice against homosexuality and homosexuals. The combination of ignorance and prejudice under the guise of morality makes the religious community, and its abuse of scripture in this regard, itself morally culpable.”

—Peter J. Gomes, *The Good Book: Reading the Bible with Mind and Heart*²

1. National Association of Evangelicals, Resolution on Homosexuality (adopted 1985) (reaffirmed Mar. 2004), <http://www.nae.net/index.cfm?FUSEACTION=editor.page&pageID=46>.

“[C]hanging the legal definition of ‘marriage’ to include same-sex couples will create an unprecedented level of legal conflict under the Free Speech and Religion Clauses of the First Amendment.”

—Becket Fund for Religious Liberty³

I. INTRODUCTION

Are gay rights laws⁴ and religious liberty fundamentally in conflict? Opponents of such laws vocally argue as much. Gay rights advocates contest such claims, but have had difficulty figuring out how best to respond. Given the highly politically charged and fast-changing nature of legal protections of gay people,⁵ a principled approach to addressing perceived and real clashes between gay equality and religious liberty is necessary.

The claim that civil equality for gay people will impinge on the religious freedom of others has most frequently and vocally been made in the context of debates about same-sex marriage.⁶ Religion

2. PETER J. GOMES, *THE GOOD BOOK: READING THE BIBLE WITH MIND AND HEART* 147 (W. Morrow 1st ed. 1996) (1998).

3. Application & Proposed Brief of the Becket Fund for Religious Liberty as Amicus Curiae Supporting Defendant & Appellant State of California at 1-2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), available at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/Becket_Fund_Amicus_Curiae_Brief.pdf [hereinafter Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*].

4. The term “gay rights laws” may be controversial, because it suggests for some people that such laws protect “special rights” rather than seeking to promote equal treatment. Cf. Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 564 (1998) (noting the “special rights” objection to nondiscrimination laws “has been voiced most strongly . . . against laws that seek to prohibit discrimination on the basis of sexual orientation”); *Romer v. Evans*, 517 U.S. 620, 626 (1996) (rejecting argument that Colorado’s ban on local sexual orientation nondiscrimination laws “does no more than deny homosexuals special rights”). I use “gay rights laws” as a convenient synonym for laws requiring civil equality regardless of sexual orientation, including same-sex marriage, sexual orientation nondiscrimination, and other related laws. I do not wish to imply that such laws protect “special rights.”

5. I use the shorthand “gay people” to refer to gay men, lesbians, and bisexuals. The rights of gay people are often discussed in tandem with the rights of transgendered individuals (hence the common shorthand “LGBT rights”). I focus on sexual orientation, because legal doctrine and basic principles properly distinguish between sexual orientation and gender identity, and because those opponents of LGBT rights who raise the religious liberty banner tend to focus on same-sex sexuality. Nevertheless, my basic arguments apply with the same force to potential conflicts between transgender equality and religious freedom.

6. See, e.g., Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WKLY. STANDARD, May 15, 2006, at 20; Douglas W. Kmiec, *If Gays Marry, Churches Could Suffer*, CHI. TRIB., May 26, 2006, at 27; Jane Lampman, *Gay*

played a prominent role in public debates leading up to, and following, the California Supreme Court's recent decision⁷ holding that same-sex couples must be granted the right to marry under the California Constitution, as well as the subsequent passage of Proposition 8,⁸ which effectively overturned the Court's decision.⁹ But civil marriage in itself poses virtually no threat to religious

Marriage Looms as "Battle of Our Times," CHRISTIAN SCI. MONITOR, June 1, 2006, at 13; Jonathan Last, *Conservatives Must Regroup*, PHILA. INQUIRER, June 11, 2006, at C7; Judy Peres, *Same-Sex Marriage Foes Say Religious Liberty at Risk*, CHI. TRIB., June 5, 2006, at 1; Roger T. Severino, *Gay Rights vs. Religious Beliefs*, PHILA. INQUIRER, Aug. 24, 2006, at A19; Peter Steinfelds, *Advocates on Both Sides of the Same-Sex Marriage Issue See a Potential Clash with Religious Liberty*, N.Y. TIMES, June 10, 2006, at A11; Glenn T. Stanton, *Debate-Tested Sound Bites on Defending Marriage*, CITIZENLINK, <http://www.citizenlink.org/FOSI/marriage/ssuap/A00000984.cfm> (last visited Mar. 12, 2009); Roger Severino, *Legalizing Gay Marriage Will Spark Lawsuits Against Churches*, EXAMINER, Apr. 7, 2008, http://www.examiner.com/a-1324540~Roger_Severino_Legalizing_gay_marriage_will_spark_lawsuits_against_churches.html ("legalizing same-sex marriage will seriously undermine the religious freedom citizens have enjoyed since the founding."); George Will, *When Marriage Became a "Hate Crime,"* JEWISH WORLD REV., June 25, 2007, <http://jewishworldreview.com/cols/will062507.php3>.

7. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). California joined Massachusetts as the second state to officially recognize same-sex marriages. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Shortly thereafter, Connecticut became the third such state. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

8. See CAL. CONST. art. I, § 7.5. On March 5, 2009 the California Supreme Court heard oral argument on whether Proposition 8, adopted November 4, 2008, violates the state constitution. Maria Dolan, *Proposition 8: Activists Rally; Justices Hear Arguments*, L.A. TIMES, Mar. 6, 2009, at A1.

9. See, e.g., Laurie Goodstein, *California, a Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES, Oct. 27, 2008, at A12 ("This vote on whether we stop the gay-marriage juggernaut in California is Armageddon We lose this, we are going to lose in a lot of other ways, including freedom of religion." (quoting Prison Fellowship Ministries founder Charles W. Colson speaking to pastors in video promoting Proposition 8)); Duke Helfand, *Doctrine Disputes Grow as Gays Wed*, L.A. TIMES, June 19, 2008, at B1; Jennifer A. Marshall, Daniel Patrick Moloney & Matthew Spalding, Heritage Foundation, WebMemo No. 1932, *California Court's Judicial Activism Threatens the Institution of Marriage 2* (May 20, 2008), http://www.heritage.org/Research/Family/upload/wm_1932.pdf; Alan Wisdom & Jim Tonkovich, *California Same-Sex "Marriage": The Arrogance of the Judges and the Silence of the Churches*, INST. ON RELIGION & DEMOCRACY, May 22, 2008, <http://www.theird.org/NETCOMMUNITY/Page.aspx?pid=682&srcid=682>; Event Transcript, *Same-Sex Marriage in California: Legal and Political Prospects*, Feb. 28, 2007, <http://pewforum.org/events/?EventID=138>.

Though he opposed Proposition 8, President Obama made it clear during the campaign that he opposed civil recognition of same-sex marriage for explicitly religious reasons. See Patrick Healy, *Hopefuls Differ As They Reject Gay Marriage*, N.Y. TIMES, Nov. 1, 2008, at A1. Shortly after Proposition 8 passed, one of its major opponents, Equality California, added two "faith leaders" to its board, "reflecting the opinion of many critics that the campaign should have courted the religious vote." Jesse McKinley, *Marriage Ban Inspires New Wave of Gay Rights Activists*, N.Y. TIMES, Dec. 10, 2008, at A23.

freedom.¹⁰ The arena in which society must make real trade-offs between the values of religious liberty and gay equality is in the application of sexual orientation nondiscrimination laws.

Conflicts between those who support sexual orientation nondiscrimination laws and those who oppose such laws on religious grounds are only likely to rise in frequency and importance. Laws prohibiting employment discrimination based on sexual orientation already exist in twenty states, the District of Columbia, and many municipalities.¹¹ Most of these laws also prevent such discrimination in housing and public accommodations.¹² The House of Representatives' passage during the last congressional session of the Employment Non-Discrimination Act ("ENDA"),¹³ which would have prohibited discrimination in employment on the basis of sexual orientation nationwide, suggests that sexual orientation nondiscrimination laws will soon be enacted at the federal level.¹⁴ Polling data indicates that a substantial majority of the general public supports sexual orientation nondiscrimination laws, and that support is growing.¹⁵ The overwhelming support for such laws among

10. *See infra* Part II.

11. *See* HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES 1 (Aug. 21, 2008), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf. Twelve states and the District of Columbia also prohibit discrimination on the basis of gender identity. *See id.*

12. *See, e.g.*, Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2009); CAL. GOV'T CODE §§ 12920, 12955, 11135(a) (West 2009); *In re Marriage Cases*, 183 P.3d at 428 n.46 (describing these statutes as prohibiting sexual orientation discrimination in, respectively, "the provision of services by any business establishment, . . . housing, . . . employment, . . . [or] any program operated by, or that receives any financial assistance from, the state").

13. *See* Employment Non-Discrimination Act (ENDA), H.R. 3685, 110th Cong. (1st sess. 2007) in 153 CONG. REC. H13228 (Nov. 7, 2007).

14. ENDA passed the House by a vote of 235 to 184, with 14 members not voting. Office of the Clerk, U.S. House of Representatives, Final Vote Results for Role Call 1057 (Nov. 7, 2007), <http://clerk.house.gov/evs/2007/roll1057.xml>.

15. The percentage of Americans who favor sexual orientation nondiscrimination laws has risen steadily from 48 percent in 1988 to 61 percent in 1996 to 72 percent in 2004. *See* AM. NAT'L ELECTION STUDY DATA CTR., ANES CUMULATIVE DATA FILE (Oct. 31, 2005), http://www.electionstudies.org/studypages/download/datacenter_all.htm (including data from 1948-2004). Gallup polls show a similar, dramatic increase over the last twenty years, with 56 percent of the public agreeing that homosexuals should have equal rights in terms of job opportunities in 1977, rising steadily to 88 percent in 2003. *See* Press Release, Pew Forum on Religion & Pub. Life, Republicans Unified, Democrats Split on Gay Marriage, Religious Beliefs Underpin Opposition to Homosexuality (Nov. 18, 2003), *available at* <http://pewforum.org/publications/surveys/religion-homosexuality.pdf> [hereinafter Pew Forum].

younger people¹⁶ suggests that it is only a matter of time before laws prohibiting discrimination of the basis of sexual orientation are enacted throughout the nation.

Either explicitly or implicitly, opponents of nondiscrimination laws argue that the conflict between gay rights laws and religious objectors presents courts with a fundamentally new, contentious, and divisive problem. They warn that the passage of such laws will produce an avalanche of litigation, threatening the religious liberty of organizations and individuals, and pressing the courts into perilous uncharted territory.¹⁷

Such dire warnings about a coming crisis are significantly exaggerated. The conflict between religious free exercise and antidiscrimination laws is neither as grave nor as unprecedented as opponents claim. Civil rights laws do not reach a wide range of religious activities. Both explicit statutory exemptions and court interpretations of the First Amendment have long made it clear that churches and other religious houses of worship may select their own members, ministers, and other spiritual leaders free from government intervention.¹⁸ Religious organizations' control over the use of their own facilities for religious purposes similarly remains unaffected by civil rights laws.¹⁹ Gay rights laws will not force churches to hire

16. See Clyde Wilcox, Paul R. Brewer, Shauna Shames & Celinda Lake, *If I Bend This Far Will I Break? Public Opinion About Same-Sex Marriage*, in THE POLITICS OF SAME-SEX MARRIAGE 215, 226 (Craig A. Rimmerman & Clyde Wilcox eds., 2007) (summarizing data from the National Election Studies, 1988-2004). Cf. Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 484-85 (2005) ("The demographics of public opinion on issues of sexual orientation virtually ensure that one day in the not-too-distant future a substantial majority of Americans will support same-sex marriage: young people are much more likely to support gay rights than are their elders.") (citations omitted).

17. See, e.g., Becket Fund, Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 26 (arguing that after recognition of same-sex marriages, "courts would surely face a wave of church-state litigation created by newly conflicting religious and legal definitions of 'marriage'"); Gallagher, *supra* note 6 ("The flood of litigation surrounding each point of contact [between church and state] will map out the territory. For religious liberty lawyers, there are boom times ahead."); Richard C. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 398 (1994) ("[G]ay rights legislation . . . may be the [issue] which forces the Supreme Court to rethink its unwise decision, in *Employment Division v. Smith*, to drastically reduce the scope of the Free Exercise Clause.") (citation omitted).

18. See *infra* notes 159-72 and accompanying text.

19. See *infra* notes 203-09 and accompanying text.

gay ministers, sanctify same-sex marriage,²⁰ or host same-sex wedding ceremonies in their chapels.²¹ No matter how many gay rights laws are adopted, the Supreme Court's robust interpretation of the First Amendment's Free Speech Clause will protect even those who engage in the most virulent anti-gay religious rhetoric from prosecution under hate crimes legislation.²²

Despite the lack of any serious threat of government intrusion into these broad areas of core religious concern, opponents of gay rights laws correctly note that laws prohibiting discrimination on the basis of sexual orientation in employment, housing, or public accommodations will, in certain circumstances, affect actors who object to homosexuality on religious grounds. The landlord, employer, or service provider who wishes not to associate with gay people for religious reasons cannot be summarily dismissed when she argues that such laws impinge on her religious freedom. But the tensions that arise between nondiscrimination mandates and religious exercise in such contexts are not new. Since the passage of the Civil Rights Act of 1964,²³ courts have developed a rich body of case law exploring the implications of conditioning government subsidies on compliance with nondiscrimination policies and applying civil rights laws to organizations and individuals who claim exemptions based on the Religion Clauses of the First Amendment.²⁴ The principles involved in resolving religious objections to gay rights laws are no different than those that courts have relied on for decades when grappling with religious objections to race, sex, marital status, age, and other nondiscrimination laws.

In Part II, I discuss a variety of arguments raised by opponents of same-sex marriage suggesting that legal recognition of such marriages would threaten religious liberty. Some of these claims can be rejected easily and those that have substance are not about same-sex marriage at all. Rather, the real substantive anxiety underlying these arguments rests on the tensions involved when sexual

20. *See infra* notes 46-55, 62 and accompanying text.

21. *See infra* note 205 and accompanying text.

22. *See infra* Part II.A.

23. Pub.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C.A. §§ 2000a to 2000h-6 (West 2009)).

24. *See infra* notes 117-26, 159-229 and accompanying text.

orientation nondiscrimination laws are enforced on actors who find homosexuality immoral on religious grounds. This clearing of the brush opens the door to a more focused discussion of the relationship between gay civil rights laws and religious liberty.

In Part III, I explore arguments that invoke religious liberty to challenge the passage of gay civil rights laws in the first place. Although opponents wish to portray the relationship between religion and gay rights as fundamentally different than the relationship between religion and other civil rights laws, the relationships involved are, in fact, virtually identical. If gay rights laws should not, or even must not, be adopted because of their potential impact on religious freedom, then laws prohibiting discrimination based on race, sex, marital status, or other categories must be abandoned as well.

Finally, in Part IV, I discuss arguments in favor of broad religious exemptions from sexual orientation nondiscrimination laws. First, I note that the conditioning of special government benefits on compliance with nondiscrimination laws does not violate the viewpoint neutrality requirement of the First Amendment or the religious liberty of potential beneficiaries who refuse to comply. Second, I review claims for exemptions from direct regulation of discriminatory conduct in employment, housing, and public accommodations. Such claims come in two basic forms. First, regardless of whether it admits or denies that any discrimination has taken place, a religious entity may make a “*church autonomy*”²⁵ argument for a broad exemption from judicial scrutiny of its internal activities. Second, an individual or religious entity may admit that it has engaged in proscribed discrimination, but argue that its actions were *religiously motivated* and thus protected.

The courts have reached largely consistent and defensible results when confronted with both kinds of arguments. When the

25. I use the term “church autonomy” as a convenient shorthand to encompass claims by all religious entities, whether they are churches, synagogues, mosques, religiously-affiliated nonprofits, or other organizations dedicated in part or in whole to a religious mission. Douglas Laycock offered the first elucidation of a “church autonomy” claim under the Free Exercise Clause. See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1388 (1981).

relationship at issue is primarily religious in nature, the courts refuse to get involved. The state may not enforce nondiscrimination rules against churches in their choice of members or ministers, or their rental of facilities or housing for primarily religious functions. At the same time, the courts have rejected the church autonomy argument and enforced civil rights laws when religious entities engaged in primarily secular relationships deny they have discriminated but ask that they be exempt from judicial oversight because of their religious nature.²⁶ Religious entities are not automatically exempt from civil rights laws when they rent housing on the open market, provide generally available secular services, or employ janitors, clerical staff, and other workers with primarily secular duties.

While agreeing upon this general framework, the courts have been somewhat less consistent when confronted by religious actors engaged in what are otherwise primarily secular relationships who admit to discriminating against a protected class but seek an exemption by arguing that the discrimination was religiously motivated.²⁷ Should private individuals, churches, or religiously-affiliated hospitals, schools, and social service agencies be allowed to discriminate in their primarily secular relationships against homosexuals, women who work outside the home despite having young children, unwed cohabitating couples, or individuals in interracial relationships because they object on religious grounds to the conduct that defines such statuses? I argue that principles drawn from the doctrine of freedom of expressive association support the conclusions that most courts have reached in such cases and can and should provide guidance to future courts addressing similar situations.²⁸ While there indeed will be real tensions between gay rights laws and religious liberty interests in certain contexts, these tensions will not be fundamentally new or unique. Courts have the tools to resolve them while respecting both the equality and liberty interests at stake.

26. *See infra* notes 159-77 and accompanying text.

27. *See infra* notes 210-29 and accompanying text.

28. *See infra* notes 243-314 and accompanying text.

After discussing the contours of the constitutional limits on the application of nondiscrimination laws to religious entities and individuals, I address the limits the Constitution places on efforts by legislatures to craft statutory exemptions from such laws for religious actors. I note that, though current Supreme Court doctrine may permit legislatures to exempt religious entities from nondiscrimination laws while denying such exemptions to secular entities, the Establishment Clause should prohibit legislatures from providing religious exemptions only to certain kinds of nondiscrimination laws and not others, because to do so would be to prefer some religions over others. If religious actors are provided exemptions from gay rights laws, they also must be exempted from race, sex, and other nondiscrimination laws.

Finally, I conclude by emphasizing that the ultimate resolution to current tensions between religious objectors and gay rights advocates will be social rather than legal. Society will only truly embrace gay equality if advocates can convince the general public that religion and gay rights are not inherently in conflict. As with the struggle for racial equality, gay rights advocates should confront opponents who invoke religion head on, invoke the mantle of religious authority on the side of equality, dignity, compassion, and tolerance, and convince the American public that commitments to religious belief and civil justice for gay people should be and are compatible and reinforcing.

II. THE REAL DISPUTE IS WITH CIVIL RIGHTS LAWS, NOT MARRIAGE

Opponents of gay rights laws have most vigorously pushed the view that such laws threaten religious liberty by strategically focusing on the issue of same-sex marriage, where such arguments are most likely to resonate. While religious affiliation and commitment is generally, but by no means always, correlated with negative attitudes towards gay people and opposition to legal protections for gay people generally,²⁹ popular opinion polls show a

29. Across denominations, those who believe the Bible is the inerrant word of God are more likely to oppose sexual orientation nondiscrimination laws and to oppose allowing gay people to marry, adopt children, and join the military than those who believe the Bible is God's word but contains human errors. See Wilcox, Brewer, Shames & Lake, *supra* note 16, at 231. Though "[t]he clergy in evangelical churches focus considerably more attention on homosexuality—and

particularly high level of resistance to gay rights in the private realm of the family, where religion tends to have its greatest salience in modern life. As of 2004, 81 percent of Americans favored allowing gay people to serve in the military and 75 percent favored sexual orientation antidiscrimination laws. Yet only 50 percent supported

address it far more negatively—than do ministers and priests in other denominations,” polling data suggests that almost no clergy in any denominations speak favorably about homosexuality. Pew Forum, *supra* note 15, at 1. Finally, there is no major religious group in America in which a majority of adherents express favorable views of gay men or lesbians. In contrast, 60 percent of those who say they have no religious affiliation and rarely, if ever, attend religious services, express favorable views about homosexuals. *See id.* at 4.

Nevertheless, though religious conviction and opposition to gay rights laws generally correlate, many religious individuals and denominations adamantly support equal rights for gay people. *See, e.g.*, Application to File Brief and Brief of Amici Curiae of the United Universalist Association of Congregations et al., in Support of Parties Arguing for Marriage Equality at ix, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (representing the General Synod of the United Church of Christ, the Union for Reform Judaism, Soka Gakkai International-USA, the Unitarian Universalist Association of Congregations, the California Council of Churches, “and more than 400 other local, regional and national religious organizations and clergy”). The Reconstruction and Reform Jewish movements have ordained openly gay, sexually active clergy since 1984 and 1990, respectively. *See* Saul M. Olyan, *Introduction: Contemporary Jewish Perspectives on Homosexuality*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 5, 6 (Saul M. Olyan & Martha C. Nussbaum eds., 1998). Reform’s Central Conference of American Rabbis adopted a resolution supporting same-sex marriage in 1996, and the Reconstruction Rabbinical Association did the same in 2004. *See id.* at 8; Reconstructionist Rabbinical Ass’n, Resolution in Support of Civil Marriage for Same-Sex Couples (Mar. 16, 2004), available at <http://www.therra.org/resolution-Mar2004.htm>. The Unitarian Universalist Association also ordains openly gay people and has been a strong proponent of same-sex marriage. *See* Unitarian Universalist Ass’n of Congregations, Bisexual, Gay, Lesbian, Transgender Community: Welcome to Unitarian Universalism!, <http://www.uua.org/visitors/justicediversity/6252.shtml> (last visited Mar. 12, 2009). At their Twenty-Fifth General Synod in 2005, the United Church of Christ adopted a resolution supporting same-sex marriage. *See* United Church of Christ, Resolution: Equal Marriage Rights For All, Adopted at the Twenty-Fifth General Synod (July 4, 2005), available at <http://www.ucc.org/assets/pdfs/2005-EQUAL-MARRIAGE-RIGHTS-FOR-ALL.pdf>. In 2003, the Episcopal Church ordained its first openly gay bishop, Gene Robinson. *See* Ruth Gledhill, *If Church Got Rid of Gay Clergy It Would Collapse, Says Homosexual Bishop*, *TIMES* (London), July 28, 2007, at 13. Though the Episcopal Church has not adopted an official position on same-sex marriage, at its Seventy-Fifth General Convention in 2006, it passed a resolution supporting “full civil rights” for gays and lesbians, calling on government to provide “gay and lesbian couples protections . . . enjoyed by non-gay married couples,” and “oppos[ing] any state or federal constitutional amendment that prohibits same-sex civil marriage or civil unions.” Resolution A095, Gay and Lesbian Affirmation, *JOURNAL OF THE 75TH GENERAL CONVENTION OF THE EPISCOPAL CHURCH* 704 (2006), available at http://www.episcopalchurch.org/documents/75th_Journal.pdf. In its opinion striking down the state’s prohibition of same-sex marriages, the California Supreme Court noted that the forty-five amicus curiae briefs it received from individuals, governmental entities, and organizations showed that “religious groups, like some of the others, are divided in their support of the [opposing sides in the same-sex marriage debate].” *In re Marriage Cases*, 183 P.3d at 407 n.10.

allowing gay people to adopt children and just 34 percent supported same-sex marriage.³⁰ Those who get a lot of personal guidance from religion in their everyday lives are more likely than others to oppose same-sex marriage.³¹

Given this backdrop, it should be no surprise that opponents of same-sex marriage have raised the religion banner for their cause.³² In recent same-sex marriage cases in California, Connecticut, Maryland, Iowa, and Rhode Island, the Becket Fund for Religious Liberty has argued that civil recognition of same-sex marriage will lead to “a wave of church-state litigation created by newly conflicting religious and legal definitions of ‘marriage.’”³³ According to the Becket Fund, if courts or legislatures grant such recognition, religious entities will be subjected to a flood of lawsuits based on employment, housing, public accommodations, and hate speech laws. Further, religious entities will risk being stripped of government benefits, including tax-exempt status, government-funded social service contracts, special access to government facilities, and the power to perform legal marriages.³⁴ Supporters of Proposition 8 raised similar arguments,³⁵ while focusing most

30. See Wilcox, Brewer, Shames & Lake, *supra* note 16, at 226 (summarizing data from the *American National Election Studies*, 1988-2004).

31. See *id.* at 232.

32. See, e.g., Application for Permission to File Amici Curiae Brief and Amici Curiae Brief of the Church of Jesus Christ of Latter-Day Saints et al. in Support of Respondent State of California, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (arguing against same-sex marriage on behalf of The Church of Jesus Christ of Latter-day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America).

33. Becket Fund, Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 26; see also Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Defendants-Appellees at 2, *Kerrigan v. Comm’r of Pub. Health*, 904 A.2d 137 (Conn. 2006) (S.C. 17716) [hereinafter Becket Fund, Brief Amicus Curiae for *Kerrigan v. Comm’r of Pub. Health*]; Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Defendants-Appellants and Urging Reversal of the Decision of the Circuit Court for Baltimore City (No. 24-C-04-005390, Hon. M. Brooke Murdock, Judge) at 10, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44); Brief of Amicus Curiae for the Becket Fund for Religious Liberty in Support of Defendant at vii, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), *appeal docketed*, No. 07-1499 (Iowa 2007); Brief Amicus Curiae of Becket Fund for Religious Liberty at 2, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 06-340-M.P.). The five briefs are largely identical.

34. See Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 7.

35. See, e.g., Alliance Defense Fund, Pacific Legal Institute, Advocates for Faith and Freedom & The Western Center for Law & Policy, Joint Statement to California Religious

intensely on the alleged threat that recognizing same-sex marriage would force children to learn about same-sex marriage in schools over their parents' religious objections.³⁶

Despite the frequency of their invocation and their likely appeal with a broad swath of voters, most of the religious liberty arguments offered by opponents of same-sex marriage can be quickly dismissed upon inspection.³⁷ Same-sex marriage will not subject religious objectors to the threat of hate crimes convictions, nor will it threaten churches' tax exemptions or their ability to perform legal marriages. Teaching students in public schools about the existence of same-sex unions does not burden the students' or their parents' free exercise rights, and, in any event, statutory rules will often allow parents to avoid such instruction if they desire. Finally, legal recognition of same-sex marriage will have almost no impact on the application of nondiscrimination laws to those who condemn same-sex sexuality on religious grounds.

A. Hate Crimes

First, the Becket Fund postulates that, following the legal recognition of same-sex marriage, “[m]inisters and preachers could face conspiracy or incitement suits under [state hate crimes] laws if, after hearing a preacher’s strongly-worded (but non-violent) sermon against same-sex marriage, a congregant commits a hate crime against a person or business.”³⁸ In a major “Yes on 8” satellite

Leaders Regarding Proposition 8, http://protectmarriage.com/files/JOINT_STATEMENT_PASTORS_AND_CHURCHES.pdf.

36. See, e.g., Ron Prentice, Rosemarie Avilla & Bishop George McKinney, *Argument in Favor of Proposition 8*, in CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008, OFFICIAL VOTER INFORMATION GUIDE 56 (Proposition 8 “protects our children from being taught in public schools that ‘same-sex marriage’ is the same as traditional marriage”); *Everything to Do with Schools* (ProtectMarriage.com commercial).

37. As the California Supreme Court has noted,

recognition that the constitutional right to marry applies to same-sex couples as well as to opposite-sex couples does not diminish any other person’s constitutional rights. Opposite-sex couples will continue to enjoy precisely the same constitutional rights they traditionally have possessed, unimpaired by our recognition that this basic civil right is applicable, as well, to gay individuals and same-sex couples.

In re Marriage Cases, 183 P.3d at 430.

38. Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 15. As examples of hate crimes laws, the Becket Fund cites CAL. CIVIL CODE § 51.7; CAL. PENAL CODE

simulcast downlinked to 170 churches throughout California in the run up to the election, supporters of Proposition 8 highlighted the experience of Ake Green, a minister convicted under Sweden's law banning hate speech, because he gave a sermon denouncing homosexuality.³⁹ At least one "leading organizer" of the "Yes on 8" campaign declared Green "a symbol of what is ahead."⁴⁰

The idea that simply advocating against same-sex marriage or against gay equality generally might subject a minister, or any other person, to the threat of criminal prosecution or hate crimes liability is outlandish. Such core political speech unquestionably receives the strongest protection of the Free Speech Clause of the First Amendment.⁴¹ Even if a particularly inflamed religiously-motivated zealot went to the extent of advocating the general idea that gay people should be hunted down and killed, his speech would still be protected.⁴² And though states may generally proscribe "fighting words" individually directed to specific persons,⁴³ the Supreme Court has rejected the idea that "hate speech" statutes may single out threats and insults based on race, sex, religion, or any other protected characteristic.⁴⁴ Religious opponents of gay rights have no reason to fear that the legal recognition of same-sex marriage or the passage of sexual orientation nondiscrimination laws will place them in the

§ 422.6; 18 PA. CONS. STAT. § 2710; and MASS. GEN. LAWS 151B § 4(4)(A). *See id.* at 15 n.27, 16 n.28.

39. Goodstein, *supra* note 9.

40. *Id.*

41. *See, e.g.,* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("[A]dvocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression. . . . When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978))).

42. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that under the Free Speech Clause, states may only proscribe advocacy of violence or lawless action when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

43. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that states may proscribe "fighting" words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace").

44. *See* *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992) (holding facially unconstitutional St. Paul's Bias-Motivated Crime Ordinance which, as construed, proscribed fighting words based on race, color, creed, religion, or gender).

remotest danger of being prosecuted for expressing their strong opposition.⁴⁵

B. Performing Legal Marriages

The Becket Fund suggests that religious institutions may soon have to “abandon their religious principles regarding marriage or be deprived of their ability to perform legally recognized ones.”⁴⁶ Such a fear is wildly implausible, because it fails to appropriately

45. The Becket Fund claims that “religious speakers have already been arrested (though not convicted) in Pennsylvania for the hate crime of peacefully opposing gay rights in public.” Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 16 (citing *Startzell v. City of Philadelphia*, No. 05-05287, 2007 WL 172400, at *6 (E.D. Pa. Jan. 18, 2007), *aff’d*, 533 F.3d 183 (3d Cir. 2008)). This description of *Startzell* is seriously inaccurate. In fact, the plaintiffs in *Startzell* were arrested for disorderly conduct after they aggressively confronted volunteers at a gay pride festival in Philadelphia (the “OutFest”). *Startzell*, at *3. When they subsequently sued the city for violating their free speech rights, the district court explicitly found that their actions were “not peaceful.” *Id.* at *11 (emphasis added). The police actually *protected* the plaintiffs’ right to speak as much as possible by repeatedly preventing gay rights supporters from attempting to block the plaintiffs from entering the festival. *See id.* at *2-3. Since the festival organizers had a valid permit from the city, the police asked the plaintiffs to relocate at one point “because they were blocking attendees’ access to the vendors’ booths.” *Id.* at *3. When the plaintiffs refused, the police arrested them. *See id.* The district court found that “the objective facts available to the civil officers policing OutFest at the time of plaintiffs’ arrest provided a basis for arresting plaintiffs for disorderly conduct, failing to disperse, and obstructing a highway.” *Id.* at *15. All charges were dismissed. *See id.* at *14. The Third Circuit affirmed the district court’s ruling, finding the actions the police took to avoid disruption at the festival were permissible time, place, or manner restrictions on the protestors’ expression, because they were content-neutral, narrowly tailored, and left ample alternative avenues for communication. *Startzell v. City of Philadelphia*, 533 F.3d 183, 198-99, 202-03 (3d Cir. 2008).

The Becket Fund also claims that “[f]oreign democracies have already demonstrated that trial-level convictions [of religious speakers for publicly opposing gay rights] are possible, and to the extent American courts look to precedents abroad, they will find support for intrusive regulations.” Becket Fund, Brief Amicus Curiae for *Kerrigan v. Comm’r of Pub. Health*, *supra* note 33, at 8-9 (citing *Riksaklagaren v. AG*, No. B-1050-05 [HD] [Supreme Court] Nov. 29, 2005 (Swed.)); *Stacey v. Campbell*, [2002] BCHRT 35 (B.C. Human Rights Trib. 2002) (Can.); *Racial and Religious Hatred Act, 2006, c. 1* (U.K.), available at <http://www.opsi.gov.uk/acts/acts2006/20060001.htm>; *Islamic Council of Victoria v. Catch the Fire Ministries*, VCAT No. A392/2002 (Vict. Civ. Adm. Trib. Dec. 17, 2004) (Austl.), vacated and remanded by *Catch the Fire Ministries, Inc. v. Islamic Council of Victoria, Inc.*, [2006] VSCA 284 (Dec. 14, 2006) (Austl.), available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>. But it has long been recognized that the First Amendment provides particularly robust protections to speakers compared to protections in other countries, especially when the speech is considered offensive. *See, e.g.*, Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003) (“In the United States, hate speech is given wide constitutional protection while under international human rights covenants and in other Western democracies, such as Canada, Germany, and the United Kingdom, it is largely prohibited and subjected to criminal sanctions.”) (citations omitted).

46. Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 25.

recognize the distinction between civil and religious marriage. Despite arguments to the contrary,⁴⁷ civil and religious marriage have important and longstanding differences. Many religions refuse to recognize certain civilly sanctioned marriages, yet recognize other marriages that fail to meet civil requirements. Religious marriages often involve ceremonial elements and detailed requirements absent from civil laws, such as the promise to raise children of the marriage in the appropriate faith. States have long recognized the distinction between civil and religious marriage.⁴⁸ As the California Supreme Court clearly stated,

affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.⁴⁹

The Becket Fund argues that “[i]f clergy act in the place of civil servants when legally marrying couples, they may soon be regulated just like civil servants.”⁵⁰ But the long history of civil recognition of

47. See Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 157, 187 (Douglas Laycock et al. eds., 2008) (asserting that “all marriage has a religious dimension to it that is probably unavoidable”). Reid argues that marriage law in America is inextricably bound to religion, because “Christian, biblically-based modes of discourse” were crucial in the reasoning of nineteenth- and early twentieth-century American jurists and “helped to cement [a] Protestant hegemony with respect to marriage law . . .” *Id.* at 182. Reid’s fundamental point is that *all* law is inevitably religious, because “through appeal to tradition and authority, and through invocation of universal values, law attempts to concretize and apply a given society’s set of beliefs about ultimate values.” *Id.* at 184 (citing HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 25 (1974)). The fundamental problem with Reid’s argument is that he defines anything having to do with foundational values as religious. Surely all law, including marriage law, draws upon society’s basic values. But our very system of government is built upon the presupposition that it is possible to distinguish secular and religious values. See *infra* text accompanying notes 240-42.

48. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 407 n.11 (Cal. 2008) (“From the state’s inception, California law has treated the legal institution of *civil* marriage as distinct from *religious* marriage. Article XI, section 12 of the California Constitution of 1849 provided in this regard: ‘No contract of marriage, if otherwise duly made, shall be invalidated by want of conformity to the requirements of any religious sect.’ This provision is now set forth, in identical language, in Family Code section 420, subdivision (c).”).

49. *Id.* at 451-52.

50. Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 25.

marriages performed by religious actors belies this. Religious officiants currently may refuse to participate in marriages for a wide variety of reasons, including refusing to marry couples not of their faith or couples whom they believe simply are not prepared for marriage. The Becket Fund points to no cases in which a religious actor has lost his or her power to perform marriages for refusing to conduct particular legal unions.⁵¹

That justices of the peace⁵² and town clerks⁵³ cannot refuse to participate in legally valid marriages or civil unions only reinforces the point that religious leaders need not fear losing their ability to perform legally recognized marriages. As civil servants, justices of the peace and town clerks have an obligation to follow the civil marriage laws.⁵⁴ The role of public officers, who have a responsibility to carry out the law without discrimination, is quite distinct from the role that clergy play in performing legally recognized marriages. Indeed, it seems appropriate to infer that one of the very reasons states authorize justices of the peace to conduct civil marriages is that clergy are *not* required to marry all comers.

51. The Becket Fund cites a Texas statute, TEX. FAM. CODE ANN. § 2.205 (Vernon 2009), requiring that anyone authorized to perform a civil marriage not discriminate on the basis of race, national origin, or religion. This statute is clearly intended to apply to justices of the peace. The Becket Fund cites no cases in which an attempt was made to apply it to a religious officiant. A Westlaw search revealed no such cases. Regardless, no law attempting to make religious officials perform marriages to which they object on religious grounds would survive First Amendment scrutiny.

52. See Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriages*, N.Y. TIMES, May 17, 2004, at A16 (“Twelve of the state’s 1,200 justices of the peace have resigned rather than perform same-sex marriages, said Claire M. Mentus, president of the Massachusetts Justices of the Peace Association.”).

53. See *Brady v. Dean*, 790 A.2d 428, 434-35 (Vt. 2001) (holding that civil union law did not substantially burden religious beliefs of town clerks).

54. When a few town clerks in Vermont refused to issue valid civil union licenses and certificates based on their religious objections to the law, the Vermont Supreme Court noted that it is a

highly questionable proposition that a public official—here a town clerk—can retain public office while refusing to perform a generally applicable duty of that office on religious grounds. We observe . . . that this proposition—which means that the personal religious beliefs of a public officer may in some circumstances trump the public’s right to have that officer’s duties performed—is neither self-evident nor supported by any of the cases cited by plaintiffs.

Id. at 434.

The state provides a basic system that accepts everyone in large part because clergy share no such obligation.

It is highly unlikely that there will ever be sufficient political will to strip clergy of their power to perform civil marriages, regardless of the civil marriage laws.⁵⁵ People value the ability to get married by their religious leaders. They also recognize that the government must provide a mechanism to allow all people legally entitled to marry to do so. The current system, in which the government recognizes marriages performed by religious leaders *and* provides justices of the peace who must perform all legal marriages, provides an appropriate balance that would remain undisturbed by the civil recognition of same-sex marriage.

C. Tax-Exempt Status

Claims that gay rights laws or civil recognition of same-sex marriage will threaten the tax-exempt status of churches, temples, and other houses of worship that oppose such laws are popular scare tactics.⁵⁶ But such claims fall apart upon closer examination.

55. It is much more likely that legislatures will explicitly allow civil servants *not* to participate in same-sex unions than it is that they would attempt to force clergy to participate or lose their ability to perform legally recognized marriages. In *Brady*, the state supreme court noted that the Vermont legislature had explicitly offered an “accommodation” for town clerks with religious reservations about issuing a civil union license. *Id.* at 435. Even assuming that a town clerk could claim that participating in a civil union violated his or her religious beliefs, the court found that the law did not impose a substantial burden on free exercise because it expressly provided that “[a]n assistant town clerk may perform the duties of a town clerk under this chapter.” *Id.* (quoting VT. STAT. ANN. tit. 18, § 5161(b) (2001)).

56. *See, e.g.*, Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 18 (arguing that civil recognition of same-sex marriage has potential to lead to “staggering financial loss [for religious institutions] due to the revocation of tax-exemptions by government authorities . . . for religious institutions that *refuse to affirm* same-sex marriage”) (emphasis added); *id.* at 19 (arguing that “houses of worship that hold fast to husband-wife marriage . . . will be virtually defenseless in court under the First Amendment” where the political will supports attempts to revoke their tax exemptions); Douglas Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103, 108, 110 (Douglas Laycock et al. eds., 2008) (entitling a section of his book, “*Bob Jones* Is Not a Direct Precedent for Denying a Tax Exemption to Churches That Refuse to Perform Same-Sex Marriages,” but dedicating almost an entire chapter to addressing this “[t]hreat”); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59, 67 (Douglas Laycock et al. eds., 2008) (“Gay rights and same-sex marriage are issues that promise to reignite th[e] controversy over tax-exempt status”); *see also* articles cited *supra* note 6.

The debate around tax-exempt status focuses on *Bob Jones University v. United States*.⁵⁷ In *Bob Jones*, the Supreme Court upheld the IRS's determination that private universities that discriminated in admissions on the basis of race were not "charities" under the Internal Revenue Code, based on the nation's deeply engrained public policy against racial discrimination in education.⁵⁸ The Court limited the scope of its ruling, holding that

a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.⁵⁹

The court further held that even if the loss of exemption placed a burden on the exercise of religion, the government's interest in eradicating racial discrimination in education was sufficiently compelling to outweigh that burden under the Free Exercise Clause.⁶⁰

Religious organizations clearly will not lose their tax exemptions under *Bob Jones* simply for expressing their opposition to same-sex marriage or gay rights laws. Such a selective revocation of a government benefit based on the content of an organization's speech would unquestionably violate the First Amendment.⁶¹ Even

57. 461 U.S. 574 (1983).

58. *See id.* at 595.

59. *Id.* at 592.

60. *See id.* at 604. Because *Bob Jones* was decided before *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court applied a test that asked whether the regulation exacted a "substantial burden" on the free exercise of religion, and if so, whether the government had a "compelling interest" sufficient to overcome that burden. The current federal free exercise test, as outlined in *Smith*, permits the government to apply generally applicable, neutral laws to religious objectors, regardless of the incidental burden on religious exercise that may result. *See Smith*, 494 U.S. at 878-79.

61. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). Thus, "houses of worship that hold fast to husband-wife marriage," as the Becket Fund describes them, Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 19, will be anything but "virtually defenseless in court under the First Amendment," if governments attempt to revoke their tax-exemption simply for their views. *Id.* Further, neither Congress nor any local governments are remotely likely to choose to revoke the tax exemptions of *all* religious groups because some oppose gay equality or same-sex marriage. The political will to end tax exemptions for churches for any reason is not remotely close to being strong enough, and the idea that changes in marriage or civil rights laws might somehow change this is far-fetched, to say the least.

religious bodies that actively discriminate on the basis of race, sex, or other proscribed categories in their selection of ministers or members need not fear. As more fully explored in Part IV, the First Amendment clearly protects both decisions.⁶² Further, courts could never justifiably revoke the tax-exempt status of religious bodies for refusing to perform or recognize same-sex marriages, regardless of the civil marriage laws. As discussed above, religious marriage has long been distinct from civil marriage, and both the Free Exercise and Establishment Clauses rightly protect any religious group from altering its conception of marriage to conform to the civil concept.⁶³

The only plausible point that those who raise the tax exemption issue could be making is that religious organizations that engage in *secular* activities—like universities, hospitals, social service providers, or even houses of worship that provide secular services like drug counseling or soup kitchens—and that *actively discriminate* against gay people as part of those *secular* activities could lose tax-exempt status under sexual orientation nondiscrimination laws. But even this outcome is highly unlikely. For such a loss to occur, “[t]he institution’s purpose must . . . be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred [from granting it a tax exemption].”⁶⁴ Society would have to see a truly massive shift for a court to come to such a conclusion regarding a religious service-provider that discriminates on the basis of sexual orientation.

Indeed, it is hard to imagine circumstances outside the context of racial discrimination in education in which the *Bob Jones* doctrine can be supported in today’s world, or the immediately foreseeable future. If the IRS has been delegated the power to determine fundamental “public policy” with little guidance from Congress or the courts and to use its decisions to deny tax-exempt status for unpopular entities, the circumstances in which such power can legitimately be exercised must be incredibly narrow. The decision in *Bob Jones* that the IRS could deny tax exemptions to schools with racially discriminatory admission policies without violating the

62. See *infra* notes 160-66, 263 and accompanying text.

63. See *supra* notes 46-55, 61 and accompanying text.

64. *Bob Jones*, 461 U.S. at 592.

Constitution arose from over a century of protracted struggle on behalf of racial equality—a struggle that included a bloody civil war, decades of officially sanctioned segregation, and a society-wide civil rights movement that radically altered the moral conscience of the country on the issue of race relations. Social change on a similar scale would be necessary before a court could fairly find that the societal interest in preventing discrimination on the basis of sexual orientation in certain contexts trumps the powerful interest in promoting pluralism that generally underlies the tax code's exemption of nonprofit organizations.

Importantly, such social change, if it ever occurs, will necessarily come from the mass of society. Should a *Bob Jones* ever come for sexual orientation discrimination, the overwhelming majority of religious entities will have already clearly committed themselves to opposing such discrimination, just as the religious community had clearly declared its broad opposition to racial discrimination at the time of *Bob Jones*.⁶⁵ This reality should both give a sense of security to religious opponents of gay equality, whose tax exemptions are in no danger for the foreseeable future, and be a source of motivation for gay rights supporters to engage in the democratic, and indeed deeply religious, activity of engaging their fellow citizens and congregants in an attempt to create a profound shift in social and religious conscience like the one that transformed the country half a century ago.

D. Teaching Same-Sex Marriage in Schools

Supporters of Proposition 8 focused much of their efforts on arguing that legal recognition of same-sex marriage would force

65. Almost every one of America's major religious denominations has sustained an intense and protracted internal struggle regarding the proper approach to racial equality, and in particular to interracial marriage. See Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AMER. HIST., 119, 130-37 (2004) (discussing internal struggles within major religious groups after *Brown v. Board of Education*, 347 U.S. 483 (1954), and greater willingness of such groups to support school desegregation than to support interracial marriage). Many major groups suffered schisms leading up the Civil War, often along North-South lines, that were not mended until the 1960s. See, e.g., PETER W. WILLIAMS, AMERICA'S RELIGIONS: FROM THEIR ORIGINS TO THE TWENTY-FIRST CENTURY 352-53 (2002) (discussing Presbyterians, Methodists, and Baptists).

children to learn about such marriages in public schools.⁶⁶ Their arguments drew explicitly on the case of *Parker v. Hurley*,⁶⁷ in which parents in Lexington, Massachusetts, claimed the state had violated their religious liberty by teaching their children about same-sex relationships without giving the parents prior notice and the chance to exempt their children from the discussions.⁶⁸ The First Circuit rightly rejected the parents' claims.⁶⁹ The court noted that the case "would easily be dismissed" under the Free Exercise Clause if the standard deference to neutral, generally applicable laws applied.⁷⁰ Further, even assuming some exception to the general rule applied, the parents failed to show any burden on their children's, or their own, free exercise of religion, because mere exposure to ideas that may be offensive is not coercion.⁷¹

The Free Exercise Clause cannot require that parents be given advanced warning and the opportunity to remove their children from

66. See, e.g., Prentice, Avilla & McKinney, *supra* note 36 (highlighting public schools issue in argument in favor of Proposition 8 in state's Official Voter Information Guide).

67. 514 F.3d 87 (1st Cir. 2008). Proposition 8 supporters highlighted *Parker* in their advocacy. See, e.g., *Everything to Do with Schools*, *supra* note 36 (Yes on Proposition 8 television commercial featuring parent plaintiffs in *Parker*).

68. See *Parker*, 514 F.3d at 90.

69. See *id.* at 107.

70. *Id.* at 95 (discussing rationality test announced in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

71. The court noted that

[t]he parents do not allege coercion in the form of a direct interference with their religious beliefs, nor of compulsion in the form of punishment for their beliefs Nor do they allege the denial of benefits. Further, plaintiffs do not allege that the mere listening to a book being read violated any religious duty on the part of the child. There is no claim that as a condition of attendance at the public schools, the defendants have forced plaintiffs—either the parents or the children—to violate their religious beliefs. In sum there is no claim of direct coercion.

Id. at 105. Further, "even assuming that extreme indoctrination can be a form of coercion . . . [and that a book read in class] was precisely *intended* to influence the listening children toward tolerance of gay marriage," schools may attempt to influence children toward tolerance without attempting to indoctrinate them. *Id.* at 105-06.

Requiring a student to read a particular book is generally not coercive of free exercise rights. Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas

.....

Id. at 106.

exposure to anything they find religiously objectionable in the public schools. To hold otherwise would make effective provision of public education in our pluralist society impossible. All parents have the right to choose to send their children to private schools if they wish to have their religious views influence the curriculum.⁷² Perhaps some people find displeasure at the idea of teaching school children about same-sex marriage a sufficient reason to oppose legal recognition of such marriages as a policy matter. But such instruction could not infringe upon constitutionally protected religious liberty, absent a teacher engaging in explicit ridicule or other disparagement of particular religious tenets, which would be prohibited regardless of the legal status of same-sex marriage.

E. Nondiscrimination Laws

The Becket Fund argues that legal recognition of same-sex marriage will lead to intrusive regulation of religious entities through employment, housing, and public accommodations nondiscrimination laws.⁷³ Further, the Fund claims that “[i]n states where courts and legislatures cannot force religious groups to accept same-sex marriage norms, revocation of special government benefits and accommodations may prove equally effective.”⁷⁴ Both claims in actuality have little to do with marriage. Whether nondiscrimination laws may be applied to religious actors and whether the state may refuse to provide “special” benefits to religious entities because they do not comply with the government’s policies against various forms of discrimination do not depend on the legal status of same-sex marriage. The one exception involves arguments that civil recognition of same-sex marriage will force employers to grant the same health and other benefits to the same-sex spouses of their employees as they currently grant to opposite-sex spouses. But even here, opponents’ real complaint is with sexual orientation nondiscrimination laws, not with marriage.⁷⁵

72. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

73. Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 2.

74. *Id.* at 18.

75. One could argue that an employee whose same-sex spouse was denied health or other benefits might sue under a marital status nondiscrimination law, making legal recognition of same-sex marriage the key step leading directly to the conflict. But such an employee would

It should not be surprising that opponents of gay equality invoke threats to religious liberty heavily in discussions about same-sex marriage. As noted above, polling data show that strong majorities of Americans across most religious denominations support sexual orientation nondiscrimination laws while smaller, but clear, majorities across denominations oppose legal recognition of same-sex marriage.⁷⁶ Most people also imagine marriage as fundamentally intertwined with religious issues in a way that employment, housing, or public accommodations nondiscrimination laws are not. Indeed, most major American religious denominations favor sexual orientation nondiscrimination laws while opposing civil recognition of same-sex marriage.⁷⁷ Opponents of all gay rights laws thus have a

almost assuredly sue under a sexual orientation nondiscrimination law as well. It is highly unlikely that any jurisdiction would recognize same-sex marriages without already having a sexual orientation nondiscrimination law in place. Indeed, some employees have sued their employers under sexual orientation nondiscrimination laws for providing spousal benefits when the jurisdiction does *not* recognize same-sex marriage, arguing that providing benefits only to spouses discriminates against gay people who cannot legally marry their intimate partners. *See, e.g.*, Brief of Patricia Bedford & Anne Breen at 24, *Breen v. N.H. Cmty. Technical Coll. Sys.*, No. 2006-0432 (N.H. Dec. 28, 2006), *available at* <http://www.glad.org/uploads/docs/cases/2006-12-28-bedford-sc-brief.pdf>. Courts have disagreed on the proper resolution to such claims. *Compare* Alaska Civil Liberties Union v. State, 122 P.3d 781 (Alaska 2005) (holding that conditioning benefits to government employees on marriage when same-sex couples cannot marry violates state constitution) *with* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1057 (N.D. Cal. 2007) (rejecting claim that “married-couples-only policy is facially discriminatory because it has the effect of discriminating on the basis of sexual orientation” (citing *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1229 (Cal. 2005); *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1170-74 (Cal. 1991))). Litigation of this question will surely continue as long as same-sex marriage is *not* legally recognized.

76. *See* Wilcox, Brewer, Shames & Lake, *supra* note 16, at 226.

77. Some denominations support full gay equality. *See supra* note 29. But even those denominations that oppose same-sex marriage frequently support sexual orientation nondiscrimination laws. Since the early 1980s, every major mainline ecumenical Protestant church body has adopted an official stance supporting sexual orientation employment and housing nondiscrimination laws. *See* Keith Green, *Introduction to Essays Representing Mainline Protestant Churches*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 113, 118 (Saul M. Olyan & Martha C. Nussbaum eds., 1998). (For a definition of “mainline” Protestantism, *see* WILLIAMS, *supra* note 65, at 355-57.) The Roman Catholic Church is steadfast in its opposition to any recognition of same-sex relationships. *See* Congregation for the Doctrine of Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (June 3, 2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (“In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty.”). Nonetheless, it calls for an end to unjust discrimination and oppression of homosexuals. *See* United States Conference of Catholic Bishops’ Committee on Marriage and

Family, Always Our Children: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers (Sept. 10, 1997), <http://www.usccb.org/laity/always.shtml> (“The teachings of the Church make it clear that the fundamental human rights of homosexual persons must be defended and that all of us must strive to eliminate any forms of injustice, oppression, or violence against them. . . . It is not sufficient only to avoid unjust discrimination. Homosexual persons must be accepted with respect, compassion and sensitivity.”).

Other denominations, especially within mainline Protestant traditions, are currently involved in passionate internal struggles about the proper relationship between the church and homosexuality. Indeed, David Campbell and Carin Robinson have argued that “[t]oday, the salient divide is not *between* religious traditions but *within* them—in virtually every major religion in America, a split has developed between traditionalist and progressive factions.” David C. Campbell & Carin Robinson, *Religious Coalitions For and Against Gay Marriage: The Culture Wars Rages On*, in *THE POLITICS OF SAME-SEX MARRIAGE* 131, 133 (Craig A. Rimmerman & Clyde Wilcox eds., 2007). The Episcopal Church’s ordination of its first openly gay bishop led to a split in the international Anglican Communion. After the Anglican Church in England called for the U.S. church to “repent,” the Episcopal Church rejected a motion at its 2006 General Convention to retract its support of gay equality. See Gledhill, *supra* note 29. The American Baptist Church (USA)’s official policy calls “the practice of homosexuality incompatible with Christian teaching.” American Baptist Resolution on Homosexuality (Oct. 1992), <http://www.abc-usa.org/resources/resol/homosex.htm> (adopted by the General Board of the American Baptist Churches by mail vote). Yet, the Church adopted a resolution in 1993 calling for “continuing dialogue on human sexuality.” See Gregory Tomlin, *Cooperative Baptist Fellowship Will Meet with Troubled ABC (USA) in 2007*, BAPTIST PRESS, June 26, 2006, <http://www.bpnews.net/bpnews.asp?ID=23541>. Further, in May 2006, the American Baptist Church (USA)’s Pacific Southwest region officially split from the parent denomination because the national body refused to discipline other local regions that are openly accepting and affirming of unrepentant homosexuals as members. See Gregory Tomlin, *Split Among American Baptists Over Homosexuality Is Final*, BAPTIST PRESS, May 18, 2006, <http://www.bpnews.net/bpnews.asp?ID=23275>. Similarly, the Presbyterian Church officially views homosexuality as a sin and rejects same-sex marriage and the ordination of sexually active homosexuals. See Presbyterian Church (USA), *Presbyterian 101: Homosexuality*, <http://www.pcusa.org/101/101-homosexual.htm> (last visited Mar. 12, 2009). Yet, regional synods and clergy have challenged the denomination’s stance, causing a major rift. See Pew Forum on Religion and Public Life, *Religious Groups’ Official Positions on Same-Sex Marriage*, April 1, 2008, <http://pewforum.org/docs/?DocID=291>. The United Methodist Church reaffirmed its opposition to same-sex marriage in 2004, see United Methodist Church, *Marriage*, <http://archives.umc.org/interior.asp?ptid=1&mid=1722> (last visited Mar. 12, 2009), and defrocked an openly lesbian minister in 2005. See Neela Banerjee, *Top Methodist Court Backs Conservatives on Gay Issues*, N.Y. TIMES, Nov. 1, 2005, at A14. However, many local congregations and regions oppose the national body’s stance. Resolutions calling for approval of same-sex marriage and the ordination of gay people were recently rejected at the United Methodist General Conference in May 2008, but each measure was supported by a substantial contingent. The votes were 574 to 298 and 579 to 335, respectively. See Terry Lee Goodrich, *Protesters at Methodist Conference in Fort Worth Decry Take on Gays*, FORT WORTH STAR-TELEGRAM, May 2, 2008, at B1. Protesters, some wearing black armbands or veils, marched through the Fort Worth Convention Center to express their sadness at the outcome, revealing the intensity of the division within the denomination. See *id.* Finally, the Evangelical Lutheran Church in America (“ELCA”) has been unable to come to a resolution to its internal debates about homosexuality. In a draft statement to be voted upon at its next church-wide assembly in August 2009, the ELCA states that “[a]fter many years of study and conversation, this church does not have consensus regarding loving and committed same-gender relationships. This church has committed itself to continuing to accompany one another in study, prayer, discernment and pastoral care.” Task Force for ELCA Studies on Sexuality, Draft Social

political incentive to emphasize the perceived threat to religious liberty posed by same-sex marriage even if the real area of potentially conflicting fundamental interests is in the arena of nondiscrimination law. By entrenching the idea that gay rights and religion are fundamentally at odds in the marriage context—a notion to which the majority of the public will be receptive—opponents of nondiscrimination laws can hope to draw on that popular conception to oppose the adoption of, or push for the rescission of, more widely-supported nondiscrimination laws.

Recognizing that the real tensions between religious freedom and gay rights arise in the interface between sexual orientation nondiscrimination laws and the constitutional protection of religious liberty, Parts III and IV explore the various interests involved in those interactions and show that courts have ample tools to appropriately resolve those tensions while respecting both the important equality and liberty interests at stake.

III. FACIAL CHALLENGES OF SEXUAL ORIENTATION NONDISCRIMINATION LAWS UNDER THE ESTABLISHMENT CLAUSE

Opponents of gay rights laws dispute the claims that gay people need and deserve the protections of such laws in order to be equal participants in civil society. They argue that homosexuality is immoral and undeserving of state protection,⁷⁸ that anti-gay

Statement on Human Sexuality 36 (Mar. 2008), <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements-in-Process/JTF-Human-Sexuality/~media/Files/What%20We%20Believe/Social%20Issues/In%20Process/Human%20Sexuality/Draft%20Statement/draftstatement.ashx>. In an updated draft issued in February 2009, the statement declares that within the ELCA, “consensus does not exist concerning how to regard same gender committed relationships, even after many years of thoughtful, respectful, and faithful study and conversation.” Task Force for ELCA Studies on Sexuality, *Human Sexuality: Gift and Trust – A Proposed Social Statement* 17 (Feb. 19, 2009), <http://www.elca.org/~media/Files/What%20We%20Believe/Social%20Issues/In%20Process/Human%20Sexuality/hsgt.pdf>. Nevertheless, the

church is united on many critical issues. It opposes all forms of verbal or physical harassment and assault based on sexual orientation. It supports legislation and policies to protect civil rights and to prohibit discrimination in housing, employment, and public services. It has called upon congregations and members to welcome, care for, and support same-gender couples and their families, and to advocate for their legal protection.

Id.

78. See, e.g., National Association of Evangelicals, *supra* note 1 (“We believe that homosexuality is a deviation from the Creator’s plan for human sexuality. While homosexuals as

discrimination is not really a problem,⁷⁹ and that the state should refrain from telling private parties how to conduct their private affairs.⁸⁰ Such arguments, of course, could be and have been made against civil rights laws prohibiting other forms of discrimination. At this level of the debate, there is nothing particularly special about sexual orientation. Civil rights laws prohibiting discrimination on the basis of a variety of characteristics, including race, sex, age, disability, marital status, veteran status, and genetic information, have all repeatedly been passed in various combinations at the local, state, and federal levels when the majority of the relevant polity has determined that such discrimination should be proscribed, despite objections by dissenters.

But opponents of gay rights laws argue that the relationship between sexual orientation and religion is special. The most sweeping religiously-framed objection to sexual orientation nondiscrimination laws asserts that all such laws violate the Establishment Clause—which requires that every law must have a secular purpose, a primary secular effect, and avoid excessive entanglement with religion⁸¹—because they depend on a moral

individuals are entitled to civil rights, including equal protection of the law, the NAE opposes legislation which would extend special consideration to such individuals based on their 'sexual orientation.' Such legislation inevitably is perceived as legitimatising the practice of homosexuality and elevates that practice to a level of an accepted moral standard.”).

79. *See, e.g.*, Robert H. Knight & Kenneth L. Ervin, Concerned Women for America, Talking Points: The Employment Non-Discrimination Act (Feb. 27, 2002), <http://www.cultureandfamily.org/articledisplay.asp?id=2578&department=CFI&categoryid=papers> (“Statistically, homosexuals do not qualify as a bona fide minority group, as determined by the U.S. Supreme Court. Homosexuals are not defined by an immutable characteristic, they are not economically deprived, nor do they suffer from a history of discrimination and political powerlessness.”).

80. *See, e.g., id.* (“ENDA’s intent is to create grounds for lawsuits. By injecting sexuality into civil rights law, ENDA opens a Pandora’s box of ways for the government to dictate to businesses.”). The State of Colorado argued that Amendment Two, which prohibited state and local government entities from adopting policies protecting gay, lesbian, or bisexual people from discrimination, was justified by the State’s interest in protecting the free exercise and associational rights of individuals who objected to associating with homosexuals on religious grounds. *See Romer v. Evans*, 517 U.S. 620, 635 (1996). The Supreme Court made short shrift of these arguments. *See id.* (“The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”).

81. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Some justices have offered elaborations upon *Lemon*. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O’Connor, J., concurring) (introducing endorsement test as “clarification” of the *Lemon* purpose and effects prongs). The Court as a whole has also developed alternative or more detailed approaches in

evaluation of homosexuality that must inherently be religious.⁸² If the determination that homosexuality is morally acceptable is inherently religious, then such laws lack a secular purpose. Further, since most people who object to homosexuality do so on religious grounds, so the argument goes, preventing private actors from treating gay people differently than others also has the primary effect of inhibiting religious practices. This argument implicitly and erroneously assumes that other civil rights laws do not suffer from the same defects.⁸³ If gay rights laws fail to be justified by a secular purpose and impermissibly have the primary effect of inhibiting religion, then civil rights laws protecting people on the basis of race, sex, or marital status must fail too.

certain contexts. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (permitting opening legislative sessions with prayer from chaplains paid by public funds as unique practice deeply imbedded in the history and tradition of the country); *Zelman v. Simmons-Harris*, 536 U.S. 663, 669-70 (2002) (holding school voucher plan satisfies secular effects prong when government funding of religious schools is result of genuine independent choices of individuals, and noting that in indirect aid cases, the Court has “folded the entanglement inquiry into the primary effect inquiry, . . . because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion”). Further, some Justices have suggested abandoning the *Lemon* test. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (Rehnquist, J., plurality) (rejecting *Lemon* test, at least in context of passive government displays); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring and dissenting) (arguing that “[p]ersuasive criticism of *Lemon* has emerged” (citing *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O’Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting); *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment))). Nevertheless, a majority of the Supreme Court has never clearly rejected the *Lemon* test or come to consensus on an appropriate general alternative.

82. *Cf. Knight & Ervin, supra* note 79 (“All major faiths support marriage and oppose homosexual conduct. [By passing ENDA, t]he U.S. government would be placing people with traditional views of morality into opposition to their own government. King George never intruded this deeply into Americans’ lives.”). Claims that sexual orientation nondiscrimination laws are facially unconstitutional are rarely made explicitly. But their potential use exists, and an analysis of the relationship between religion and gay rights laws would be incomplete without addressing them.

83. Courts have made short shrift of the notion that prohibiting race, sex, and other forms of discrimination might lack a secular purpose or a primarily secular effect. *See, e.g.*, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 956 (9th Cir. 2004) (“In Title VII claims against religious employers, the relevant [Establishment Clause] criterion is entanglement”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (“It is clear that both the ADEA and Title VII have a secular purpose, and that neither has the principal or primary effect of advancing or inhibiting religion.”); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170 n.6 (4th Cir. 1985) (“There is no question that Title VII meets the first two of these tests.”); *EEOC v. Pacific Press Publ’g Ass’n*, 676 F.2d 1272, 1281-82 (9th Cir. 1982).

A. Secular Purpose: Ensuring Democratic Legitimacy

First, even if protecting gay people from discrimination relies on a moral evaluation of homosexuality, *not* protecting them by failing to pass sexual orientation nondiscrimination laws must rest on a similar, but opposite, moral evaluation.⁸⁴ Just as with discrimination based on any other characteristic, the state cannot avoid taking a moral stand.

Michael McConnell has argued, however, that the state could avoid passing moral judgment on homosexuality by approaching sexuality the way we approach religion.⁸⁵ McConnell argues that laws proscribing discrimination on the basis of sexual orientation in the private sector could be justified under such a regime in the ways that similar laws prohibiting religious discrimination in employment, housing, and public accommodations are justified despite the Religion Clauses' requirement that the government abstain from judging the morality of adherence to any particular faith.⁸⁶ As McConnell asserts, "[o]ne does not have to think homosexuality is

84. "When the government *fails* to pass a law prohibiting . . . discrimination on the basis of sexual orientation, in the face of documentation that such discrimination is occurring on a regular basis, . . . the government has similarly taken a position on a moral question." Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 123, 132 (Douglas Laycock et al. eds., 2008) (an earlier version is published as Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 *BROOK. L. REV.* 61, 86 (2006)).

85. McConnell calls this a "first amendment" approach to sexuality. See Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 234, 235 (Saul M. Olyan & Martha C. Nussbaum eds., 1998). He emphasizes that he is not suggesting that the Religion Clauses actually apply to sexuality. Rather, his approach attempts to answer the question: "What would the world look like if there were a 'first amendment' for sexual orientation?" *Id.* According to McConnell:

Partisans on neither side are likely to accept this solution, or anything like it, if they think they will ultimately prevail in the political and cultural struggle. So who are the possible constituents for a 'first amendment' resolution? Those who fear a total victory of their foes more than they savor a total victory for themselves, those who think a total victory for either side would come at too high a cost in freedom for the losers, and those who prefer our public life to focus on issues more appropriate to the competence of civil government.

Id. at 256-57.

86. See *id.* at 253-54.

moral to believe that employers have no business interfering in the private lives of their employees.”⁸⁷

But as Chai Feldblum emphasizes, the state must commit to *some* moral view of homosexuality, even if that view is one of official neutrality.⁸⁸ While gay rights laws do not necessarily convey a message of moral approval of homosexuality,

it is disingenuous to say that voting for a law of this kind conveys *no* message about morality at all. The only way for the state to justify prohibiting private employers, landlords and business owners from discriminating against gay people is for the state to have made the prior moral assessment that acting on one’s homosexual orientation is not so morally problematic as to justify private parties discriminating against such individuals in the public domain.⁸⁹

The fact that the state necessarily makes a moral evaluation when it adopts a gay rights law, just as it does when passing any other civil rights law, does not imply that such laws violate the Establishment Clause. If acting to protect gay people from private discrimination lacked a secular purpose by necessarily relying on a religious moral assessment, by the same logic, *not* acting would also violate the Establishment Clause for necessarily relying on an opposite religious assessment.

This catch twenty-two is easily avoided by recognizing that not all moral judgments are inherently religious. Almost all laws ultimately rest on a belief that it is morally appropriate or even morally required for the state to regulate behavior in certain ways.

87. *Id.* at 254. Andrew Koppelman agrees with McConnell, noting that

state neutrality on sexual ethics does not necessarily exclude antidiscrimination protection of gay people, any more than disestablishment of religion necessarily excludes antidiscrimination protection of religious minorities. “Disestablishment” does demand an easily available exemption for those who think that homosexual conduct is intrinsically immoral, but such exemptions may be defensible even without “disestablishment.” The Civil Rights Act of 1964’s moral condemnation of racism did not preclude exemptions for very small businesses.

Andrew Koppelman, *Sexual and Religious Pluralism*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 215, 226 (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

88. Feldblum, *supra* note 84, at 131.

89. *Id.*

Laws that prohibit all manner of harmful interactions between persons, from physical harms, like those caused by murder and assault, to economic and psychological harms, like those inflicted on victims of fraud, libel, and breach of contract, rest on moral evaluations about the proper balance between protecting individual liberty and preventing suffering in a free society. Civil rights laws are not fundamentally different. They represent society's consensus that the harms caused by private discrimination in certain contexts outweigh the value of protecting the liberty of individuals to act as they wish in those contexts. Our system of government necessarily assumes that it is possible to distinguish between secular and religious moral reasoning. The Establishment Clause doctrine could not function without recognizing that the multitude of value-balancing choices that must be made by any government can be justified by purely secular reasons.

Laws prohibiting private discrimination in certain contexts rest on a secularly grounded conception about the necessary role of public equality in a legitimate democratic society. Such laws are not justified solely on the grounds that discrimination on the basis of race, sex, or other protected characteristic is inherently morally wrong.⁹⁰ Rather, such laws embody a secular political conception that argues that basic equality norms must be enforced in the public domain in order for society to lay a legitimate claim to being democratic. As Michael McConnell has described it,

[u]nder this conception, some aspects of the market, though privately owned and controlled, are seen as "public" for certain purposes, including application of nondiscrimination norms. Thus, just as the

90. Nondiscrimination laws would potentially be subject to attack under the Equal Protection Clause if moral disapproval of discriminatory conduct were their only justification. *Cf. Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (holding that moral disapproval is not a legitimate justification for statute that bans homosexual but not heterosexual sodomy, even under a deferential rational basis standard). Most everyone in today's society would agree that civil rights laws prohibiting racial discrimination are justified by the moral equivalence of people of various races. Indeed, the Supreme Court has called "the principle that discrimination on the basis of race is odious and destructive" a concept "virtually sacred to our Nation as a whole." *Texas v. Johnson*, 491 U.S. 397, 418 (1989). But civil rights laws also rest on a consensus about the need to prevent such discrimination in certain "public" arenas in order to maintain a legitimate democracy by ensuring that people of all races have equal access to participation in civil life. The same justification supports laws prohibiting discrimination on the basis of sex, sexual orientation, age, and other protected characteristics.

government is seen as overstepping the proper bounds of its authority when it makes religious judgments, so is *General Motors*.⁹¹

It has long been recognized that basic equality norms must be enforced against public actors for a society to legitimately claim to be a democracy.⁹² Crucially for present purposes, however, in our modern society, we have come to realize that equal participation in civil life requires more than just equal treatment by the government, and thus we have come to conceptualize the “public” as extending beyond the narrow confines of the overt acts of the state.⁹³ Without

91. McConnell, *supra* note 85, at 253.

92. The Equal Protection Clause explicitly enshrines this basic norm in the Constitution, but the norm has also provided the foundation for the courts’ interpretations of other constitutional rules, including the Free Speech Clause, *see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (finding ban on residential signs unconstitutional in part because it eliminated equal opportunity for effective speech by “persons of limited means or modest mobility”); *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992) (requiring that government regulations of speech be viewpoint neutral, even regarding speech that may be proscribed); *cf. Chi. Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (finding subject-matter distinction in city ordinance that barred some kinds of picketing while permitting others unconstitutional under the Equal Protection Clause, and noting that “the equal protection claim in this case is closely intertwined with First Amendment interests”), and the Religion Clauses. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 663, 652, 655-56 (2002) (holding that programs that direct government aid to religious schools through “true private choice” satisfy the Establishment Clause because they are neutral with respect to religion and are not coercive); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (emphasizing importance of government acting with neutrality toward religion under Establishment Clause); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993) (reciting rule that laws that are not neutral or of general applicability with respect to religion are subject to strict scrutiny under the Free Exercise Clause).

93. The classical liberal approach to political theory, which conceives of the “public” domain as strictly involving overt state action, requires that equality norms only be enforced against the state, leaving “private” actors free to discriminate as they wish in their own personal and commercial affairs. This exclusive focus on the overt actions of the state was the product of a philosophical approach that no longer is persuasive. The approach imagined the existence of pre-societal rights, in particular what Joseph Story called the “sacred rights of property.” Joseph Story, *Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829*, in *THE LEGAL MIND IN AMERICA* 178 (Perry Miller ed., 1962). While some may still hold a similar view today, society has recognized that community intervention into decisions about how one may use his or her property are legitimate. The community, through the state, has created the current rules of property, either through judges’ decisions or legislative enactments, and the community may legitimately change those rules. *See* Cass R. Sunstein, *Lochner’s Legacy*, 87 *COLUM. L. REV.* 873, 904 (1983) (“The common law is not prepolitical; its conception of the function of the state has been repudiated by the political branches of government, and for good reasons. Constitutional and statutory interpretation is properly informed by this repudiation.”) (citation omitted). The modern version of the “public-private” distinction, which conceives of the “public” as expanding beyond overt actions of the state, is the result of the civil rights era and is “deeply embedded in modern legal and popular conceptions.” McConnell, *supra* note 85, at 253. The Civil Rights Act of 1964 marks a watershed moment in this evolution of understanding. *Cf. Bruce Ackerman, The Living*

the right to be protected from discrimination in certain vital areas of life, one cannot truly be said to be an equal citizen. The legal guarantee of equal treatment by the state does not ensure that subjugated groups will have access to the core necessities of life, including housing and employment. And one cannot truly be said to be an equal citizen in a democratic society if one is excluded from services and amenities made publicly available. Society cannot legitimately claim the “democratic” mantle when groups of its citizens are systematically denied access to the market due to characteristics that “bear[] no relation to the individual’s ability to participate in and contribute to society.”⁹⁴ Though the courts have found constitutional support for federal nondiscrimination laws in the federal government’s power to regulate interstate commerce,⁹⁵ the philosophical support for such power rests primarily on a fundamentally modern, and avowedly secular, re-imagination of the “public-private” distinction.

B. Secular Effects: Preventing Harm

Granting that gay rights laws have the secular purpose of ensuring that all people have equal access to participation in civil society, do they nevertheless run afoul of the Establishment Clause for having the primary effect of inhibiting religion? One is hard-pressed to find explicit objections to gay rights laws that do not rely on religious beliefs.⁹⁶ It does seem likely that the great bulk of individuals who would wish to violate such laws would argue that an obligation to comply with sexual orientation nondiscrimination laws would impinge on their religious freedom. But again, this is nothing new. If gay rights laws fail the Establishment Clause secular effects

Constitution, 120 HARV. L. REV. 1737, 1751-52 (2006) (arguing that the Civil Rights Act, as a “landmark statute,” should be conceptualized as on par with a constitutional amendment); William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237 (2001). With its passage, the nation acknowledged that the “public” sphere is broader than the state.

94. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

95. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

96. Though opponents of same-sex marriage and gay adoption laws often point to alleged negative effects on children caused by same-sex parenting, such arguments are generally inapplicable in employment, housing, and public accommodations contexts. Further, such arguments are usually implicitly or explicitly coupled with religious objections to same-sex sexuality.

test, then so must civil rights laws prohibiting discrimination on the basis of race, sex, and marital status. Historically, arguments against these civil rights laws were premised on religious convictions, but both society and the courts have rejected the notion that they infringe on religious liberty.

For example, while religious leaders and religious language played pivotal roles in advancing the cause of racial equality during the Civil Rights Movement of the 1950s and 60s,⁹⁷ religious arguments formed the core *opposition* to racial equality, too. Jane Dailey has documented the ways that religion played a “central role” in articulating a defense of Jim Crow laws and resistance to desegregation.⁹⁸ Segregationist theology focused in particular on the supposed moral evils of interracial sexuality.⁹⁹ The similarities to contemporary religiously grounded arguments against equal rights for gay people are striking.¹⁰⁰ Further, religious arguments focusing

97. See Dailey, *supra* note 65, at 120.

Historians have noted respectfully the deep religious faith of many civil rights leaders and supporters and the influence of religious language and ideals on the movement. Although more recent scholarship has broadened both the organizational and ideological genealogy of the civil rights movement, even those historians who qualify the influence of the black church on the movement recognize the importance of the religiosity of black and white southerners in structuring their views in favor of civil rights.

Id.

98. *Id.* at 122.

99. In 1933, when investigating the ways people rationalize prejudice, W. O. Brown called the prejudice against racial intermarriage “the most intense aspect of race prejudice,” and the taboo against miscegenation “fundamental.” W. O. Brown, *Rationalization of Race Prejudice*, 43 INT’L J. ETHICS 294, 296, 304 (1933). When the Civil Rights Movement sparked two decades later, the role of interracial sex in the mind of segregationists was no less critical. See Klarman, *supra* note 16, at 447 (noting that over ninety percent of whites across the country opposed interracial marriage in the 1950s). “It was through sex that racial segregation in the South moved from being a local social practice to a part of the divine plan for the world . . . [and] assumed, for the believing Christian, cosmological significance.” Dailey, *supra* note 65, at 122. In the South, white religious leaders and laymen alike drew on biblical stories to argue that race mixing was the cause of all the major tragedies of human history “from the Fall and the Flood through the Holocaust Bringing this narrative together and linking the catastrophes of the past with the integrated apocalypse to come was the chief sin in the service of the anti-Christ: miscegenation.” *Id.* at 123.

100. Just as many contemporary conservatives claim same-sex sexuality is incompatible with God’s will, segregationists lamented the immorality and divine disapproval of interracial sex. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge as stating, “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for [interracial]

on sexuality remain prominent defenses asserted by those who openly support racial discrimination today.¹⁰¹

marriages. The fact that he separated the races shows that he did not intend for the races to mix.”); State *ex rel.* Hawkins v. Bd. of Control, 83 So. 2d 20, 28 (Fla. 1955) (Terrell, J., concurring) (“[W]hen God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man, but we are now advised [by opponents of segregation] that God’s plan was in error”); Naim v. Naim, 87 S.E.2d 749, 752 (Va. 1955) (“[T]he natural law which forbids the[] intermarriage [of the races] and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures.”), *vacated*, 350 U.S. 891 (1955), *reaff’d on remand*, 90 S.E.2d 849 (Va. 1956), *motion to recall mandate denied*, 350 U.S. 985 (1956); MARK NEWMAN, GETTING RIGHT WITH GOD: SOUTHERN BAPTISTS AND DESEGREGATION: 1945-1995 53 (2001) (quoting resolution passed by South Carolina’s Summerton Baptist Church in October, 1957, stating: “(1). God made men of different races and ordained the basic difference between races; (2). Race has a purpose in the Divine plan, each race having a unique purpose and distinctive mission in God’s plan; (3). God meant for people of different races to maintain their race purity and racial identity and seek the highest development of their racial group. God has determined the ‘bound of their habitation.’” (quoting ACTS 17:26)).

While opponents of gay equality, and especially of same-sex marriage, often rest their claims on the supposedly bedrock foundational importance of the family in the sacred plan, opponents of racial intermarriage had a long history of making similar arguments. In 1906, segregationist W. B. Smith argued that “the idea of race is far more sacred than that of the family. It is in fact the most sacred thing on earth. And he who offends against it is an apostate from his kind and mounds the apex of sacrilege.” Brown, *supra* note 99, at 298 (quoting W. B. SMITH, THE COLOR LINE: A BRIEF IN BEHALF OF THE UNBORN 10 (1906)).

Further, opponents of gay rights, just like opponents of integration before them, claim their position rests on the plain, unequivocal teachings of the Bible. In 1954, after the Supreme Court held segregation in public schools unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954), Rev. James F. Burks of Bayview Baptist Church in Norfolk, Virginia, argued, in a sermon that was widely reprinted in newspapers and circulated in pamphlet form,

We are interested—finally and absolutely—in what the Word of God teaches about the races of men. . . . The Word of God is the surest and only infallible source of our facts of Ethnology, and when man sets aside the plain teachings of this Blessed Book and disregards the boundary lines God Himself has drawn, man assumes a prerogative that belongs to God alone.

Dailey, *supra* note 65, at 121. Similarly, ministers who were prominent members of the crowds surrounding and protesting Central High School in Little Rock, Arkansas, when it was forcibly integrated in 1957, asserted that the Bible “gave clear guidance on the integration-segregation issue.” *Id.* at 125 (citing ERNEST Q. CAMPBELL & THOMAS F. PETTIGREW, CHRISTIANS IN RACIAL CRISIS: A STUDY OF LITTLE ROCK’S MINISTRY 51 (1959)).

101. Betty Dobratz has shown that religious belief plays a powerful role in the contemporary white racist movement (more commonly known as the white supremacist movement). She focuses in particular on the roles of the Christian Identity, Odinist, and Church of the Creator religions among white racials, and notes that “religion is one of the crucial defining characteristics in ethnic identity and one of the rallying points in ethnic conflict.” See Betty A. Dobratz, *The Role of Religion in the Collective Identity of the White Racist Movement*, 40 J. SCI. STUDY OF RELIGION 287, 288 (2001) (quoting J. Milton Yinger, *Ethnicity*, ANN. REV. OF SOC. 151 (1985)). Further, though the vast majority of Americans no longer admit to holding explicitly racist views like those promoted by segregationist opponents of the Civil Rights

Similarly, opposition to sex equality laws is frequently grounded in religious language. Though some opponents of such laws argue for “traditional” values and sex-defined roles, at bottom these traditional limitations on women’s rights are defended by religious arguments. And those who object to marital status nondiscrimination laws generally rely on their religious convictions about the appropriate roles of women as wives and mothers or the impropriety of cohabitation outside of wedlock.¹⁰²

Granted, the vast majority of defendants in race, sex, marital status, and other discrimination cases do not raise religious defenses, preferring to dispute that any discrimination took place. But of those who admit they did discriminate, the overwhelming majority point to their religious tenets in defense.¹⁰³ There is no reason to assume that defense against sexual orientation nondiscrimination laws will follow a different trajectory. Only a relatively small minority of the population claims to believe active discrimination against gay people

Movement or fringe white racialists today, religion still powerfully affects people’s attitudes towards racial equality. Among whites across denominations, those who attend church more frequently and participate more heavily in other church activities are less likely to see discrimination, laws and institutions, or lack of access to schools and other social connections as causes of current inequalities for black people and more likely to see lack of effort or hard work by African Americans themselves as causes for their social inequalities. See Penny Edgell & Eric Tranby, *Religious Influences on Understandings of Racial Inequality in the United States*, SOCIAL PROBLEMS 263, 281 (2007).

102. See, e.g., *Thomas v. Anchorage Equal Rights Comm’n (Thomas III)*, 102 P.3d 937, 939 (Alaska 2004) (reaffirming earlier case finding landlords not entitled to religious exemption from marital status nondiscrimination laws despite their religious objections to renting to unmarried cohabiting couples); *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909, 912 (Cal. 1996) (finding no substantial burden on religion in forcing landlord to rent to unmarried couples despite sincere religious objections because the landlord could avoid the burden by exiting the rental business); *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 234 (Mass. 1994) (finding substantial burden on landlord in similar case and remanding for evaluation of whether state had compelling interest in applying marital status nondiscrimination law).

103. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (college prohibited interracial dating based on interpretation of Bible); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985) (for-profit sports club run by devout Christian refused to employ “individuals living with but not married to a person of the opposite sex; a young, single woman working without her father’s consent or a married woman working without her husband’s consent; a person whose commitment to a non-Christian religion is strong; and someone who is ‘antagonistic to the Bible,’ which according to *Galati[a]ns* 5:19-21 includes fornicators and homosexuals.”); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (church-operated school provided better health benefits to men than women because of religious beliefs about differing gender roles).

is religiously required.¹⁰⁴ Most people accused of sexual orientation discrimination, even including many explicitly religious institutions,¹⁰⁵ will likely offer defenses that deny any such discrimination took place.

That gay equality is more controversial in more mainstream religious circles today than is racial or (perhaps) gender equality does not make sexual orientation nondiscrimination laws somehow more intrusive on religious freedom than race or sex equality laws. Religious disagreement about racial equality was as intense and pervasive before the Civil Rights Movement as such disagreement about sexual orientation is now.¹⁰⁶ If gay rights laws unconstitutionally infringe upon the religious sphere now, then the Civil Rights Act of 1964 suffered from similar defects when it was adopted. Racial equality is less controversial within religious communities today because of the social impact of the Civil Rights Movement. That gender and sexual orientation equality norms remain less widely accepted within various religious traditions is a reflection of the differences in stages of the race, sex, and gay equality movements,¹⁰⁷ not any inherent differences in the relationship between these movements and religion.

That many, if not most, people who wish to discriminate on the basis of race, sex, marital status, or sexual orientation rely on religious language to support their positions does not mean that civil rights laws prohibiting such discrimination fail to have a primarily secular effect. Like laws preventing parents from withholding medical treatment for their children, child labor laws, and mandatory vaccination laws, civil rights laws have the primarily secular effect of protecting people in vulnerable groups from harm, even if many, or perhaps most, people who wish to violate such laws have religious

104. See polling data cited *supra* note 15.

105. Most major American religious denominations officially condemn discrimination on the basis of sexual orientation. See *supra* note 77.

106. See generally Dailey, *supra* note 65.

107. Cf. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?* 48 B.C. L. REV. 781, 782 (2007) (arguing that differences in courts' approaches to claims for religious exemptions from race, sex, and sexual orientation nondiscrimination laws reflect not logic or principle but "the different trajectories of social movements mobilizing around each category").

reasons.¹⁰⁸ Laws affect the public and potential victims, not just potential violators. There are likely many laws that have the legitimate secular effects of preventing harms and ensuring peace and order despite the fact that most people who wish to violate those laws are driven by religious reasons. Indeed, most, if not all, government officials who would prefer to enforce their religious views on the general populace object to the Religion Clauses of the First Amendment on explicitly religious grounds. Yet the Religion Clauses themselves still achieve the preeminently secular effects of promoting religious liberty for all people and protecting minorities from religiously-motivated coercion.

Civil rights laws have the primary effect of demarcating certain aspects of the market as “public” for the purposes of enforcing nondiscrimination norms. In essence, these laws identify the market’s provision of core goods like housing, employment, and generally available goods as part of the secular public sphere.¹⁰⁹

Sexual orientation nondiscrimination laws are not facially invalid under the Establishment Clause, because they have a primary secular purpose and effect. When applied to secular entities or individuals who have no religious objections, they will involve no entanglement with religion. The application of such laws to religious individuals, organizations, or institutions, however, may pose a more difficult question under the Free Exercise Clause.

108. See *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 170 (1944) (holding that the state’s authority to restrict parents’ freedom in child-rearing “is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”) (citation omitted); *In re Elisha McCauley*, 565 N.E.2d 411, 413 (Mass. 1991) (permitting hospital to provide child a necessary blood transfusion over parents’ religious objections, stating, “When a child’s life is at issue, it is not the rights of the parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child.”) (internal quotation omitted); *Commonwealth v. Barnhart*, 497 A.2d 616, 624-25 (Pa. Super. 1985) (affirming involuntary manslaughter conviction of parents who withheld medical treatment from infant child based on religious beliefs), *appeal denied*, 538 A.2d 874 (Pa. 1988), *cert. denied*, 488 U.S. 817 (1988).

109. Legal recognition of same-sex marriage also has a primarily secular effect. Specifically, such recognition provides legal and financial protections for family units, provides stable environments for the raising of children, and promotes long-term, committed relationships. Opponents of same-sex marriage routinely laud the benefits that the institution of marriage brings to society. Whether one believes legal recognition of same-sex marriage will strengthen or weaken those benefits, such effects are secular, not religious.

IV. RELIGIOUS EXEMPTIONS FROM SEXUAL ORIENTATION
NONDISCRIMINATION LAWS: AS-APPLIED CHALLENGES AND
LEGISLATIVE EXEMPTIONS

Only the most extreme opponents of sexual orientation nondiscrimination laws take the position that such laws are unconstitutional on their face. More commonly voiced concerns focus on the proper scope of exemptions from such laws.¹¹⁰ There are two distinct instances in which the state might attempt to apply a nondiscrimination norm to a private entity that objects on religious grounds. First, the government might condition the receipt of certain special government benefits, such as the award of a social services contract or the use of government facilities, on compliance with a policy prohibiting discrimination on the basis of sexual orientation. In such cases, those who refused to comply would be denied the opportunity to access certain benefits, but would be permitted to continue engaging in discriminatory conduct without interference from the state. Second, the government might directly regulate the conduct of private entities in the marketplace, as it does through the adoption and enforcement of laws prohibiting discrimination in employment, housing, and public accommodations.

The constitutional limitations on the government's authority to act in these two manners are distinct, and their implications for religious liberty will be discussed separately below. In broad terms, so long as it complies with the viewpoint neutrality requirements of the First Amendment, the state may condition government subsidies on compliance with nondiscrimination norms without seriously threatening the religious liberty of private actors. In contrast, the constitutional constraints on direct state regulation of the discriminatory conduct of private entities depend on whether the relationship in which discrimination is alleged is either primarily religious or primarily secular. In both cases, however, the courts have developed rich bodies of case law that can be relied upon to resolve claims brought under sexual orientation nondiscrimination laws.

110. See generally Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3 (raising concerns over application of nondiscrimination laws to religious opponents of same-sex marriage).

A. Nondiscrimination Conditions on Special Government Benefits

Some opponents of gay rights laws argue that their adoption would lead to the loss of government funding and other benefits for entities that object to homosexuality on religious grounds. The Becket Fund, for example, claims that “[i]n states where courts and legislatures cannot force religious groups to accept same-sex marriage norms, revocation of special government benefits and accommodations may prove equally effective.”¹¹¹ Of course, the Becket Fund’s rhetoric notwithstanding, courts and legislatures cannot “force religious groups to accept same-sex marriage norms” in any state. Religious organizations can, and always will be able to, accept whatever “marriage norms” they so choose.¹¹² The real threat that the Becket Fund fears is not that religions will be forced to recognize same-sex marriages—because this will not and cannot happen—but rather that religious groups may no longer be able to use government funds or other “special government benefits” to discriminate against individuals based on their sexual orientation because of nondiscrimination laws.

It is worth noting first that regardless of the government’s policies toward same-sex marriage or sexual orientation discrimination, providing many “special government benefits” to religious groups directly runs afoul of the Establishment Clause. For example, some advocates point to cases involving the revocation of special access to government facilities for the Boy Scouts as evidence of the dangers to religious liberty posed by same-sex marriage recognition and sexual orientation nondiscrimination laws generally.¹¹³ Yet, courts in those cases have repeatedly found that providing special benefits, such as offering discounted leases to government facilities in a noncompetitive process, to the explicitly religious Boy Scouts violates the Establishment Clause principle of

111. *Id.* at 18.

112. *See supra* notes 46-55, 61 and accompanying text.

113. The Becket Fund points to the experiences of the Boy Scouts as a “useful parallel” to support its claim that legal recognition of same-sex marriage will lead religious institutions to “face challenges to their equal access to a diverse array of public subsidies on the one hand, and access to fora where they may freely discuss their religious beliefs on the other.” Becket Fund, Brief Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 23.

neutrality.¹¹⁴ As a federal district court in California held in *Barnes-Wallace v. Boy Scouts of America*,¹¹⁵ the Boy Scouts’ “status as an expressive organization does not entitle it to governmental aid, especially on terms more favorable than those held by other, nondiscriminatory, organizations.”¹¹⁶

While cases involving preferential government treatment of explicitly religious organizations can be resolved relatively easily, the more difficult question is how to handle religious entities that have been denied access to generally available government benefits because of their failure to abide by government nondiscrimination policies. In *Boy Scouts of America v. Wyman*,¹¹⁷ the Second Circuit held that excluding the Boy Scouts from the state’s workplace charitable contribution campaign for a violation of Connecticut’s Gay Rights Law¹¹⁸ did not violate the Scouts’ First Amendment rights. Similarly, in *Evans v. City of Berkeley*,¹¹⁹ the Supreme Court of California ruled that the City of Berkeley’s requirement that all organizations leasing public berths at the City’s marina ascribe to a nondiscrimination policy protecting homosexuals and atheists, among others,¹²⁰ did not violate the First Amendment rights of the Sea Scouts, a local “subdivision” of the Boy Scouts.¹²¹

114. See *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1269 (S.D. Cal. 2003) (finding City of San Diego’s twenty-five-year leases of two parcels of “prized parkland” to Boy Scouts for nominal sums in uncompetitive process violated the Establishment Clause because “[a] reasonable observer would perceive an advancement of religion as a result of the City’s failure to use a neutral process in selecting lessees”); cf. Joseph Slobodzian, *Council Votes to End City Lease with Boy Scouts*, PHILA. INQUIRER, June 1, 2007, at B1 (discussing city council’s decision to end preferential below-market lease of city-owned building space to Boy Scouts); *Winkler v. Chi. Sch. Reform Bd. of Trs.*, 382 F. Supp. 2d 1040 (N.D. Ill. 2005) (finding federal statute requiring military to provide loans and other logistical support to Boy Scouts for annual Jamboree, 10 U.S.C. § 2554 (2006), violated the Establishment Clause), *rev’d sub nom. Winkler v. Gates*, 481 F.3d 977, 979 (7th Cir. 2007) (finding plaintiff taxpayers lacked standing). These cases are not, as the Becket Fund claims, about “equal . . . access to fora.” Becket Fund, Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 23. Rather, they are about special privileges granted to explicitly religious entities.

115. 275 F. Supp. 2d 1259 (S.D. Cal. 2003).

116. *Id.* at 1287.

117. 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).

118. CONN. GEN. STAT. § 46a-81(a)-(r) (West 2009).

119. 129 P.3d 394 (Cal. 2006), *cert. denied*, 549 U.S. 987 (2006).

120. A Berkeley City Council resolution required that “access to marina facilities may ‘not be predicated on a person’s race, color, religion, ethnicity, national origin, age, sex, sexual

The courts in both cases crucially recognized that government actors do not run afoul of the First Amendment when they condition the receipt of benefits on compliance with rules of *conduct* designed to protect the public from harm. As the *Wyman* court explained,

[w]here a law is on its face viewpoint neutral (e.g., when it applies to conduct that is not primarily expressive) but has a differential impact among viewpoints, the inquiry into whether the law is in fact viewpoint discriminatory turns on the law's purpose. Such a law is viewpoint discriminatory only if its purpose is to impose a differential adverse impact upon a viewpoint.¹²²

As discussed above, nondiscrimination laws have the primary purpose not of punishing certain viewpoints but of promoting democratic legitimacy by ensuring that vulnerable groups enjoy full and equal access to participation in civil life.¹²³ Indeed, the government has a particularly strong interest in ensuring that it avoids using public resources to directly support discriminatory action.

We should not avoid the bare fact that there is a trade-off here. Either the state avoids subsidizing discrimination that undermines

orientation, marital status, political affiliation, disability or medical condition.” *Evans*, 129 P.3d at 398 (quoting the resolution).

121. *See id.* at 397; *cf.* *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (holding that written nondiscrimination affirmation requirements of Title IX apply to religious college where institution's students receive federal financial assistance), *superseded by statute as stated in* *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 75 (2d Cir. 2008). Though its specific holding has been superseded, the *Grove City College* Court correctly stated that “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.” 465 U.S. at 576. Requiring funding recipients to comply with nondiscrimination laws with respect to race, sex, disability, age, and various other statuses is commonplace. *See, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (prohibiting recipients of federal funding from discriminating on the basis of race, color, or national origin); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006) (same for sex); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2006) (same for disability); Age Discrimination Act of 1975, 42 U.S.C. § 6102 (2006) (same for age).

122. *Wyman*, 335 F.3d at 94; *see also* *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1288 (S.D. Cal. 2003) (“The government’s decision to exclude organizations with discriminatory membership policies is viewpoint neutral when the purpose for the decision is to protect persons from the effects of discrimination and not to exact a price for the organization’s protected expression.”).

123. *See supra* notes 90-95 and accompanying text; *see also* *Wyman*, 335 F.3d at 95 (“[T]he purpose of Connecticut’s Gay Rights Law is to discourage harmful conduct and not to suppress expressive association.”).

society's democratic legitimacy, or it promotes the autonomy of religiously-motivated discriminators. Carving out an exemption for religious actors from general policies prohibiting discrimination by the recipients of government benefits is no escape. Such a benefit would amount to a direct government preference for religion over nonreligion, in violation of the Establishment Clause. Religious exemptions from direct regulations like employment, housing, and public accommodation laws at least plausibly could be argued to satisfy the Establishment Clause because they merely act to accommodate religious exercise by *removing* a government-imposed burden.¹²⁴ Nevertheless, exemptions from general rules regarding access to government benefits cannot so easily be conceptualized. When the state directly subsidizes religious actors who discriminate, but denies such subsidies to those who discriminate for nonreligious reasons, it is not lifting a burden, but rather is taking affirmative action to support religion. It cannot do so.¹²⁵ Either nondiscrimination conditions on government benefits must be applied across the board, or they must be applied to no one.

This conclusion is likely to be troubling for religious entities that rely on government funding streams to provide social and other services, but the result has nothing in particular to do with sexual orientation nondiscrimination laws. It applies to all nondiscrimination conditions placed on government funding and other special government benefits. The Becket Fund's claim that "[t]he amount of government benefits at risk is large and only stands to grow in light of the increasing cooperation between faith-based organizations and state and federal governments through health, education, and 'charitable choice' programs"¹²⁶ only reinforces the value of these nondiscrimination laws. If services traditionally provided by government to the general public, like healthcare, education, and welfare, are increasingly contracted out to private organizations, the public has a strong interest in ensuring those

124. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987); see also *infra* notes 316-32 and accompanying text (discussing *Amos* and permissible legislative exemptions from nondiscrimination laws for religious entities).

125. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (government may not prefer religion over nonreligion).

126. Becket Fund, Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 18.

services remain accessible to all without discrimination. No religious organization has a right to government funding. Indeed, for such funding to be constitutional under the Establishment Clause, the religious organization must be treated like all other secular organizations receiving similar funding. No religious group will lose its funding for opposing same-sex marriage or gay rights laws generally. Groups that *actively discriminate* against gay people in the provision of government-funded services, however, are a different matter.

B. Direct Regulation through Employment, Housing, and Public Accommodations Nondiscrimination Laws

While the state may justifiably condition public benefits on compliance with nondiscrimination rules without impermissibly infringing on religious liberty, whether and when it may directly regulate the discriminatory conduct of private religious actors is a more nuanced matter. There are two interrelated questions at issue here. First, given constitutional constraints, what kinds of relationships *must* legislatures exempt from sexual orientation nondiscrimination laws? Second, what kinds of exemptions, though not constitutionally required, *may* legislatures write into such laws?

1. As-Applied Challenges: Constitutional Constraints on Direct Regulation of Discriminatory Conduct

Though the Supreme Court has never directly addressed the question,¹²⁷ since the passage of the Civil Rights Act of 1964, lower federal and state supreme courts have developed a rich body of case law grappling with claims for religious exemptions to race, sex, age, sexual orientation, and other nondiscrimination laws. The application of nondiscrimination laws to religious objectors must satisfy at least two, and in many cases three, constitutional tests.

127. The Supreme Court had the chance to address these issues in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), when a religiously-affiliated school fired a teacher who had become pregnant. The school claimed its religious beliefs required that women with preschool age children remain home to care for them. *See id.* at 623. The Court avoided addressing the claim, however, by dismissing the case under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), because litigation was pending in the state court system. *See Dayton Christian Sch.*, 477 U.S. at 625.

First, the federal Establishment Clause requires that legislation have a primarily secular purpose, a primarily secular effect, and avoid excessive entanglement between government and religion.¹²⁸ As discussed above, sexual orientation nondiscrimination laws satisfy the secular purpose and secular effects prongs.¹²⁹ Thus the relevant establishment question involved in the application of such laws is whether they create excessive entanglement problems.¹³⁰

Second, the federal Free Exercise Clause, as interpreted in *Employment Division v. Smith*,¹³¹ permits regulation of religious objectors so long as the law in question is neutral and generally applicable.¹³² Employment, housing, and public accommodations nondiscrimination laws generally satisfy this requirement.¹³³ Civil rights laws do not provide for individualized exemptions.¹³⁴ In some

128. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). As previously noted, recent cases have elaborated upon or criticized *Lemon*, but a majority of the Court has never explicitly rejected the basic test it sets forth. *See supra*, note 81.

129. *See supra* Part III.

130. *See, e.g.*, *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (engaging in entanglement analysis without mentioning secular purpose or secular effects prongs of *Lemon*); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996) (same). The courts have approached entanglement issues by considering the nature of the institution subject to the regulation, the nature of the regulation, and the nature of the relationship created between the institution and the state by applying the regulation. *See Lemon*, 403 U.S. at 615.

131. 494 U.S. 872 (1990).

132. *See id.* at 878-79.

133. Richard Duncan has argued that sexual orientation nondiscrimination laws that provide exemptions for religious organizations but not religious individuals are not religiously neutral, because they favor some classes of believers—those who form specifically religious organizations—over others. *See Duncan, supra* note 17, at 424-25. I suggest that such exemptions generally satisfy the religious neutrality criterion, because they seek to distinguish “public” activities in which the state properly enforces nondiscrimination norms (even when those activities are operated by religiously-motivated individuals) from the private associational sphere, where the state must permit religiously motivated discrimination. *See supra* notes 90-95 and accompanying text; *infra* notes 134, 254-60 and accompanying text. In contrast, some sexual orientation nondiscrimination norms *do* fail the religious neutrality requirements of the First Amendment, because they provide exemptions for religious entities or individuals absent from laws prohibiting discrimination on the basis of race, sex, or other characteristics. *See infra* notes 329-32 and accompanying text. The state need not exempt everyone with a religious motivation from nondiscrimination laws, regardless of the activity at issue, but it must provide analogous exemptions from laws prohibiting discrimination on the basis of different characteristics.

134. *Smith* distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963), and subsequent unemployment compensation cases, in which the Court had applied a test prohibiting the state from imposing a substantial burden on religious exercise without a compelling interest, *see Sherbert*, 374 U.S. at 403, by asserting that “where the State has in place a system of individual

circumstances, however, employers, landlords, and purveyors of public accommodations may be able to raise “hybrid” claims against the enforcement of nondiscrimination laws by relying on the argument that such laws impinge upon both religious free exercise and freedom of association.¹³⁵ Indeed, I argue below that understanding religious exemption claims in just this way provides support for the resolutions that most courts have come to in difficult cases and can provide guidance to future courts faced with similar situations.¹³⁶ In those cases where a party truly can raise a hybrid claim, the government may only substantially burden religious exercise by showing that the regulation furthers a compelling state interest.¹³⁷

Regardless of whether a hybrid claim is available, however, more often than not, civil rights laws must satisfy the narrowly tailored and compelling interest free exercise standard. This standard is required of federal action by the Religious Freedom Restoration

exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 494 U.S. at 884.

That Title VII only applies to employers with fifteen or more employees, *see* 42 U.S.C. § 2000e(b) (2006), the Fair Housing Act does not apply to small owner-occupied dwellings, *see* 42 U.S.C. § 3603(b)(2) (2006), and other civil rights laws have similar limits, does not mean these laws provide for the kinds of “individualized exemptions” contemplated in *Smith*. *Cf.* *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405, 1408-09 (9th Cir. 1991) (holding that in Immigration Reform and Control Act, which requires employers to verify immigration status of employees, exceptions for independent contractors, household employees, and persons hired prior to certain date “exclude entire, objectively-defined categories of employees from the scope of the statute; they are not ‘individualized exemptions’ within the meaning of *Smith*.”), *abrogated on other grounds* by *Thomas v. Anchorage Equal Rights Comm’n (Thomas I)*, 165 F.3d 692 (9th Cir. 1999). The legislature’s tailoring of the scopes of these laws is substantially different, and entails much less risk to religious liberty, than the provision of discretion to individual government functionaries to decide when religious hardship may be sufficient for exemptions from general laws in individual cases. Indeed, the way legislatures limit the scope of civil rights laws often promotes individual liberty by accommodating personal association interests. *See infra* notes 254-60 and accompanying text.

135. The *Smith* Court held that the First Amendment may require exempting religiously-motivated actions from neutral generally applicable laws in “hybrid” cases involving “the Free Exercise Clause in conjunction with other constitutional protections.” 494 U.S. at 881. The Court specifically noted that “it is easy to envision a case in which a challenge on freedom of association grounds would . . . be reinforced by Free Exercise Clause concerns.” *Id.* at 882 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

136. *See infra* notes 243-314 and accompanying text.

137. *See Smith*, 494 U.S. at 881-82; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Act (“RFRA”)¹³⁸ and imposed on state action by many state constitutions, as interpreted by state supreme courts.¹³⁹

Claims to religious exemptions from nondiscrimination laws may arise in two basic forms, each of which relies on both establishment and free exercise ideas. First, adopting what commentators have called the “*church autonomy*” argument, a self-described religious organization might argue that, regardless of whether or not it engaged in prohibited activities, First Amendment principles demand that the state refrain from reviewing its autonomous practices.¹⁴⁰ The basic thesis is that principles of religious liberty require the state to refrain from interfering with the internal operations and decision-making of religious entities.

138. 42 U.S.C. §§ 2000bb to 2000bb-4 (2006). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court invalidated RFRA as it applied to state and local government action. *Id.* at 536. But in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Court applied RFRA without comment to federal action. *Id.* at 430-31.

139. *See, e.g.*, *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994) (rejecting *Smith* approach under Massachusetts state constitution); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (same in Minnesota). Some states have adopted the *Smith* approach for their state Constitutions. *See, e.g.*, *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 123 (Md. 2001). Others take an intermediate approach. *See, e.g.*, *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006) (adopting balancing approach in which “substantial deference is due the Legislature, and . . . the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom,” and noting that “[t]his test, while more protective of religious exercise than the rule of *Smith*, is less so than the rule stated (though not always applied) in a number of other federal and state cases”). Yet other state supreme courts have left the proper standard of review of free exercise claims under their state constitutions an open question. *See, e.g.*, *N. Coast Women’s Care Med. Group, Inc. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008).

140. Douglas Laycock first set forth a case for a church autonomy exemption from labor relations laws. *See Laycock, supra* note 25. Laycock’s basic claim is that “churches have a constitutionally protected interest in managing their own institutions free of government interference.” *Id.* at 1373. According to Laycock, the Free Exercise Clause not only protects “the bare freedom to carry on religious activities,” *id.* at 1388, and “the right of conscientious objection to government policy,” *id.* at 1389, but also “the right of churches to conduct [religious] activities autonomously: to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.” *Id.* (citations omitted). Laycock notes that “the right of church autonomy does not depend on conscientious objection. Churches may object to regulation on church autonomy grounds even when their official doctrine seems to support the regulation.” *Id.* at 1398. Laycock’s article has been influential with the courts. *See, e.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (quoting Laycock to distinguish *Smith*); *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (citing Laycock); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 n.3, 1171 (4th Cir. 1985) (citing Laycock repeatedly); *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 127-28 (Md. 2001) (quoting Laycock extensively); *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301, 306 n.8 (Mass. 2004) (quoting Laycock).

Second, adopting what I will call the *religiously motivated discrimination* argument, individuals or organizations might admit that they have indeed engaged in discrimination of a proscribed variety, either in their internal affairs or in their relationships with outsiders, but assert that their religious beliefs require them to do so.¹⁴¹ More specifically, those who assert such claims argue that their religious beliefs condemn as immoral a certain practice, behavior, or relationship protected by nondiscrimination laws. Thus, requiring them to comply with such laws would force them to condone what their religious beliefs abhor. Gay rights laws have the potential to lead defendants to raise both kinds of claims.

The courts have managed to reach mostly consistent and defensible outcomes in cases dealing with both church autonomy and religiously motivated discrimination arguments by generally focusing on the nature of the relationship in which discrimination has been alleged. Generally speaking, when the relationship is primarily religious, courts have permitted an exemption, but when the relationship is primarily secular, they have not.¹⁴² This one-dimensional focus, however, has led to some disagreement when the relationship at issue clearly entails both important secular and religious elements. After surveying the case law, I suggest that recognizing that claims for religious exemptions from nondiscrimination laws are also claims to a protected right of

141. Laycock would say such claims are based on both church autonomy and conscientious objection. See Laycock, *supra* note 25, at 1374, 1388.

142. In this respect, the courts have generally followed the advice of Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979) (proposing decreasing protection of activities of churches the farther those activities are removed from the church's "spiritual epicenter"). Laycock argues that this "unidimensional approach" is inadequate and proposes that courts should weigh other factors in the balance, including whether a regulation affects internal or external relations, the religious intensity of the regulated activity, and the nature and extent of the regulation's intrusiveness. See Laycock, *supra* note 25, at 1402-14. In contrast, I suggest that the first-order focus on whether the relationship at issue is primarily religious or secular is appropriate and should be conclusive when the defendant relies solely on a church autonomy argument. However, in cases in which the relationship involves both important religious and secular elements and the defendant defends its practices by relying on a religiously motivated discrimination argument, courts should draw on freedom of association principles to resolve the dispute, including whether the relationship involves group insiders or outsiders and whether the relationship has a primarily expressive or non-expressive purpose or function. See *infra* Part IV.B.1.e.

expressive association can help justify the results reached by most courts and provide a richer set of analytical tools to resolve the most difficult cases that may arise in the future.

a. The Church Autonomy Argument

The courts have been receptive to the church autonomy argument up to a point, both through statutory construction and substantive constitutional interpretation. First, in *NLRB v. Catholic Bishop of Chicago*,¹⁴³ the Supreme Court adopted a rule of statutory interpretation that errs on the side of avoiding conflicts between generally applicable laws like nondiscrimination laws and religious objectors. Because applying the National Labor Relations Act¹⁴⁴ to parochial schools to compel them to recognize and bargain with unions representing lay teachers would “give rise to serious constitutional questions,” the Court refused to interpret the Act to provide jurisdiction over such relationships absent “the affirmative intention of Congress clearly expressed.”¹⁴⁵

In practice, this first level of protection has had little impact on the application of nondiscrimination laws to religious organizations. Almost immediately after *Catholic Bishop*, the lower courts recognized that, unlike the NLRA, Congress did clearly express its intent that Title VII of the 1964 Civil Rights Act,¹⁴⁶ which prohibits discrimination based on race, color, sex, and national origin, should be applied to religious organizations.¹⁴⁷ Congress provided an

143. 440 U.S. 490 (1979).

144. 29 U.S.C. §§ 151-69 (2006).

145. *Catholic Bishop*, 440 U.S. at 501. Justice Brennan, joined by Justices White, Marshall, and Blackmun, issued a strong dissent criticizing the majority’s approach to statutory interpretation as “seemingly invented by the Court for the purposes of deciding this case.” *Id.* at 508 (Brennan, J., dissenting). Justice Brennan argued that the Act’s language and legislative history, along with the Court’s precedents, clearly led to the conclusion that the NLRA did apply to teachers at church-operated schools. He believed the constitutional questions should be reached, but declined to do so because the majority did not reach them. *See id.* at 518.

146. 42 U.S.C. §§ 2000e to 2000e-16c (2006).

147. *See, e.g.*, *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1276 (9th Cir. 1982); *Ritter v. Mount St. Mary’s Coll.*, 495 F. Supp. 724, 726 (D. Md. 1980); *cf. McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (holding, before *Catholic Bishop*, that “[t]he language and the legislative history of § 702 [Title VII’s exemption for religious discrimination by religious employers] compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or

explicit exemption for religious organizations from Title VII's prohibition on discrimination on the basis of *religion*, but not other kinds of discrimination.¹⁴⁸ If congressional legislators had not affirmatively meant for Title VII's other prohibitions to apply to religious institutions, they would have made the exception more expansive. Indeed, amendments calling for just such broader exemptions have been repeatedly rejected.¹⁴⁹ Though some lower courts have used the *Catholic Bishop* test to exempt religious organizations from other nondiscrimination laws,¹⁵⁰ like the Age Discrimination in Employment Act ("ADEA"),¹⁵¹ the majority approach has been to treat laws like the ADEA that effectively duplicate Title VII's basic structure as covering the same organizations as Title VII.¹⁵²

national origin with respect to their compensation, terms, conditions or privileges of employment").

148. See 42 U.S.C. § 2000e-1(a) (2006).

149. See *Pac. Press Publ'g Ass'n*, 676 F.2d at 1277 ("The legislative history shows that Congress consistently rejected proposals to allow religious employers to discriminate on grounds other than religion."). In contrast, state nondiscrimination laws often explicitly exempt religious organizations entirely. See, e.g., CAL. GOV'T CODE § 12926(d) (West 2009) (exempting from state employment nondiscrimination law any "religious association or corporation not organized for private profit"); VT. STAT. ANN. tit. 21, § 1301(6)(C)(vii)(I) (2009) (exempting any service performed "in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches").

150. See, e.g., *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413, 1416 (E.D. Mo. 1989) (finding Congress did not affirmatively express intent to have Age Discrimination in Employment Act ("ADEA") or Equal Pay Act apply to church-operated schools); *Ritter*, 495 F. Supp. at 727-28 (same); cf. *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361 n.2 (8th Cir. 1991) (finding it unclear whether ADEA applies to employment suit by chaplain at church-affiliated hospital under *Catholic Bishop*, but finding it unnecessary to resolve the question because such application would violate First Amendment).

151. 29 U.S.C. §§ 621-634 (2006).

152. See, e.g., *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172-73 (2d Cir. 1993) ("Congress implicitly expressed an intention to apply the ADEA to religious institutions."); *Dole v. Shendoah Baptist Church*, 899 F.2d 1389, 1394 (4th Cir. 1990) (Congress intended Fair Labor Standards Act to apply to church-operated schools); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (Congress's intent to have ADEA apply to religious institutions "can be derived from the structure of Title VII because '[t]he substantive prohibitions of the ADEA were derived *in haec verba* from Title VII.'" (quoting *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir.1983)); *Soriano v. Xavier Univ. Corp.*, 687 F. Supp. 1188, 1189 (S.D. Ohio 1988) (same); *Russell v. Belmont Coll.*, 554 F. Supp. 667, 672 (D. Tenn. 1982) (Congress intended Equal Pay Act to apply to church-controlled college).

Catholic Bishop also implied, but did not definitively declare, that the interest in church autonomy would provide a second check on government action, beyond a preference for constitutional avoidance in statutory construction, by requiring exemptions from some laws for religious organizations even when the legislature clearly expressed its intent to regulate such organizations. Here, however, the Supreme Court's guidance is less than clear. The Court found three risks inherent in applying the NLRA to collective bargaining by teachers of secular subjects at religious schools. First, the Court emphasized the inherently religious role of such teachers and suggested excessive entanglement concerns would arise in government regulation of their collective bargaining.¹⁵³ Second, the Court argued that church-affiliated schools had responded to claims of unfair labor practices by asserting that "their challenged actions were mandated by their religious creeds."¹⁵⁴ According to the Court,

[t]he resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.¹⁵⁵

Finally, applying the Act would require the NLRB to determine what are "terms and conditions of employment" and thus subjects of mandatory bargaining.¹⁵⁶ The Court asserted that "[i]nvariably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions."¹⁵⁷ Because of the "substantial religious activity and purpose" of parochial schools, these conflicts would

153. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979) ("In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon v. Kurtzman* is true of the schools in this case: 'Religious authority necessarily pervades the school system.')" (citation omitted).

154. *Id.* at 502.

155. *Id.*

156. *Id.* at 503.

157. *Id.*

likely often force the NLRB to pass judgment on fundamentally ecclesiastical issues.¹⁵⁸ The majority's list of concerns suggests both that there are some relationships with which the state should not interfere because of their religiosity and that there are some kinds of inquiry into the internal operations of religious organizations that must be avoided because of their extensiveness and intrusiveness.

The lower courts have addressed both concerns when contemplating the application of nondiscrimination laws to religious actors. In general terms, they have agreed that courts must abstain from infringing on primarily religious relationships, but they have simultaneously held that the state may regulate primarily secular relationships regardless of the religious identity or convictions of the actors involved. In the employment context, where the church autonomy argument has most frequently been raised, the result of this general approach has been the widespread recognition of a "ministerial exception" to Title VII and state employment nondiscrimination laws, which forbids civil interference in the employment relationships between houses of worship and those they select to preach, lead, act as spokespeople, and propagate their faith.¹⁵⁹

The Fifth Circuit first announced the ministerial exception to Title VII in *McClure v. Salvation Army*¹⁶⁰ to resolve a sex discrimination claim brought against the Salvation Army by one of its officers. After recognizing that the express statutory exemption for religious organizations in Title VII allowed such organizations to discriminate on the basis of religion, but *not* on the basis of race, color, or sex, the Fifth Circuit held that applying the latter prohibitions to the employment relationship between a church and its minister¹⁶¹ would violate the First Amendment because "[t]he relationship between an organized church and its ministers is its lifeblood."¹⁶² Since then, all eight circuits that have addressed the

158. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)).

159. *See infra* notes 160-66 and accompanying text.

160. 460 F.2d 553, 560-61 (5th Cir. 1972).

161. The court noted that it was undisputed that the Salvation Army is a church and Ms. McClure served as one of its ministers. *See id.* at 556.

162. *Id.* at 558.

issue have adopted the ministerial exception for Title VII,¹⁶³ the ADEA,¹⁶⁴ and other employment nondiscrimination laws.¹⁶⁵ The state courts have followed suit in interpreting state law counterparts.¹⁶⁶ The broad acceptance of the ministerial exception

163. *See* *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-04 (3d Cir. 2006) (“Every one of our sister circuits to consider the issue has concluded that application of Title VII to a minister-church relationship would violate—or would risk violating—the First Amendment and, accordingly, has recognized some version of the ministerial exception.” (citing *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (cathedral’s music director and part-time music teacher at cathedral’s elementary school falls within ministerial exception to Title VII, barring suit for sex discrimination); *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (suit for race and sex discrimination for denial of pastoral position at church barred by First Amendment); *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (ministerial exception bars sex discrimination suit by clergy against church); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (same); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (suit by Hispanic Communications Manager against Archdiocese barred by ministerial exception); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (First Amendment bars race and sex discrimination suit by minister against church); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (sex discrimination claim by chaplain against religious hospital barred by First Amendment); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (sexual harassment claim by minister based on termination by church barred by ministerial exception); *Bollard v. Soc’y of Jesus*, 196 F.3d 940 (9th Cir. 1999) (ministerial exception exists but does not apply to sexual harassment claim by former novice against order of priests); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000) (ministerial exception to Title VII is of continuing vitality); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (ministerial exception applies to selection of tenured faculty member in department of religious canon law at Catholic university))).

164. *See* *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (ADEA claim by church music director and organist barred by ministerial exception); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (recognizing ministerial exemption to ADEA but finding it inapplicable to lay teacher at church-operated elementary school); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (ADEA claim by chaplain against religious hospital barred by First Amendment); *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990) (ADEA claim by minister against church barred by First Amendment); *cf. DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171-72 (2d Cir. 1993) (distinguishing ministerial exception cases from application of ADEA to lay teacher at parochial school).

165. *See* *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (applying ministerial exception to claim under Americans with Disabilities Act (“ADA”)); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004) (applying ministerial exception to claims under ADA and Rehabilitation Act of 1973); *cf. Natal v. Christian Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) (dismissing wrongful termination claim brought by minister against nonprofit religious employer because “[b]y its very nature, the inquiry which [plaintiff] would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause.”); *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 247 F. Supp.2d 728, 731 (D.Md. 2003) (recognizing ministerial exception to Fair Labor Standards Act).

166. *See, e.g.,* *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999) (sex discrimination claim by former university chaplain and director of campus ministry under

makes it clear that churches need not fear that they will ever be forced to ordain a gay minister or hire a lesbian Sunday school teacher.

The lower courts initially grounded the ministerial exception on a line of Supreme Court cases involving intra-church property disputes and direct interference with church hierarchies by state legislatures. In these cases, the Court outlined a general hands-off approach to church “administration and governance,” citing the principle that courts should refrain from deciding controversies in “matters of purely ecclesiastical concern.”¹⁶⁷ As recognition of the

California Fair Employment and Housing Act barred by First Amendment); *Rweyemamu v. Comm’n on Human Rights & Opportunities*, 911 A.2d 319 (Conn. App. Ct. 2006) (ministerial exception applies to suit by Roman Catholic priest against diocese alleging race, ethnicity, national origin, and alienage discrimination under state nondiscrimination law); *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc.*, 875 A.2d 669 (D.C. 2005) (same for race and retaliation claims by former Catholic school principal against archdiocese); *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820 (Mass. 2002) (state law gender discrimination claim by Episcopal priest against diocese and bishop barred by First Amendment); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. App. Ct. 1988) (discrimination claim by church organist under Michigan Civil Rights Law barred by First Amendment); *Geraci v. Eckankar*, 526 N.W.2d 391, 399 (Minn. App. Ct. 1995) (application of Minnesota Human Rights Act to employment decisions by church barred by state constitution); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217, 219 (N.J. Super. Ct. App. Div. 1996) (gender discrimination claim by lay principal of Catholic school barred by First Amendment when archdiocese hired nun to replace her); *Jocz v. Labor & Indus. Review Comm’n*, 538 N.W.2d 588, 596 (Wis. App. Ct. 1995) (ministerial exception to Wisconsin Fair Employment Act required by First Amendment and state constitution and applies to sex discrimination claim by field director at seminary); *cf. Heard v. Johnson*, 810 A.2d 871, 885 (D.C. 2002) (defamation claim by pastor against church trustees stemming from employment dispute barred by First Amendment).

167. In *Watson v. Jones*, 80 U.S. 679 (1871), after a Presbyterian church in Kentucky had split into two rival groups during the Civil War, the Court was asked to determine which group had the legal right to control the church’s property and land. The Court declined to interfere with the church hierarchy’s internal decision-making, claiming that civil courts “exercise no jurisdiction” over matters that “concern[] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.” *Id.* at 733. In *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1 (1929), the Court affirmed *Watson*, stating that “[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.” *Id.* at 16. Subsequently, in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), the Court held that the New York legislature had violated the Free Exercise Clause by passing a statute that had purported to transfer administrative control of Roman Orthodox churches in North America away from the Patriarch in Moscow to authorities selected by a convention of North American churches. The Court proclaimed that “legislation that regulates church administration, the operation of the churches [or] the appointment of clergy . . . prohibits the free exercise of religion.” *Id.* at 107. The Court explained that the First Amendment contemplates “a spirit of freedom for religious organizations, an independence from secular

ministerial exception has expanded, its doctrinal underpinnings and relationship to modern Free Exercise and Establishment Clause tests have become clear. Before *Employment Division v. Smith*,¹⁶⁸ courts held that regulating the employment relationship between churches and their ministers would violate both the Free Exercise Clause, by imposing a substantial burden on the church's free exercise that was not outweighed by the state's interest in eradicating discrimination, and the Establishment Clause, by causing an excessive entanglement between government and religion.¹⁶⁹ Since *Smith*, federal courts have reaffirmed the ministerial exception by arguing that *Smith* does not overrule the Supreme Court's earlier pronouncements protecting the autonomy of internal operations of church bodies.¹⁷⁰ In effect, the

control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. More recently, in *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the Court further warned that

First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.

Id. at 449. Finally, as already discussed, in *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979), the Court held that, in order to avoid serious constitutional questions, the National Labor Relationships Act should be interpreted not to apply to the employment relationships between parochial schools and their teachers. See *supra* notes 143-45, 153-58 and accompanying text.

168. 494 U.S. 872 (1990).

169. See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

170. In *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996), the D.C. Circuit argued that the ministerial exception to Title VII survived *Smith* for a number of reasons.

First, the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith* and in the cases cited by the Court in support of its holding. The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission. Moreover, the ministerial exception does not present the dangers warned of in *Smith*. Protecting the authority of a church to select its own ministers free of government interference does not empower a member of that church, "by virtue of his beliefs, 'to become a law unto himself.'" [*Smith*, 494 U.S. at 885]. Nor does the exception require "judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field." *Id.* at 887. . . .

courts have argued that there are (at least) two kinds of free exercise claims—those made by individuals regarding burdens placed on their personal exercise of religion, and those made by religious organizations regarding interference with their internal administration—and *Smith* only applies to the first kind.¹⁷¹ Some

Second, while it is true that some of the cases that have invoked the ministerial exception have cited the compelling interest test, *e.g.*, *McClure*, 460 F.2d at 558, all of them rely on a long line of Supreme Court cases that affirm the fundamental right of churches to “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff*, 344 U.S. at 116.

Catholic Univ., 83 F.3d at 462. Finally, applying Title VII in the present case

would both burden Catholic University’s right of free exercise and excessively entangle the Government in religion. As a consequence, this case presents the kind of ‘hybrid situation’ referred to in *Smith* that permits us to find a violation of the Free Exercise Clause even if our earlier conclusion that the ministerial exception survived *Smith* should prove mistaken.

Id. at 467; *see also* *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) (“*Smith*’s language is clearly directed at the first strand of free exercise law, where an individual contends that, because of his religious beliefs, he should not be required to conform with generally applicable laws. The concerns raised in *Smith* are quite different from the concerns raised by Reverend Combs’s case, which pertains to interference in internal church government. We concur wholeheartedly with the D.C. Circuit’s conclusion [in *Catholic University*] that *Smith*, which concerned individual free exercise, did not purport to overturn a century of precedent protecting the church against governmental interference in selecting its ministers.”); *Van Osdol v. Vogt*, 908 P.2d 1122, 1130-31 (Colo. 1996) (“The gravamen of *Smith* is that it is not the position of a judge to decide what a person’s belief system is or should be, or how important those beliefs are to that person. . . . Applying Title VII or any anti-discrimination law to a church’s choice of a minister would require a judge to question the belief system of the church, to validate certain interpretations of the religious doctrine over others, or to compel the church to accept certain ideas into their belief system. All of these actions clearly fall into the unacceptable realm of judicial evaluation of religious belief. Hence, the reasoning in the *Smith* case argues for one result when applied to a felony drug law and quite another when applied to a church’s choice of its minister. It would be impossible for a court to apply Title VII and evaluate the propriety of a minister hiring or discharge decision without evaluating the beliefs behind that decision.”) (citation omitted). *But see* *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) (holding *Smith* reduced scrutiny of civil regulation of employment matters of religious school).

171. *See* *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006) (stating ministerial exception derives from “concern . . . that secular authorities would be involved in evaluating or interpreting religious doctrine [if discrimination laws applied to employees with religious functions, and] . . . second quite independent concern . . . that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.” (quoting *Combs*, 173 F.3d at 350)); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 946-47 (9th Cir. 1999) (applying compelling interest test in ministerial exemption context without mentioning *Smith*); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 702-04 (7th Cir. 2003) (same); *cf.* *Laycock*, *supra* note 25,

state courts have supported the ministerial exception by continuing to rely on the substantial burden-compelling interest doctrinal approach they have adopted for their own state constitutional protection of free exercise.¹⁷²

The argument for complete freedom from state intervention into the internal affairs of religious bodies, however, has not been adopted wholesale. With marked consistency, the courts have held that, though ministers and other employees who perform primarily religious functions, such as teaching religious doctrine, preaching in church, offering pastoral care, and leading or speaking on behalf of religious entities, are constitutionally exempt from employment discrimination laws,¹⁷³ employees of religious institutions who perform primarily secular functions generally are not.¹⁷⁴ Though

at 1374 (distinguishing between free exercise claims based on direct regulation of religious activities, church autonomy, and conscientious objection).

172. *See, e.g.*, *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).

173. *See, e.g.*, *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) (ministerial exemption applies to minister); *Alicea-Hernandez*, 320 F.3d at 698 (church’s Hispanic Communications Manager); *Combs*, 173 F.3d at 343 (clergy); *Catholic Univ. of Am.*, 83 F.3d at 457 (nun teaching canon law at Catholic university); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (church elder); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (chaplain at religiously-affiliated hospital); *Rayburn*, 772 F.2d at 1164 (associate in pastoral care at church); *Bryce v. Episcopal Church in Diocese of Colo.*, 121 F. Supp. 2d 1327 (D. Colo. 2000) (church youth minister); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (Roman Catholic theology teacher at parochial school).

174. *See Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998) (ministerial exemption does not apply to pastor’s secretary and receptionist); *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1994) (administrator of Jewish temple “responsible for logistical support of activities including supervision of administrative, clerical, building maintenance, and custodial personnel, . . . manage[ment of] property and equipment and maintain[ance of] financial records”); *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary at religious publishing house); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (support and administrative staff at seminary); *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689 (W.D.Pa. 2004) (church employees responsible for administrative review and record keeping of sacramental documents and other administrative duties); *Smith v. Raleigh Dist. of N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999) (pastor’s secretary and receptionist); *Shirkey v. Eastwind Cmty. Dev. Corp.*, 941 F. Supp. 567, 577-78 (D.Md. 1996) (community developer at church-affiliated nonprofit community development organization); *Stouch v. Bros. of Order of Hermits of St. Augustine*, 836 F. Supp. 1134 (E.D.Pa. 1993) (chef at monastery); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D.Pa. 1991) (director of plant operations at religiously-affiliated hospital); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (D.C.N.Y. 1975) (church’s typist-receptionist).

courts have not always agreed on whether a particular kind of employee function is primarily religious or primarily secular,¹⁷⁵ they have been remarkably consistent overall. Even in cases involving teachers of secular subjects at religious schools—which one might expect to lead to disagreement, due to the frequency with which they have arisen in various courts and the strong arguments that such positions involve both secular and religious elements¹⁷⁶—the courts have almost uniformly agreed that the ministerial exemption does not apply, because such teachers’ functions are primarily secular.¹⁷⁷

175. Compare *Archdiocese of Wash. v. Moersen*, 925 A.2d 659 (Md. 2007) (church organist not covered by ministerial exception) with *Tomic*, 442 F.3d at 1036 (church music director and organist covered by ministerial exception); *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp.2d 1174 (E.D. Wis. 2001) (same for church choir director); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. App. Ct. 1988) (same for church organist). For another example of disagreement, compare *Bollard* 196 F.3d at 940 (sexual harassment claim by novice in religious order not barred by ministerial exception), with *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917 (N.D. Ohio 2002) (novice in religious order covered by ministerial exception).

176. Douglas Laycock argues:

[E]ven the nonbelieving math teacher has some intrinsically religious responsibilities. And even for those who would minimize such a teacher’s religious function, there is no feasible way to distinguish him from teachers who actively seek to instill religious values, without intolerable litigation over the religious content of each teacher’s instruction. Churches have strong claims to autonomy with respect to employment of teachers.

Laycock, *supra* note 25, at 1411. For discussion of the critique that distinguishing between primarily secular and primarily religious functions requires judges to engage in impermissible theological evaluations, see *infra* notes 236-42 and accompanying text.

177. See *Ticali v. Roman Catholic Diocese of Brooklyn*, 201 F.3d 432 (2d Cir. 1999), *aff’d* 41 F. Supp. 2d 249, 260 (E.D.N.Y. 1999) (race discrimination claim by elementary school teacher at parochial school not barred by First Amendment); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996) (sex discrimination claim by preschool teacher at church-affiliated school that hires only Christian teachers); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993) (ADEA claim by lay teacher at church-operated elementary school); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (ADEA claim by math teacher with some limited religious duties at parochial elementary school); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-97 (4th Cir. 1990) (Fair Labor Standards Act minimum wage and equal pay claims by teachers who perform no sacerdotal functions at church-run school); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (Title VII and Equal Pay Act claims by employees of church-owned and operated private school); *EEOC v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980) (Title VII claim by faculty member at religious college); *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (Title VII claim by teacher with primarily secular but some religious duties at church-run elementary school); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (ADEA claim by fifth grade teacher at parochial school); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344 (E.D.N.Y. 1998) (Title VII sex discrimination claim by elementary math teacher fired after becoming pregnant out of wedlock against church-affiliated

To understand the courts' basic approach, it helps to conceptualize a religious employer's possible arguments for exemption in a discrimination case as falling into three basic categories. First, the employer might assert that it acted for *purely secular* reasons—the janitor was fired for showing up late or the chef was fired for lousy cooking. In such circumstances, the employer *denies* that it engaged in any proscribed discrimination, but seeks exemption from judicial oversight nonetheless. Second, the employer might again *deny* that it engaged in any prohibited discrimination but justify its actions on *religious* rather than purely secular grounds. A parochial school could defend against a sex discrimination suit by arguing that it fired the plaintiff for engaging in premarital sex against the school's religious tenets—not because she was a woman. Third, a religious employer could *admit* that it violated a nondiscrimination law, but argue that it did so to conform to its religious beliefs. A church might fire a receptionist for being gay because it condemns homosexuality, or it might dismiss a pregnant bookkeeper because it believes women with young children should not work outside the home. In this third situation, both a

school that “puts a major emphasis on religious teaching and education . . . and expects . . . teachers to be role models for their students”); *Grotke v. Canisius High Sch. of Buffalo, N.Y.*, No. 90-CV-1057S, 1992 WL 535400 (W.D.N.Y. Apr. 13, 1992) (ADEA claim by Latin teacher at Jesuit high school); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 267 (D. Iowa 1980) (Title VII sex discrimination claim against Roman Catholic high school by English teacher fired after becoming pregnant out of wedlock); *Russell v. Belmont Coll.*, 554 F. Supp. 667 (D. Tenn. 1982) (Title VII and Equal Pay Act claims by assistant professor of education at college controlled by association of Southern Baptist Churches); *Ritter v. Mount St. Mary's Coll.*, 495 F.Supp. 724 (D. Md. 1980) (Title VII claim by lay professor denied tenure at private, independent Catholic college); *McLeod v. Providence Christian Sch.*, 408 N.W.2d 146 (Mich. App. Ct. 1987) (state law sex discrimination claim by elementary school teacher fired by church-run school based on policy against hiring women with young children); *Welter v. Seton Hall Univ.*, 608 A.2d 206, 208 (N.J. 1992) (breach of contract claim by nuns employed as teachers at Roman Catholic university); *Gallo v. Salesian Soc'y, Inc.*, 676 A.2d 580 (N.J. Super. Ct. App. Div. 1996) (state law age and sex discrimination claims by lay teacher of English and history at all-boys parochial high school); *Sacred Heart Sch. Bd. v. Labor & Industry Review Comm'n*, 460 N.W.2d 430, 431 (Wis. App. Ct. 1990) (hearing by state Equal Rights Division regarding age discrimination complaint of teacher at religious elementary school not barred by First Amendment); *cf. Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802 (N.D. Cal. 1992) (librarian at religious school not covered by ministerial exception). *But see Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858 (E.D. Wis. 2004) (teacher at private elementary school operated based on traditional Indian spiritual and cultural practices covered by ministerial exception).

church autonomy and a religiously motivated discrimination argument are in play.¹⁷⁸

In the first kind of case, when a religious employer denies discriminating against an employee who performs primarily secular functions and only offers secular rationales for its actions, the courts are appropriately willing to resolve the controversy.¹⁷⁹ For example, in *Stouch v. Brothers of Order of Hermits of St. Augustine*,¹⁸⁰ a chef sued the monastery that had fired him, claiming age discrimination under the ADEA. The order of brothers who ran the monastery argued he was fired for the lack of variety and poor quality of the food he served.¹⁸¹ The District Court concluded that resolving the case would not infringe on the monastery's religious liberty, because "[t]he primary trial issue in this case will be whether defendants terminated their relationship with Stouch because of his age or because they were dissatisfied with his job performance. Culinary demands, not church doctrine, will be subject to scrutiny."¹⁸²

There is no principled reason why a court should be barred from hearing the discrimination complaint of a gay janitor or a black computer technician fired from his job at a Catholic hospital, a Baptist high school, or a Jewish synagogue when his employer

178. A religiously motivated discrimination argument might arise without an accompanying church autonomy argument when a religious entity or individual discriminates against an outsider, for example, in the provision of services to the public. In such circumstances, the church autonomy argument that courts should refrain from inquiring into the *internal* practices of religious entities is inapplicable. See *infra* notes 211-29 and accompanying text.

179. See, e.g., *Weissman*, 38 F.3d at 1041 (adjudicating lay temple administrator's ADEA claim did not violate First Amendment when temple argued firing was for "the failure to properly supervise custodial personnel, the purchase of a facsimile machine which was too expensive, the release of a membership list to a congregation member, the failure to resolve a dispute between the chief custodian and a secretary, . . . lack of sufficient familiarity with the computer system . . . [and] a general dissatisfaction with Weissman's performance and his failure to remedy deficiencies after he had been advised of them"); *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (resolving typist-receptionist's Title VII race discrimination claim against church employer and finding enforcement of Title VII did violate the First Amendment because "[n]othing in the record indicates that, much less specifies how, Whitney's discharge was based on the doctrinal policies of the Seventh-Day Adventist Church or that the relationship between the church and its clerical help touches so close to the heart of church administration as to be protected by the First Amendment from the commands of Title VII").

180. 836 F. Supp. 1134 (E.D.Pa. 1993).

181. See *id.* at 1143.

182. *Id.* at 1144.

defends its actions by arguing he was fired for poor performance *and nothing more*.¹⁸³ In such cases, the potential burden on the religious freedom of the employers is slight to nonexistent. Contrary to the suggestions of at least one commentator, religious entities have no special *religious* exercise interest in being free from government regulation of their purely secular activities.¹⁸⁴ When the employer fails to point to any aspect of its decision-making in which religion was implicated, the courts do not risk trampling religious liberty by enforcing secular regulations on secular activities just because one of the actors has a general religious mission or affiliation.

Critically, courts have distinguished the application of nondiscrimination laws to secular employees from the application of the NLRA to parochial schools that so troubled the Supreme Court in *Catholic Bishop*. While enforcement of the NLRA provisions would require extensive, on-going interactions between the state and

183. If the employer argued, in contrast, that it fired the employee, not for poor performance, but for violating its religious tenets, the balance of interests would be somewhat different. *See infra* notes 186-98 and accompanying text (discussing religious defenses unrelated to protected classes) and notes 199-202, 210-29 and accompanying text (discussing religiously motivated discrimination argument).

184. Douglas Laycock argues that churches have a religious liberty interest in resisting secular regulation “even when their official doctrine seems to support the regulation.” Laycock, *supra* note 25, at 1398. Discussing the Roman Catholic Church’s resistance to NLRB jurisdiction over teachers in parochial schools despite the Church’s support of the right to organize and the duty of employers to bargain and the Seventh Day Adventists’ resistance to the enforcement of the Equal Pay Act in their schools despite their official doctrine endorsing equal pay, Laycock argues:

There are a variety of possible reasons, all constitutionally legitimate, for these examples of resistance to regulation that arguably reinforces church teaching. These churches may have been hypocritically seeking to exempt themselves from a moral duty they preach to others. Such conduct is not very admirable, but free exercise protection is not limited to churches the government admires. Alternatively, these churches may have resisted government regulation on principle, to avoid creating an adverse precedent that might support some objectionable regulation in the future. There is a third possible reason, and it casts further light on the nature of the right to autonomy. Even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal. . . . [C]hurches that do not want to discriminate at all are deprived of the chance to define discrimination.

Id. at 1399. But even Laycock acknowledges that at some point “a church’s legitimate interest in autonomy . . . becomes sufficiently attenuated, and the government’s interest in regulation sufficiently strong, that neutral regulation for secular purposes becomes consistent with free exercise.” *Id.* at 1402. Such should be the case when the church offers only secular rationales to support its actions.

religious entities, with the likelihood of repeated conflict intertwined with religious beliefs, enforcing nondiscrimination laws involves one-time court action.¹⁸⁵ The NLRB's task of identifying the "terms and conditions of employment" subject to mandatory bargaining would involve extensive reviews of the employer-employee relationship that would necessarily touch on religious aspects of that relationship. In contrast, when a court is asked to examine whether an employee was fired for a proscribed reason and the religious employer offers only secular explanations for its actions in defense, the court can adequately ensure that its focus will remain on purely secular areas of dispute.

In the second kind of case, in which the religious employer disputes that any discrimination has taken place, but instead of providing purely secular rationales for its actions, argues that it fired an employee for a religious reason unrelated to the nondiscrimination law,¹⁸⁶ the courts' approaches have been slightly more nuanced, but they have still followed the consistent principle that the First Amendment permits civil regulation of primarily secular relationships.¹⁸⁷ For example, in *Boyd v. Harding Academy of Memphis, Inc.*,¹⁸⁸ school authorities at a church-run school fired a

185. See, e.g., *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328 (3d Cir. 1993) (recognizing important "distinction between pervasive supervision and simple prohibition"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169-70 (2d Cir. 1993) (same); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1282 (9th Cir. 1982) (same).

186. These cases are analytically distinct from what I call cases of religiously motivated discrimination. Here, the employer *denies* that any proscribed discrimination has taken place but offers a religious rationale for its employment action. In contrast, in cases involving religiously motivated discrimination, the employer *admits* that it has discriminated, but asserts it is religiously compelled to do so.

187. The Supreme Court has ruled, however, that the Establishment Clause does not always *require* that the primarily secular relationships of religious entities be regulated in the same way as analogous relationships engaged in by secular entities. In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Court found that Congress could exempt religious entities from Title VII's prohibition on discrimination on the basis of *religion* with respect to *both* employees engaged in primarily religious and primarily secular functions. The Court emphasized the free exercise interests that religious employers have in employing coreligionists. The Court assumed for the sake of argument that the Free Exercise Clause did *not* require Congress to draw the statutory exemption so broadly, but would have permitted an exemption that only applied to employees who performed primarily religious functions. *Id.* at 336. For a discussion of the constitutional limits on the kinds of statutory religious exemptions legislatures may create from nondiscrimination laws, see *infra* Part IV.B.2.

188. 88 F.3d 410 (6th Cir. 1996).

preschool teacher after they discovered she was pregnant. The teacher sued for sex discrimination under Title VII, but the school argued it had fired her based on a gender-neutral religious prohibition on premarital sex.¹⁸⁹ Similarly, in *Geary v. Visitation of Blessed Virgin Mary Parish School*,¹⁹⁰ a lay teacher fired from a church-operated elementary school sued the school for age discrimination under the ADEA.¹⁹¹ The school argued that she had been fired for marrying a divorced man against church doctrine.¹⁹² In such cases, the question for courts to resolve is whether the employee may argue that the religious rationale offered by the employer is merely a pretext for the proscribed discrimination that actually took place.¹⁹³ The majority approach seems to be to allow an employee to argue pretext but to limit the extent of the court's inquiry.¹⁹⁴ A plaintiff may argue that the religious rationale offered in defense was not the actual reason for the discharge and offer objective evidence

189. *Id.* at 412. The Sixth Circuit concluded that Title VII's prohibition on sex discrimination in employment applied, but found that the school's policy against pre-marital sex was a legitimate, nondiscriminatory rationale for its action and that there was no evidence that the policy was applied in a discriminatory manner against women and not men. *See id.* at 414-15.

190. 7 F.3d 324 (3d. Cir. 1993).

191. *Id.* at 326.

192. *See id.* The Third Circuit found that the plaintiff had failed to offer any evidence to support her claim that the school's proffered legitimate reason for her dismissal was in fact a pretext. *Id.* at 332.

193. Generally, in an employment discrimination case, the plaintiff employee bears the burden of making a prima facie case of discrimination. Once a prima facie case has been made, the burden shifts to the defendant employer to offer a legitimate nondiscriminatory rationale for the employment action at issue. The burden then shifts back to the plaintiff to show that the defendant's proffered rationale is pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Finally, even if the plaintiff succeeds in showing the defendant's proffered reason is a pretext, the plaintiff must further prove by a preponderance of the evidence that the employment action was actually motivated by an illegal purpose. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993).

194. *See, e.g., Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1043 (8th Cir. 1994) (secular plaintiff may argue a religious defense is a pretext, but cannot question its validity or plausibility); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993) ("[W]hen a religious employer contends that a religious tenet or practice—not illegal discrimination—motivated a challenged employment action, the ADEA will apply only so long as the plaintiff does not challenge the validity of the doctrine or practice and asks no more than whether the proffered religious reason actually motivated the employment action."); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993) ("[I]n those cases where a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as pretextual the employer's justification without calling into question the value or truthfulness of religious doctrine.").

to support this claim.¹⁹⁵ The court's review of such a claim, however, must be limited in scope. When an employee who performs primarily secular functions attacks her religious employer's proffered religious justification for an adverse employment action, arguments asserting implausibility and insincerity of that rationale must be avoided.¹⁹⁶ Religious rationales offered by religious employers must be accepted at face value as genuinely backed by religious conviction. Further, courts must refrain from evaluating the relative severity of different violations of doctrine.¹⁹⁷ So long as a court adheres to these limitations, the burden on the defendant religious entity remains minimal. As the Third Circuit explained, under such circumstances,

[t]he institution, at most, is called upon to explain the application of its own doctrines. Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim. Indeed, because the court in an [employment discrimination] case should not examine either the validity or the religious nature of the doctrine, the burden of the religious institution to explain is considerably lighter than in a non-religious employer case.¹⁹⁸

195. *See, e.g., Geary*, 7 F.3d at 331-32 (when school claimed it fired teacher for divorcing and remarrying against church doctrine, teacher "might have demonstrated, for example, that similarly remarried persons had not been fired, that she did not in fact marry, or that Visitation School's explanation did not emerge until late in the litigation").

196. *See id.* at 325; *DeMarco*, 4 F.3d at 171 ("ADEA plaintiffs may not challenge the plausibility of putative religious purposes. A fact-finder will necessarily have to presume that an asserted religious motive is plausible in the sense that it is reasonably or validly held.").

197. *See Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 139-40 (3d Cir. 2006) (when English teacher at Catholic school was fired for signing advertisement in local paper supporting abortion rights argued she was victim of sex discrimination because men who committed "similar" but not identical infringements of Church doctrine were not fired, court concluded that to address "allegation that male employees, who committed substantially similar offenses, were treated differently than was Curay-Cramer, we would have to assess the relative severity of offenses. This exercise would violate the First Amendment. We conclude that if we were to consider whether being Jewish or opposing the war in Iraq is as serious a challenge to Church doctrine as is promoting a woman's right to abortion, we would infringe upon the First Amendment Religion clauses." (citing *Hall v. Baptist Memorial*, 215 F.3d 618, 626-27 (6th Cir. 2000) ("If a particular religious community wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory and therefore warrants Title VII liability."))).

198. *Geary*, 7 F.3d at 330.

Finally, in the third kind of case, the defendant employer admits that it has, in fact, discriminated against a protected class, but claims that it did so because of its religious beliefs. In *Dole v. Shenandoah Baptist Church*,¹⁹⁹ a church-run school admitted to providing unequal benefits to male and female employees because of its religious beliefs about the proper gender-defined identity of “heads of household.” Similarly, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,²⁰⁰ a religiously-affiliated school declined to rehire a pregnant teacher because of religious tenets disapproving of women with young children working outside of the home.²⁰¹ In these cases, the employer makes two separate claims. First, as with the previous kinds of cases, the employer argues that the principle of church autonomy should prohibit courts from inquiring into a religious employer’s employment actions regardless of their rationale. As already discussed, the courts have been consistent in accepting this argument when applied to employees who perform primarily religious functions while rejecting it when applied to employees who perform primarily secular functions.²⁰² The second argument available here, that forcing compliance with a nondiscrimination law that directly contradicts an organization or individual’s religious scruples violates the Religion Clauses, must be dealt with separately.

Before doing so, however, it should be noted that the church autonomy argument provides results in the contexts of housing and public accommodations analogous to those in the employment context, with courts looking to the primary function or purpose of the activity at issue to determine whether it is primarily secular, and thus subject to regulation, or primarily religious, and thus exempt from judicial inquiry. If a church provides housing to its ministers or rents

199. 899 F.2d 1389 (4th Cir. 1990).

200. 477 U.S. 619 (1986).

201. Cases in which religious schools have fired teachers for getting married against church doctrine would also fall into this category if challenged under laws prohibiting discrimination on the basis of *marital status*. But when challenged under *sex* discrimination laws, such cases would fall under the second category, because the employer *denies* any sex discrimination has taken place and instead offers an unrelated religious justification for the dismissal. See *Geary*, 7 F.3d at 324; *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991).

202. See *supra* notes 173-77 and accompanying text.

out rooms to participants in religious conventions or retreats, the function of the housing relationship in question is primarily religious and the courts will keep their distance.²⁰³ However, if a church engages in the buying and selling of real estate or invests in rental properties on the open market as a financial pursuit, it deserves no special autonomy claim to exemptions from the general fair housing laws that protect the rights and interests of potential buyers and renters.²⁰⁴ Similarly, religious entities are exempt from public accommodations laws when they provide facilities for primarily religious purposes, but not otherwise.²⁰⁵ For example, in *Dignity*

203. Fair housing statutes generally exempt such relationships anyway. *See, e.g.*, *Cowen v. Lily Dale Assembly*, 354 N.Y.S.2d 269, 271 (N.Y. App. Div. 1974) (holding Spiritualist organization fell under religious exemption to state fair housing law when it provided housing for religious retreats during winter and made housing available to nonmembers during summer tourist season to attempt to make non-Spiritualists conversant with the organization).

204. *See United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1044 (N.D. Ohio 1998) (operator of nursing home linked to church not exempt from Fair Housing Act's prohibition on racial discrimination). Most courts that have addressed claims for religious exemptions from fair housing laws have done so in the context of landlords who wished to refrain from renting to unmarried cohabiting couples, in violation of state marital status nondiscrimination laws. *See infra* note 211 (collecting cases).

205. This rather straightforward distinction should assuage the concerns of those like the Becket Fund, who argue that religious groups will have to start providing space for same-sex wedding ceremonies if such marriages are legally recognized. *See Becket Fund, Amicus Curiae for In re Marriage Cases*, *supra* note 3, at 13-14. The relationship between a private religious hall and those who wish to use it to host a marriage ceremony is surely primarily religious, because of the deep religious significance of such ceremonies to most people.

The Becket Fund supports its argument by relying on the Canadian case *Smith & Chymyshyn v. Knights of Columbus*, [2005] BCHRT 544 (B.C. Human Rights Trib. 2005) (Can.), available at http://www.bchrt.bc.ca/decisions/2005/pdf/Smith_and_Chymyshyn_v_Knights_of_Columbus_and_others_2005_BCHRT_544.pdf. *See Becket Fund, Amicus Curiae for In re Marriage Cases*, *supra* note 3, at 14 n.21. *Knights of Columbus* was decided under laws distinct from those applicable in the U.S., in particular section 8 of the Canadian Human Rights Code, so the comparison is of limited value. *See supra* note 45. Further, the Canadian court in fact held that the Knights could exclude same-sex couples from celebrating their marriages in the Knights' hall. *Knights of Columbus*, 2005 BCHRT 544 at 28. However, the court noted that Canada's Human Rights Code requires businesses to accommodate members of the public to the point of "undue hardship." *Id.* at 30. Thus, if an organization like the Knights cannot fully comply with the antidiscrimination law for legitimate reasons, including religious objections, it must still explore alternatives, including "whether there [i]s a way to accommodate the person that [i]s less discriminatory, yet still accomplish the employer or service-provider's purpose." *Id.* at 31. In this case, the plaintiff couple had completed a signed contract to rent the hall and sent invitations to all their guests before the Knights discovered the purpose of the rental and renege on the contract. *Id.* at 11. It was under these circumstances, in which the Knights' actions caused the plaintiffs added economic and emotional burdens, that the court found that the Knights could have been more accommodating. The panel awarded the plaintiffs \$444.59—the costs of reprinting their invitations, postage to resend their invitations, and the cost of renting an alternate

Twin Cities v. Newman Center and Chapel,²⁰⁶ the Minnesota Court of Appeals held that applying the state's sexual orientation nondiscrimination law to a Catholic church's refusal to rent its chapel and other facilities to a gay Catholic organization that wished to use the space for worship and other religious activities would involve excessive entanglement and violate the church's free exercise rights.²⁰⁷ The court argued that if the church wished to rent its space out for primarily secular functions, it would not be exempt from public accommodations laws.²⁰⁸ But its choice to grant or deny a rental to another religious entity to use the space specifically for religious purposes must be protected as an internal, purely religious decision.²⁰⁹

To summarize, the church autonomy argument protects religious organizations from extensive, ongoing government oversight of their internal affairs and protects relationships involving primarily religious functions or purposes from any intervention at all, but

hall—and a nominal \$1000 “for injury to their dignity, feelings and self-respect.” *Id.* at 39-40. The Knights were not fined for simply refusing to rent the hall.

The one American case the Becket Fund cites as evidence of its fears of forced same-sex weddings in church facilities is *Harriet Bernstein v. Ocean Grove Camp Meeting Assoc.*, No. PN34XB-03008 (N.J. Dept. of Law & Pub. Safety, June 19, 2007) (filed). See Becket Fund, Amicus Curiae for *In re Marriage Cases*, *supra* note 3, at 14 n.21. The Becket Fund describes *Bernstein* as a case in which plaintiffs are “seeking damages and [an] injunction against [a] religious organization that denied complainants use of [a] wedding pavilion for [a] civil union ceremony.” *Id.* The implication—that gay activists are trying to force churches to house their weddings or civil unions—is far from the reality. In fact, the Ocean Grove Camp Meeting Association, which is affiliated with the Methodist Church, owns *all* property in the one-square-mile unincorporated community of Ocean Grove, NJ, and leases to businesses and homeowners on ninety-nine year renewable leases. See Jill P. Capuzzo, *Civil Union Dispute Pits Methodist Retreat Against Gays Who Aided in Its Rebirth*, N.Y. TIMES, Sept. 3, 2007, at B1. The plaintiffs in *Bernstein* are a lesbian couple who would like to use the town's Boardwalk Pavilion for their civil union ceremony. They point out that the Association has long received a state property tax exemption for the pavilion because it is open for use by the general public. See *id.* Thus, though the Association is an offshoot of the Methodist Church, the plaintiffs are arguing that the facility at issue is *public*, not private. See Ocean Grove United Is Taking a Stand and Making a Difference, Posting of Chris Johnson to The HRC Blog, <http://www.hrcbackstory.org/2007/07/ocean-grove-united-is-taking-a-stand-and-making-a-difference/>, (July 31, 2007, 1:13PM). Such an exceptional circumstance cannot support the assertion that legally recognizing same-sex marriage would lead to a flood of suits attempting to force churches to host same-sex weddings.

206. 472 N.W. 2d 355 (Minn. Ct. App. 1991).

207. See *id.* at 357.

208. See *id.*

209. See *id.* (“Here, the form of the relationship between the parties was clearly religious.”).

leaves the state fully competent to resolve one-time disputes involving primarily secular relationships by applying generally applicable secular laws, including nondiscrimination laws.

b. The Religiously Motivated Discrimination Argument

While the church autonomy principle shields a wide range of activities and relationships engaged in by religious actors, it does not protect them from the application of nondiscrimination laws to their primarily secular relationships and activities. Yet applying such laws, even if only to primarily secular relationships, can implicate religious liberty for another reason. When organizations or individuals accused of discrimination readily admit that they have, in fact, discriminated, but claim that their religious beliefs require them to do so—what I call a religiously motivated discrimination argument—the law must resolve a direct tension between equality and religious liberty. Such claims are not only made in the employment context,²¹⁰ but arise in housing and public accommodations contexts as well. For example, individual landlords have refused to rent to unmarried opposite sex couples because of their religious objections to out of wedlock sexuality, despite state marital status nondiscrimination laws.²¹¹

210. See *supra* notes 199-202 and accompanying text (discussing examples of employment cases in which the religiously motivated discrimination argument has arisen).

211. Courts have taken three basic approaches to such claims. Some have concluded that the Free Exercise Clause or its state constitution equivalent does not require a religious exemption for such landlords, either because the law is neutral and generally applicable, the law does not exact a substantial burden on the landlords' free exercise, or such a burden is justified by a compelling interest in eradicating discrimination in the housing market. See *Thomas v. Anchorage Equal Rights Comm'n (Thomas III)*, 102 P.3d 937 (Alaska 2004) (nondiscrimination law narrowly tailored to state's compelling interest in eradicating marital status discrimination in housing); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998) (same), *vacated in part and remanded*, 593 N.W.2d 545 (Mich. 1999); *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996) (law neutral and generally applicable and landlord's religious exercise not substantially burdened because she could leave the rental market); *Jasniowski v. Rushing*, 687 N.E.2d 743 (Ill. App. Ct. 1997) (substantial burden on landlord's free exercise rights justified by compelling interest), *vacated without comment*, 685 N.E.2d 622 (Ill. App. Ct. 1997). Other courts have concluded that state or federal constitutional free exercise principles require exemptions for landlords with religious objections to renting to unmarried couples. See *Thomas v. Anchorage Equal Rights Comm'n (Thomas I)*, 165 F.3d 692 (9th Cir. 1999) (religious exemption to marital status nondiscrimination law required under "hybrid rights" theory because state interest not compelling), *vacated as not ripe for review*, *(Thomas II)* 220 F.3d 1134 (9th Cir. 2000) (en banc); cf. *State ex rel. Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (holding state marital status

Claims for religious exemptions to gay rights laws will often take this form as well, as objectors argue that they must treat gay people differently because of their religiously-grounded disapproval of homosexuality.²¹² Here the law must directly confront the value conflict between nondiscrimination norms and religious liberty. While courts have consistently rejected religiously motivated discrimination claims for exemptions from civil rights laws when brought by for-profit corporations or other primarily secular organizations, they have been somewhat divided when such claims are brought by individuals or primarily religious organizations.²¹³

Primarily secular organizations cannot discriminate against employees on the basis of religion or other protected categories,²¹⁴

nondiscrimination law does not protect unmarried cohabiting couples, but arguing in dicta that if it did, freedom of conscious clause in state constitution would require religious exemption); *Att’y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for consideration of whether substantial burden exacted by law on landlord is justified by compelling interest). Finally, some courts have avoided the constitutional issue by finding the state marital status nondiscrimination law at issue does not protect unmarried cohabiting couples. *See* N.D. Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551 (N.D. 2001); *County of Dane v. Norman*, 497 N.W.2d 714 (Wis. 1993); *Cooper*, 460 N.W.2d at 7, *Mister v. A.R.K. P’ship*, 553 N.E.2d 1152 (Ill. App. Ct. 1990).

212. *See, e.g.*, *N. Coast Women’s Care Med. Group, Inc. v. Superior Court*, 189 P.3d 959 (Cal. 2008) (doctor refused to provide fertility treatment to lesbian in violation of state public accommodations law).

213. In some instances, the distinction between primarily secular and primarily religious organizations may be a fine line. Courts have often had to make this distinction in cases in which the defendant organization claims it falls under a statutory exemption for “religious” organizations, such as Title VII’s section 702, which allows “a religious corporation, association, educational institution, or society” to employ “individuals of a particular religion.” 42 U.S.C. § 2000e-1(a) (2006). Courts have generally agreed that to determine whether such an exemption applies, “all significant religious and secular characteristics must be weighed to determine whether the corporation’s purpose and character are primarily religious.” *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988); *EEOC v. Kamehameha Schs.*, 990 F.2d 458, 461 (9th Cir. 1993) (holding that being “merely ‘affiliated’ with a religious organization” is not enough to fall under statutory exemption for religious organizations); *Hall v. Baptist Mem’l Health Care Corp.*, 27 F. Supp.2d 1029, 1035 (W.D. Tenn. 1998) (quoting *Townley Eng’g*, 859 F.2d at 610); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (implicitly using totality of circumstances test to find college fit statutory religious exemption).

214. *See Townley Eng’g*, 859 F.2d at 610 (mining equipment company must comply with Title VII’s religious nondiscrimination prohibition despite deep religious convictions of owners); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 854 (Minn. 1985) (same for for-profit sports and health club sued under state nondiscrimination law). The *Sports & Health Club* court emphasized that the defendant

is not a religious corporation—it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants passed over the line that affords them absolute freedom to exercise religious beliefs. The state’s overriding compelling interest of eliminating discrimination based

decline to rent apartments to unmarried couples in violation of marital status nondiscrimination laws,²¹⁵ or refuse to provide otherwise publicly available services, like medical care, to protected groups²¹⁶ simply because of the religious scruples of individual owners or managers. There is no danger of excessive entanglement or the appearance of government endorsement of religion when nondiscrimination laws are applied to primarily secular organizations.²¹⁷ Such laws satisfy the *Smith* test of being neutral and generally applicable.²¹⁸ Further, application of civil rights laws to primarily secular organizations satisfies the more stringent free exercise standards required by RFRA and some state constitutions. In most cases, a primarily secular organization can easily avoid having civil rights laws exact any “substantial burden” on religious exercise by simply declining to provide a particular service to the public or ensuring that only individual employees who do not have religious objections participate in particular transactions.

For example, the California Supreme Court recently noted that when one doctor within a larger practice organization refused on

upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes.

370 N.W.2d. at 853.

215. Though each of the published cases in which a landlord sought a religious exemption from a marital status nondiscrimination law that protected unmarried cohabiting couples involved individual rather than organizational landlords, *see supra* note 211 (collecting cases), it seems highly likely that courts would reject such claims if brought by primarily secular organizations rather than individuals. *Cf. Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994) (holding that applying marital status nondiscrimination law to individual landlord operating as a corporation did not violate free exercise).

216. *See N. Coast Women’s Care Med. Group*, 189 P.3d at 959 (finding no free exercise right for doctor to deny fertility treatments to lesbian in violation of state sexual orientation nondiscrimination law). The California Supreme Court noted, however, that the defendant doctor could still raise a defense that her religious scruples prohibited her from providing fertility treatments to *unmarried* individuals, regardless of their sexual orientation. Assuming the state’s public accommodations law did not prohibit marital status discrimination (a question upon which the court declined to comment, *see id.* at 963 n.1), the court suggested that such a defense would be legitimate. In this respect, the case mirrors employment cases in which employers may legitimately fire employees for religious reasons not directed at protected classes. *See supra* notes 186-98 and accompanying text.

217. *Cf. Townley Eng’g*, 859 F.2d at 618 n.14 (noting that inquiry into whether an institution is primarily religious or secular is similar to Establishment Clause entanglement inquiry, but even regulation of primarily religious entities can sometimes avoid entanglement).

218. *See N. Coast Women’s Care Med. Group*, 189 P.3d at 966-67.

religious grounds to offer intrauterine insemination (IUI) fertility treatments to a lesbian, the group of physicians could avoid a conflict by either “simply refus[ing] to perform the IUI medical procedure at issue here for any patient . . . [o]r . . . by ensuring that every patient requiring IUI receives ‘full and equal’ access to that medical procedure through a . . . physician [within the organization] lacking defendants’ religious objections.”²¹⁹ Further, even if avoiding such a burden is not feasible in some cases, courts have routinely found the eradication of discrimination by primarily secular entities in employment, housing, and public accommodations to be a compelling interest.²²⁰

However, when religious organizations or individual actors raise the religiously motivated discrimination argument, courts have taken two opposing views. Some have argued that for the state to require religious organizations or individual proprietors to act in direct conflict with their own religious tenets imposes too great a burden on free exercise and creates too great an entanglement between church and state to be permissible.²²¹ In contrast, the majority, and I argue correct, view relies on the modern conception of the public-private

219. *See id.* at 968-69.

220. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (eradicating sex discrimination in public accommodations is compelling interest); *Townley Eng’g*, 859 F.2d at 620-21 (eradicating discrimination based on religion in employment is compelling interest). For an argument that eradicating discrimination on the basis of sexual orientation is a compelling state interest, *see infra* notes 271-83 and accompanying text.

221. *See, e.g.*, *Thomas v. Anchorage Equal Rights Comm’n (Thomas I)*, 165 F.3d 692, 717 (9th Cir. 1999) (individual landlords who wished not to rent to unmarried couples for religious reasons in violation of state marital status nondiscrimination law presented “hybrid” claims subject to strict scrutiny and application of law exacted substantial burden on religion not justified by compelling interest), *vacated en banc as not ripe for review, (Thomas II)* 220 F.3d 1134 (9th Cir. 2000); *State ex rel. Cooper v. French*, 460 N.W.2d 2, 9 (Minn. 1990) (holding that state housing law’s prohibition of marital status discrimination did not protect unmarried opposite sex cohabitating couples, but arguing in dicta that if it did, individual landlord’s religious objection to renting to such couples would require that he be exempt under state Constitution because the state lacks overriding and compelling interest in refusing such exemption); *Donahue v. Fair Employment and Hous. Comm’n*, 2 Cal.Rptr. 2d 32, 46 (Cal. Ct. App. 1991) (state interest in preventing marital status discrimination not enough to deny exemption to individual landlord with religious objection to renting to unmarried cohabiting couple) *review granted, opinion superseded by Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996), *then review dismissed; cf. N. Coast Women’s Care Med. Group*, 189 P.3d at 971 (Baxter, J., concurring) (“At least where the patient could be referred with relative ease and convenience to another practice, I question whether the state’s interest in full and equal medical treatment would compel a physician in sole practice to provide a treatment to which he or she has sincere religious objections.”).

distinction²²² to resolve the controversy. These courts recognize that by passing civil rights laws, legislatures define certain commercial or quasi-commercial activity as “public” in nature.²²³ When a religious actor then chooses to engage in such activity, it is choosing to act in a “public” role, and as such it must accept the limits placed on its freedom by the legislature to protect the rights and interests of third parties.²²⁴ Not only are civil rights laws neutral, generally applicable laws from which no free exercise exemptions are required under *Smith*,²²⁵ but even under the compelling interest test required by

222. See *supra* note 93 (discussing modern public-private distinction).

223. See *Roberts*, 468 U.S. at 625 (noting that Minnesota’s Human Rights Act “adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct”).

224. See *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”). In *Smith v. Fair Employment & Housing Commission*, the California Supreme Court noted that it could find no case

in which the Supreme Court exempted a religious objector from the operation of a general law when the [C]ourt also recognized that the exemption would detrimentally affect the rights of third parties. Indeed, the notion that an accommodation might affect the rights of third parties led the Supreme Court in *Wisconsin v. Yoder* expressly to limit its holding to avoid such an implication. As limited, the decision cannot be read as authority for granting religiously based exemptions when to do so would sacrifice the rights of third parties.

913 P.2d at 928 (citation omitted). Dissenting in *State ex rel. Cooper*, Minnesota Supreme Court Chief Justice Popovich explained his conclusion that a landlord should not be granted a religious exemption from the state’s marital status nondiscrimination law as follows:

Upon entering the public marketplace appellant could no longer consider just his rights and beliefs, but became subject to certain state laws and the rights of potential tenants. . . . As respondent states “the First Amendment does not bestow upon the individual an absolute right to require others in the marketplace to adopt those values as a precondition to doing business with him or her.” Appellant is free, in his private life, to not associate with anyone whom he feels has the “appearance of evil,” but when someone voluntarily enters the public marketplace he may encounter laws that are inconsistent with his religious beliefs. While the Act imposes a burden on French’s sincerely held religious belief that living together is sinful, such a burden is greatly lessened because it occurred only when French voluntarily entered into the rental marketplace—by crossing over the line drawn by the legislature—and thus subjecting himself to potentially burdensome regulations such as the Act’s prohibition of marital status discrimination.

460 N.W.2d at 15 (Popovich, C.J., dissenting).

225. See *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994), *reaffirmed by Thomas v. Anchorage Equal Rights Comm’n (Thomas III)*, 102 P.3d 937 (Alaska 2004); *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996). *But see Thomas I*, 165 F.3d at 711-12 (holding that landlords who objected to renting to unmarried couples for

RFRA and many state constitutions, the state also has a compelling interest—in eradicating discrimination in the public commercial arenas of employment,²²⁶ housing,²²⁷ and public accommodations²²⁸—that outweighs religious objections of even religious entities and individual actors.

Further, the application of civil rights laws to religious entities and individuals is narrowly tailored to serve the government’s interest in ensuring that all people have equal opportunities to participate in civil society. When purveyors of employment, housing, and public accommodations deny access to groups of individuals based on arbitrary characteristics, members of those groups suffer significant harm, because acquiring these goods becomes more difficult for them. Granting exemptions to anyone who framed his objection to complying with a civil rights law in religious terms would fatally undermine the effectiveness of such laws. Many, if not most, people who object to such laws do so in religious terms. Further, even if religiously motivated discrimination does not significantly impact the overall availability of jobs, housing,

religious reasons presented “hybrid” claims subject to strict scrutiny under *Employment Division v. Smith*), *vacated en banc as not ripe for review*, 220 F.3d 1134.

226. See *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (“By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a ‘highest priority.’ Congress’ purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.”) (internal citations omitted).

227. See *Thomas III*, 102 P.3d at 937 (holding state’s marital status nondiscrimination in housing law satisfies state constitutional requirement that substantial burdens on religious free exercise be justified by a compelling interest and be narrowly tailored); *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996) (holding that even if RFRA applies to state housing marital status nondiscrimination law, application of the law against landlords with religious objections to unmarried cohabitation does not substantially burden free exercise); *Jasniewski v. Rushing*, 687 N.E.2d 743 (Ill. Ct. App. 1997) (holding municipal marital status nondiscrimination law’s protection of unmarried cohabiters inflicts a substantial burden on religious exercise under RFRA, but that burden is justified by the state’s compelling interest), *vacated without comment*, 685 N.E.2d 622 (Ill. 1997); *cf. Att’y Gen. v. Desilets*, 636 N.E.2d 233 (Mass 1994) (holding that state marital status nondiscrimination law’s protection of unmarried cohabiting couples substantially burdens landlord’s free exercise rights but denying summary judgment for landlords and remanding for a fuller exploration of whether state has compelling interest that would justify burden).

228. See *N. Coast Women’s Care Med. Group v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (holding that state has “compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation . . .”).

or public services and amenities, the discrimination nevertheless causes serious harms.

First, employment, housing, and most public accommodations are not fully fungible goods. Removing a particular job or home from the market for certain groups can harm members of those groups in and of itself. The more attractive the particular job, home, or other amenity, the greater the injury. Second, even when purveyors of “generic” jobs, apartments, or services discriminate, they seriously harm the specific individuals whom they deny because of their race, sex, or other protected status. This individual harm does not depend on the number of providers who seek exemptions from nondiscrimination laws. One exemption is enough to inflict the individual degradation and reminder of second-class status that accompanies each individual act of discrimination.²²⁹

c. Critiques of the Courts’ Current Approach

Two important critiques of the courts’ response to the church autonomy and religiously motivated discrimination arguments deserve attention. First, it might be argued that enforcing nondiscrimination laws on the operations of *any* religious entity impermissibly infringes on religious liberty. However, such an objection is too broad. Religious organizations necessarily must be subject to a wide range of civil regulations. Though the line of Supreme Court cases supporting the ministerial exception suggests that the First Amendment requires that the state remain uninvolved in issues of “church administration . . . and government,”²³⁰ those same cases, buttressed by others, simultaneously assert that religious

229. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.” (quoting S. REP. NO. 88-872, at 16 (1964))).

230. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107, 116 (1952). See *supra* note 167 (discussing cases).

institutions are not completely free from civil regulation.²³¹ The state may enforce the legal rights of outsiders against religious organizations by resolving contract disputes or holding religious entities liable in tort.²³² Even purely internal church disputes may be resolved by civil courts, if it is possible to do so using “neutral principles” of law.²³³ Religious actors are not exempt from civil regulation generally, nor should they be generally exempt from civil rights laws.

Moreover, courts routinely enforce other laws affecting the employer-employee relationships of religious actors, including, for example, laws requiring the payment of a minimum wage²³⁴ and social security and unemployment taxes.²³⁵ Civil rights laws are no different. They are just as “neutral” as legal principles of contract, tort, or property and general regulations of wage rates and taxes. Rather than requiring civil authorities to completely abstain from regulating religious institutions, the Supreme Court’s precedents can better be understood simply to hold that secular regulations may generally be applied to religious actors, but courts must refrain from passing judgment on ecclesiastical issues and should adopt a

231. *See, e.g.*, *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986) (“Even religious schools cannot claim to be wholly free from some state regulation.”).

232. *See, e.g.*, *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (“A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court.”); *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (“District courts have the power to enforce secular contract rights, despite the fact that one of the contracting parties may base their rights on religious affiliations.”); *Jenkins v. Trinity Evangelical Lutheran Church*, 825 N.E.2d 1206, 1213 (Ill. App. Ct. 2005) (quoting *Minker*, 894 F.2d at 1359).

233. *See Jones v. Wolf*, 443 U.S. 595, 602-03 (1979) (approving of neutral principles approach to resolve intra-church property disputes); *United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”); *Welter v. Seton Hall Univ.*, 608 A.2d 206, 292 (N.J. 1992) (“In appropriate circumstances a court may apply neutral principles of law to determine disputed questions that do not implicate religious doctrine. ‘Neutral principles’ are wholly secular legal rules whose application to religious parties or disputes does not entail theological or doctrinal evaluations.”) (citations and quotations omitted).

234. *See Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303-06 (1985) (religious organization must comply with federal minimum wage laws).

235. *See United States v. Lee*, 455 U.S. 252, 256-61 (1982) (Amish employer must pay Social Security and unemployment taxes).

statutory interpretation approach that avoids potential conflict between secular regulations and religious tenets whenever possible. The general approach that courts have taken to both church autonomy and religiously motivated discrimination arguments satisfies these constraints.

The second, more powerful and deeper, critique of the courts' general approach points out that the courts' willingness to apply the "neutral principles" of civil rights laws to secular employment, housing, and other relationships rests on the supposition that it is possible for civil courts to distinguish between primarily secular and primarily religious activities. But is the very possibility of separating the secular from the religious a fundamentally theological proposition? What of religious entities that insist that everything they do is primarily religious? Further, what of individual business owners who insist that every aspect of their lives involves an inherently religious element? In *EEOC v. Townley Engineering & Manufacturing Co.*,²³⁶ the Ninth Circuit held that a closely held mining equipment corporation founded by a married couple as a "Christian, faith operated business" did not qualify as a "religious" organization under Title VII, and thus was not exempt from the requirement that it refrain from discriminating against an atheist employee.²³⁷ In a thoughtful dissent, Judge Noonan presented a strong argument that the idea that commercial life is necessarily secular and separable from religious life is a deep theological assertion. According to Noonan, when the government, either through the courts or a legislature, enforces a rule based on a strict dichotomy between the secular and the religious, it is necessarily making "a theological judgment fairly characterized as reflecting either a secularism skeptical of God's existence and power or a species of deism that radically isolates God from the world that believers believe God created and animates and directs."²³⁸

236. 859 F.2d 610 (9th Cir. 1988).

237. *Id.* at 619. The owner-operators of the business perceived the company to be integral to their covenant with God. They printed Bible verses in purchase documents and held a mandatory devotional service once a week for all employees during work hours. But the court found "that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702 [of Title VII]." *Id.*

238. *Id.* at 625 (Noonan, J., dissenting).

Despite the strength of this argument, it must fail. First, it should be noted that more often than not objective evidence supplied by the defendant proves sufficient to determine whether a given employment, housing, or other commercial relationship has a primarily religious or secular purpose or function. Priests, theology teachers in religious seminaries, and church youth counselors have job descriptions that explicitly require them to engage in religious instruction and training. In contrast, secretaries, janitors, and accountants generally perform duties that the employer itself readily admits are not religious.

It is certainly true, however, that not all relationships are so easy to categorize as primarily secular or religious. Is the relationship between a parochial school and a teacher who teaches both religious and secular subjects primarily religious or secular? What about the relationship between a church-run soup kitchen or drug counseling service and its clients? Critics are right to argue that the secular-religious distinction is not always *sufficient* to resolve difficult cases. Recognizing this, I suggest below that courts should look to principles drawn from the doctrine of freedom of expressive association to help guide their analyses when the religious-secular distinction is ambiguous.²³⁹

But recognizing that clean judicial parsing of secular and religious relationships is not always possible does not mean that an attempt to distinguish between the two should never be made. At bottom, our entire legal system is based on the premise that secular and religious activities and organizations can generally be distinguished. The Free Exercise Clause imagines that there is such a thing as a “religious” practice or activity that may not be targeted by the government for adverse regulation. Further “legislative accommodations would be impossible as a practical matter if the government were . . . forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not.”²⁴⁰ The Supreme Court in

239. See *infra* notes 290-314 and accompanying text.

240. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 79 (Cal. 2004). In *Catholic Charities of Sacramento*, the California Supreme Court held that that state’s Women’s Contraception Equality Act (“WCEA”), which requires employers who provide group health

*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*²⁴¹ assumed for the sake of argument that Title VII's pre-1972 exemption allowing religious organizations to discriminate on the basis of religion only for jobs with religious functions "was adequate in the sense that the Free Exercise Clause required no more," despite recognizing that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."²⁴²

The Establishment Clause even more directly imagines this separation by explicitly demarcating the federal government (and through incorporation by the Fourteenth Amendment, the states) as a secular institution. If every aspect of life is inherently religious to at least some people, and if therefore conceiving of any aspect of life as purely or even primarily secular is itself a theological judgment the government may not make, then the government may not legislate in any area. Every law would be an endorsement of the theological view that the law itself and the activity it purports to regulate is primarily secular in nature.

d. Looking to the Freedom of Association for Guidance

While the broad critique of the religious-secular distinction should be rejected, at its core is the important truth that in many cases, making such a distinction is profoundly difficult, if not impossible, without considering other interests at play. In virtually every instance in which a defendant seeks religious exemption from a civil rights law, the relationship at issue includes both important secular and religious elements. The relationship between a minister and a church is both a spiritual commitment and a purchase of services in the labor market. The rental of housing units by a religious individual is a market exchange, but when the tenants engage in conduct to which the landlord objects on religious

insurance to cover prescription contraceptives, does not violate the First Amendment when applied to a religious-affiliated employer who does not fit within WCEA's religious employer exemption, even under strict scrutiny. *See id.* at 94.

241. 483 U.S. 327 (1987).

242. *Id.* at 336.

grounds, the relationship takes on religious implications. In most cases, courts faced with claims for religious exemptions to nondiscrimination laws have come to defensible conclusions by relying exclusively on whether the religious or secular elements of a given relationship seem to predominate. But to justify the courts' conclusions, resolve those cases in which the courts are in conflict, and provide tools that should help resolve difficult cases in the future, we should look beyond the one-dimensional religious-secular distinction.

The key step in finding a principled resolution to religious exemption claims from nondiscrimination laws is to recognize that, in essence, they are claims of both religious liberty and expressive association. Religious employers, landlords, and purveyors of publicly available services and amenities very rarely, if ever, argue that they are religiously compelled to discriminate.²⁴³ Rather, they assert that, having chosen to enter the labor, housing, or other service markets, they want to avoid acting in ways that seem to express their approval of conduct to which they object. The lower courts have developed their basic approach to such claims by relying almost exclusively on the Supreme Court's standard Religion Clause tests.²⁴⁴ But a proper understanding should recognize that the Court's doctrine of freedom of expressive association, which explicitly protects association for the purpose of engaging in religious free exercise,²⁴⁵ provides an additional framework that can and should provide guidance to help resolve these conflicts.

While the Supreme Court has remained silent on the question of compelled exemptions from civil rights laws under the Religion Clauses, it has directly explored the limits to the permissible reach of such laws through its elaboration of the doctrine of freedom of

243. See, e.g., *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 926 (Cal. 1996) (landlord not religiously compelled to be in residential housing rental business); *N. Coast Women's Care Med. Group, Inc. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (physician did not claim religious compulsion to provide infertility treatments to the public).

244. When addressing claims brought under state constitutions, state courts have similarly focused on analogous religion clause based tests.

245. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion.*") (emphasis added).

association. This should not be particularly surprising. Nondiscrimination laws in general are directly addressed at associative activity. They seek to identify particular kinds of “public” relationships in which basic norms of equal treatment must prevail for society to legitimately call itself democratic. The doctrine of freedom of association describes the outer limits of what relationships may legitimately be called “public” in this way.

i. The Freedom of Intimate Association and Civil Rights Laws

In *Roberts v. United States Jaycees*,²⁴⁶ the Supreme Court explained that the Constitution protects two forms of freedom of association, one intrinsic and the other instrumental. First, the fundamental liberty protections of the First Amendment, the Due Process Clause, and other constitutional provisions prohibit the government from intruding on the intrinsic freedom to choose one’s intimate relationships.²⁴⁷ The Court described the right to intimate association in general terms, discussing the basic principles and

246. 468 U.S. 609 (1984). In *Roberts*, the Court addressed the constitutionality of Minnesota’s statutory prohibition on sex discrimination in places of public accommodations as applied to the Jaycees, a private nonprofit membership organization that engaged in a variety of social and commercial activities and restricted full voting membership only to men. Minnesota law prohibited the denial to “any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.” *Id.* at 615 (quoting MINN. STAT. § 363.03(3) (1982)). “Public accommodation” was defined as “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.” *Id.* (quoting § 363.01(18)). The Minnesota Supreme Court determined the statute applied to any “public business facility.” *Id.* (quoting *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 768 (Minn. 1981)). The Jaycees organization, founded as the Junior Chamber of Commerce in 1920, *see id.* at 612, was found by the Minnesota Supreme Court to be

a ‘business’ in that it sells goods and extends privileges in exchange for annual membership dues; . . . a ‘public’ business in that it solicits and recruits dues-paying members based on unselective criteria; and . . . a public business ‘facility’ in that it conducts its activities at fixed and mobile sites within the State of Minnesota.

Id. at 616 (quoting *U.S. Jaycees*, 305 N.W.2d at 768-74).

247. *See Roberts*, 468 U.S. at 617-18 (“[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.”).

interests at stake rather than outlining the right's specific contours.²⁴⁸ According to the Court, the strength of the personal liberty interest involved depends on where the relationships at issue fall on the spectrum between the most protected personal sphere of the family and the least protected impersonal arena exemplified by the relationships among employees in "a large business enterprise."²⁴⁹ Large corporations lack characteristics of "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" that distinguish family relationships.²⁵⁰ Accordingly, "the Constitution undoubtedly imposes constraints on the state's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."²⁵¹ Between the extremes of the family and the large corporation, "lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the

248. The Court explained that the freedom of intimate association protects "the formation and preservation of certain kinds of highly personal relationships," including but not necessarily limited to those that

have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs. . . . [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 618-19.

249. *Id.* at 620.

250. *Id.* The Court further explained:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Id. at 619-20.

251. *Id.* at 620 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Ry. Mail Ass'n. v. Corsi*, 326 U.S. 88, 93-94 (1945)).

State.”²⁵² The Court noted “that factors that may be relevant” to the determination of whether and how the state may regulate an individual’s decision to join a particular association include the association’s “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.”²⁵³

Laws prohibiting discrimination in employment, housing, and public accommodations generally honor the personal liberty interests involved in private personal relationships protected by the right of freedom of intimate association. No laws purport to enforce nondiscrimination norms on the personal selection of family or friends. Legislatures have also generally tailored civil rights laws to avoid reaching those special cases within the general arenas of employment, housing, and public accommodations in which a claim of intimate association rights might plausibly be raised. The clearest examples of such tailoring are statutory exemptions from fair housing laws for rentals within small-scale owner-occupied dwellings.²⁵⁴ The *Roberts* court recognized that intimate association rights explicitly protect “cohabitation with one’s relatives.”²⁵⁵ Constitutional doctrine in a variety of arenas recognizes the special privacy interests involved in regulations affecting individuals in their homes.²⁵⁶ The choice to share one’s living space with another person is very personal, even if the relationship is also an economic one. Whether courts would or should actually find personal liberty rights violated by laws preventing discrimination in owner-occupied rentals, the choice of legislatures to decline to regulate such relationships seems an eminently reasonable resolution of the various interests at play.

252. *Id.*

253. *Id.*

254. *See, e.g.*, 42 U.S.C. § 3603(b)(2) (2006).

255. *Roberts*, 468 U.S. at 619 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)).

256. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (searches of homes subject to more stringent limits than other searches under Fourth Amendment); *FCC v. Pacifica Found.*, 438 U.S. 726, 731 n.2 (1978) (broader regulation of broadcast media than other media is permissible under Free Speech Clause in part because of reach of broadcasts into the home); *cf. City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (“A special respect for individual liberty in the home has long been part of our culture and our law.”).

Employment nondiscrimination laws similarly limit their scope to larger scale organizations to avoid reaching relationships that might involve intimate association interests.²⁵⁷ The *Roberts* court specifically contrasted family relationships, the paradigmatic site of protected intimate association rights, with the relationships involved in “large” business enterprises.²⁵⁸ The relationship between an employer and employee in a very small business, in contrast, is likely to be more personal in nature than in a large corporation and may even at rare times come close to the emotional and identity-defining intimacy of a family bond. There is a strong argument that because the employment relationship is at its core economic, it by definition cannot come close enough to the family relationship to deserve the protection of the freedom of intimate association. Nevertheless, decisions by legislatures to regulate only larger enterprises, where no intimate relational interests could plausibly exist, assure that employment nondiscrimination laws do not infringe on important personal relationships, regardless of whether those particular relationships deserve constitutional protection.²⁵⁹

Finally, public accommodations laws generally avoid infringing on the personal liberty interests recognized in *Roberts* by explicitly applying only to services, facilities, and other amenities voluntarily made available to the general public. Almost by definition, the relationships involved in the provision of such resources lack the selectivity, congeniality, and personal intimacy necessary to be protected as elements of fundamental personal liberty.²⁶⁰

257. See, e.g., 42 U.S.C. § 2000e(b) (2006) (limiting application of Title VII’s nondiscrimination rules to employers with fifteen or more employees).

258. *Roberts*, 468 U.S. at 620.

259. Exemptions from employment civil rights laws for small employers can also be justified by arguing that the economic hardship involved in defending against baseless claims of discrimination generally outweighs the positive value that society would accrue from the prevention of discrimination by such employers. Of course, this is purely a policy argument. It does not implicate constitutional limits to such laws.

260. For example, the *Roberts* Court found that local chapters of the Jaycees, which were “large and basically unselective groups,” were not the kinds of associations that enjoy freedom of intimate association rights. See *Roberts*, 468 U.S. at 621. If a state ever attempted to apply a public accommodations law to the membership policies of a church, the interests involved in intimate association rights might come into play. Relationships between fellow members of churches at times exhibit intimate characteristics similar to those found in familial bonds. But the freedom of expressive association, the principles of free exercise, and the disestablishment of

ii. The Freedom of Expressive Association: Interpreting Roberts and Dale

In addition to the intrinsic freedom of intimate association, *Roberts* also recognized the instrumental freedom of expressive association, which protects “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”²⁶¹ Infringements on expressive association rights can be justified by “regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”²⁶²

Expressive association rights are more commonly implicated than intimate association rights when defendants assert religious objections to being subject to sexual orientation nondiscrimination laws. A church or other religious group’s decision to deny membership to gay people would directly involve expressive association rights.²⁶³ Refusals to employ or rent to gay people might also involve expressive rights. Whether civil rights laws prohibiting sexual orientation discrimination in such circumstances run afoul of expressive rights depends on a proper understanding of the doctrine and principles supporting the freedom of expressive association.

To begin, it is important to recognize the threshold principle that the freedom of expressive association only protects relationships that involve membership in a joint endeavor. In *Rumsfeld v. Forum for*

religion would each be enough on its own to prevent such an application of state-enforced nondiscrimination norms to church membership decisions.

261. *Id.* at 618; *see also id.* at 622 (“According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”) (internal citations omitted).

262. *Id.* at 623.

263. *See id.* (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.”).

Academic and Institutional Rights, Inc. (FAIR),²⁶⁴ the Supreme Court held that requiring law schools to provide the same access to military recruiters that they provide to other recruiters does not violate the schools' freedom of expressive association, because the recruiters clearly are not "members" of the school.²⁶⁵ The premise of the protection of freedom of expressive association is the idea that individuals join together to engage in expressive activity. The more distant, anonymous, or formal the relationship, the less such jointness is apparent. Thus, freedom of expressive association only protects the choices of groups regarding inclusion, exclusion, and other treatment of members or *insiders* in their groups.²⁶⁶ It does not protect the ability of groups to choose not to interact with *outsiders*.

But associational rights do not protect all internal practices of every group. Determining when the freedom of expressive association protects a group's ability to discriminate against protected classes depends on the proper understanding of two further pivotal Supreme Court cases.

First, in *Roberts*, the Court found that Minnesota could apply its Human Rights statute to the Jaycees, a private nonprofit membership

264. 547 U.S. 47 (2006).

265. *See id.* at 69 ("Law schools . . . 'associate' with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, *outsiders* who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association.") (emphasis added).

266. The *FAIR* Court noted:

[T]he freedom of expressive association protects more than just a group's membership decisions. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-102 (1982), or impose penalties or withhold benefits based on membership in a disfavored group, *Healy v. James*, 408 U.S. 169, 180-184 (1972). Although these laws did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message.

547 U.S. at 69 (full citations omitted). The Court went on to conclude, however, that requiring law schools to provide access to military recruiters "has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable." *Id.* at 69-70. Thus, while the freedom of expressive association prohibits the government from interfering with the internal affairs of some groups in various respects, it does not apply to regulation of the interactions between such groups and outsiders, "regardless of how repugnant" the group finds that interaction. *See id.* at 70.

organization originally founded as the Junior Chamber of Commerce that engaged in a variety of social and commercial activities, to require them to grant full voting membership to women. Doing so furthered “compelling state interests of the highest order . . . [in] eliminating discrimination and assuring its citizens equal access to publicly available goods and services” through the least restrictive means available.²⁶⁷ In contrast, the Court in *Boy Scouts of America v. Dale*²⁶⁸ held that New Jersey’s statutory prohibition on discrimination on the basis of sexual orientation in public accommodations could not constitutionally be applied to compel the Boy Scouts to accept an openly gay scoutmaster to remain as a member.

The combination of *Roberts* and *Dale* highlights a profound tension in American law between the principles of nondiscrimination and freedom of association. The way the two cases attempt to resolve that tension could be understood in four ways. One could reject one of the cases as simply *wrong*. Or, accepting both cases as good law, one might explain the outcomes by distinguishing along *compelling/noncompelling interest, status/conduct, or commercial/expressive* grounds. Because it best realizes the goal of promoting democratic legitimacy by ensuring equal access to the modern “public” realm of civil life for all people while simultaneously protecting pluralism and individual liberty, I suggest the fourth approach.

First, it may be that one of the cases was incorrectly decided. The *Dale* decision has received ample, incisive, and largely compelling criticism.²⁶⁹ However, despite some commentators’ claims to the contrary,²⁷⁰ one need not reject one or the other case outright to find coherence.

267. *Roberts*, 468 U.S. at 624.

268. 530 U.S. 640 (2000).

269. See, e.g., Andrew Koppelman, *Sign of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819 (2002); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1605-36 (2001).

270. Cf. Turley, *supra* note 56, at 60 (“The Court’s jurisprudence in this area [i.e., the enforceability of antidiscrimination laws on religious groups] is now hopelessly confused and contradictory.”).

A second understanding postulates that the distinction between the two cases is that eliminating discrimination on the basis of sex is a compelling interest while eliminating discrimination on the basis of sexual orientation is not. The Supreme Court has never answered the question of whether the state interest in eliminating discrimination against gay people is compelling.²⁷¹ The few lower courts that have directly addressed the question, however, have correctly concluded that it is.²⁷² The *Roberts* Court's discussion of the state's compelling interest in the elimination of discrimination against women bears quoting at length:

[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. . . . [I]n upholding Title II of the Civil Rights Act of 1964, which forbids race discrimination in public accommodations, we emphasized that its "fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as

271. See *Dale*, 530 U.S. at 659 (holding that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association" without further elaboration); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that Free Speech Clause protects parade organizers' right to exclude group because of group's message without discussing compelling interest issue); cf. *Lawrence v. Texas*, 539 U.S. 558 (2003) (declining to determine whether sexual orientation is suspect classification for Equal Protection analysis); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (same). The Court has spoken positively of sexual orientation nondiscrimination laws, describing them in the same breath as race, sex, and other nondiscrimination provisions as "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . ." *Hurley*, 515 U.S. at 572. This treatment may suggest the state's interests in eradicating discrimination based on the various categories covered by such laws are equally compelling.

272. See *N. Coast Women's Care Med. Group, Inc. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (finding that state has a "compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation"); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 31 (D.C. 1987) (finding that state "has a compelling or overriding governmental interest in the eradication of sexual orientation discrimination"); cf. *State ex rel. Cooper v. French* 460 N.W.2d 2, 15 (Minn. 1990) (Popovich, C.J., dissenting) (noting in dicta the conclusion of *Gay Rights Coalition* as support of argument that eradicating marital status discrimination is also compelling); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (asserting in dicta that state has compelling interest in "elimination of all forms of discrimination").

by those treated differently because of their race. . . . Th[e] expansive definition [of public accommodations in Minnesota's law] reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. . . . Assuring women equal access to such goods, privileges, and advantages [as leadership skills, business contacts, and employment promotions offered by the Jaycees to its members] clearly furthers compelling state interests.²⁷³

The “stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly”²⁷⁴ by those suffering from sexual orientation discrimination as by those subject to discrimination based on sex or race. Sexual orientation, like race, sex, and other protected characteristics, “bears no relation to the individual’s ability to participate in and contribute to society.”²⁷⁵ Gay people face “barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups”²⁷⁶ like women and racial minorities. As the D.C. Court of Appeals eloquently put it in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*,²⁷⁷

[t]he compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.²⁷⁸

While few courts have explicitly addressed the question of whether eliminating discrimination on the basis of sexual orientation should be considered a compelling interest, there is an ongoing related debate about whether sexual orientation should be considered

273. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984) (citations omitted).

274. *Id.* at 625.

275. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

276. *Roberts*, 468 U.S. at 626.

277. 536 A.2d 1 (D.C. 1987).

278. *Id.* at 37.

a suspect or quasi-suspect classification requiring strict or intermediate scrutiny for equal protection purposes. Most courts that have considered the question have rejected the notion.²⁷⁹ However, in a few important recent decisions, most prominently the same-sex marriage cases in California and Connecticut, courts have concluded that sexual orientation should indeed be considered such a classification.²⁸⁰ The arguments in favor of such a finding are stronger,²⁸¹ and certainly once such a determination has been made, it

279. See, e.g., *Cook v. Gates*, 528 F.3d 42, 61 (9th Cir. 2008) (collecting cases); *Baker v. State*, 744 A.2d 864, 878, n.10 (Vt. 1999) (collecting additional cases). But see *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 467 (Conn. 2008) (“To a very substantial degree, [*Lawrence v. Texas*, 539 U.S. 558 (2003)], which overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986),] undermines the validity of the federal circuit court cases that have held that gay persons are not entitled to heightened judicial protection because . . . the courts in those cases relied heavily—and in some cases exclusively—on *Bowers* to support their conclusions.”).

280. See *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (sexual orientation a suspect classification requiring strict scrutiny under state constitution); *Kerrigan*, 957 A.2d at 431-32 (sexual orientation a quasi-suspect classification calling for intermediate scrutiny under state constitution); see also *Witt v. Dep’t of Air Force*, 527 F.3d 806, 824 (9th Cir. 2008) (Canby, J., concurring) (sexual orientation a suspect classification under federal constitution), *reh’g denied*, No. 06-35644, 2008 WL 5101565 (9th Cir. Dec. 4, 2008); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 446-47 (Or. Ct. App. 1998) (sexual orientation a suspect classification under state constitution); *Hernandez v. Robles*, 855 N.E.2d 1, 27-29 (N.Y. 2006) (Kaye, C.J., dissenting) (same); *Anderson v. King County*, 138 P.3d 963, 1029-32 (Wash. 2006) (Bridge, J., concurring) (same); cf. *Egan v Canada*, [1995] 2 S.C.R. 513, 528-29, 536 (Can.) (finding sexual orientation analogous to enumerated classifications, such as race or sex, that are constitutionally suspect under equal protection clause of Canadian Charter); *Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir. 1988) (finding sexual orientation a suspect classification for the first time in American courts), *amended by*, 847 F.2d 1329 (9th Cir. 1988), *superseded by* 847 F.2d 1329 (9th Cir. 1988), *reh’g granted*, 847 F.2d 1362 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

281. As noted in *In re Marriage Cases*, sexual orientation “is a characteristic (1) that bears no relation to a person’s ability to perform or contribute to society . . . and (2) that is associated with a stigma of inferiority and second-class citizenship, manifested by the group’s history of legal and social disabilities.” 183 P.3d at 442 (citations omitted). Though immutability is often discussed as an element of suspect classifications, “immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes.” *Id.* Alienage is a suspect classification, yet an alien can become a citizen. See *id.* “Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.” *Id.* Finally, even if a group has some political power currently, the core question in the suspect classification analysis should be, and at least in California is, “whether the class of persons who exhibit a certain characteristic *historically* has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual’s ability to perform or contribute to society.” *Id.* at 443 (emphasis added); cf. *Kerrigan*, 957 A.2d at 439 (arguing that group may be entitled to suspect or quasi-suspect class status “upon a showing *either* that the group is a minority *or* that it [currently] lacks political power”). Dissenting in the California case, Justice

should easily follow that eliminating discrimination based on such a classification is a compelling interest.

But even if sexual orientation is not a suspect classification, the interest in eliminating discrimination remains compelling. Courts have found such an interest with respect to other forms of discrimination not accorded suspect classification status under the equal protection doctrine.²⁸² Once the polity has decided to protect gay people from discrimination through the enactment of civil rights laws, courts should be wary to question the political determination of the seriousness of the interests at stake. As the D.C. Circuit declared over twenty years ago, “a court cannot lightly dispute a determination by the political branches that the . . . interests at stake are compelling.”²⁸³

Rather than questioning whether eradicating discrimination against gay people is a compelling interest, a third potential explanation of the *Roberts-Dale* tandem would rely on the distinction between status and conduct. Under this view, women were protected in *Roberts* because the protected characteristic involved—sex—is

Baxtor argued that, at least when dealing with a question of first impression, courts “should consider whether, despite a history of discrimination, a particular group remains so unpopular, disfavored, and susceptible to majoritarian abuse that suspect-class status is necessary to safeguard its rights.” *In re Marriage Cases*, 183 P.3d at 467 (Baxtor, J., dissenting); accord *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) (arguing sexual orientation not a suspect classification because “gay and lesbian persons are [not] so politically powerless that they constitute a suspect class”); *Kerrigan*, 957 A.2d at 492-93 (Border, J., dissenting) (arguing sexual orientation not a quasi-suspect classification because gay persons in Connecticut do not currently lack political power). The Maryland Supreme Court in *Conaway* argued that increasing legal recognition and protection of gay rights prove that gay people do not need to be protected by strict scrutiny. See 932 A.2d at 614. Judge Borden made the same argument for denying quasi-suspect class status to gay people in his dissent in *Kerrigan*. See 957 A.2d at 492-93 (Borden, J., dissenting). But if current political power, as evidenced by widespread legal protections for a group’s rights, is enough to deny a classification suspect status, then surely race, the quintessential suspect classification, should lose the designation.

282. See, e.g., *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988) (holding that state has a compelling interest in “[p]rotecting an employee’s right to be free from forced observance of the religion of his employer”); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Alaska 1994) (holding state has compelling interest in eradicating housing discrimination “based on irrelevant characteristics” including marital status); *State ex rel McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (“[T]he government has an overriding compelling interest in prohibiting discrimination in employment and public accommodation” based on religion.); cf. *EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) (“[T]he government has a compelling interest in eradicating discrimination in all forms.”).

283. *Finzer v. Barry*, 798 F.2d 1450, 1459 (D.C. Cir. 1986), *aff’d in part, rev’d in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988).

purely a status attribute. In contrast, protecting Dale from ouster from the Boy Scouts could not be justified because of his conduct—not only was he gay, but he was *openly* gay and a gay “activist.”²⁸⁴ According to this argument, requiring that groups not discriminate purely based on status does not implicate expression in the same way as requiring a group to accept members who engage in specific conduct the group opposes.²⁸⁵ The *Dale* court gave some credence to this position when it argued that allowing the Boy Scouts to expel Dale “is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”²⁸⁶ In its most critical passage, the majority asserted that “[t]he presence of an *avowed* homosexual and *gay rights activist* in an assistant scoutmaster’s uniform sends a distinctly different message than the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.”²⁸⁷

While the language in *Dale* might be read to embrace the idea that there is a legally significant difference between treating someone differently for being *openly* gay and treating someone differently for just *being* gay, such a conclusion cannot withstand scrutiny. Kenji Yoshino has provided an incisive critique of the conduct/status distinction in this context, arguing that its embrace in legal doctrine eviscerates gay rights laws and civil rights laws generally.²⁸⁸ To

284. The Court emphasized that “Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

285. *Cf. Duncan*, *supra* note 17, at 405 (arguing that, unlike in the case of race or sex discrimination, “[w]hen an employer or landlord makes a distinction based upon a person’s sexuality, he is making a judgment about the content of that individual’s character.”).

286. *Dale*, 530 U.S. at 653.

287. *Id.* at 655-56 (emphasis added).

288. *See* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 21 (2006). Yoshino notes that “[a]ll civil rights groups feel the bite” of the demand to “cover”—that is, to act in a way that discounts one’s “spoiled” identity by “mak[ing] a great effort to keep the stigma from looming large.” *Id.* at 18 (quoting ERVING GOFFMAN, *STIGMA* (1963)).

African-Americans are told to “dress white” and to abandon “street talk”; Asian-Americans are told to avoid seeming “fresh off the boat”; women are told to “play like men” at work and to make their child-care responsibilities invisible; Jews are told not to be “too Jewish”; Muslims, especially after 9/11, are told to drop their veils and their Arabic; the disabled are told to hide the paraphernalia they use to manage their disabilities. This is so despite the fact

prohibit disparate treatment of a group of people because of a particular characteristic—be it race, sex, sexual orientation, or any

that American society has seemingly committed itself, after decades of struggle, to treat people in these groups as full equals. . . . In the new generation, discrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons. Outsiders are included, but only if we behave like insiders—that is, only if we cover.

Id. at 21-22. Courts have repeatedly relied on the status-conduct distinction to condone this kind of discrimination. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (holding that prosecutor's decision to strike jurors because they could speak Spanish did not violate Equal Protection Clause); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (holding that employer's policy of prohibiting employees from wearing cornrows did not constitute racial discrimination); *Dimaranan v. Pomona Valley Hosp. Med. Ctr.*, 775 F. Supp. 338, 342 (C.D. Cal. 1991) (holding that hospital policy prohibiting speaking of Tagalog was not discrimination on the basis of national origin), *withdrawn pursuant to settlement*, No. 89 4299 ER (JRJ), 1993 WL 326559 (C.D. Cal. March 17, 1993). The conduct-status distinction has played a particularly problematic role in a variety of cases involving gay rights. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state sodomy law as applied to homosexuals by focusing exclusively on conduct rather than status), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (2004) (upholding state ban on adoptions by homosexuals and distinguishing *Romer v. Evans*, 517 U.S. 620 (1996), by arguing adoption ban was limited to conduct, not status and conduct); *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (holding that state Attorney General's dismissal of employee for engaging in religious marriage ceremony to same-sex partner was permissible, in part because decision was based on employee's conduct, not status), *cert. denied*, 522 U.S. 1049 (1998). The conduct-status distinction has had the particularly pernicious effect of repeatedly undermining the rights of gay and lesbian parents in adoption and custody cases. *See, e.g.*, *Chaffrin v. Frye*, 45 Cal. App. 3d 39, 46-47 (Cal. Ct. App. 1975) (noting, in affirming denial of child custody to a lesbian mother, "Appellant does not merely say she is homosexual. She also lives with the woman with whom she has engaged in homosexual conduct, and she intends to bring up her daughters in that environment."); *Charpentier v. Charpentier*, 536 A.2d 948, 950 (Conn. 1988) (noting, in affirming denial of custody to lesbian mother, that trial court had been concerned not "with her sexual orientation per se but with its effects upon the children, who had observed in the home inappropriate displays of physical affection between their mother and M while M had resided with them"); *Teegarden v. Teegarden*, 642 N.E.2d 1007, 1010 (Ind. Ct. App. 1994) (awarding custody to lesbian mother but noting, "Had the evidence revealed that Mother flagrantly engaged in untoward sexual behavior in the boys' presence, the trial court may have been justified in finding her to be unfit and, accordingly, awarded custody to Stepmother"); *Lundin v. Lundin*, 563 So. 2d 1273, 1277 (La. Ct. App. 1990) (denying custody to lesbian mother because she engaged in "open, indiscreet displays of affection beyond mere friendship . . . where the child is of an age where gender identity is being formed"); *Delong v. Delong*, No. WD 52726, 1998 WL 15536, at *12 (Mo. Ct. App. Jan. 20, 1998) (granting custody to lesbian mother after finding that "the children were unaware of Mother's sexual preference, and Mother never engaged in any sexual or affectionate behavior in the presence of the children"), *superseded by* *J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. 1998). Yoshino notes that courts apply a double-standard to gay and straight parents regarding the types of affectionate behavior they consider "inappropriate." YOSHINO, *supra*, at 103. "[I]t is generally clear that what counts as sexually appropriate behavior for straights is out of bounds for gays. . . . If acceptable sexuality for same-sex couples is limited to the appearance of friendship, then the expectations for parents are clearly not orientation-neutral."

Id.

other status—while permitting unequal treatment of those same people for conduct that is intimately intertwined with that protected status is to uphold equality in semantics but little more. Imagine if the Jaycees had argued that they in no way discriminated against *women* but rather only barred full membership to those women who failed to conceal their gender, i.e. those women who were “open” about not being men. Surely the *Roberts* court would have discarded such an argument as both disingenuous and irrelevant. If the Jaycees had allowed women to be full members only if those women dressed like men, adopted stereotypically male names and behavioral traits, and scrupulously avoided revealing their true gender, any reasonable observer would have concluded that they were, in fact, discriminating against women as *women*, not simply engaging in gender-neutral regulation of the conduct of their members. If *Dale* is good law,²⁸⁹ it must stand for the proposition that the Boy Scouts may discriminate against gay individuals purely for *being* gay.

Roberts and *Dale* came to seemingly opposite conclusions not because of differences between the kinds of discrimination involved in each case, but because of differences in the natures of the two groups engaging in the discrimination. The two cases can best be understood in a fourth way, one that allows us to hold fast to the proposition that eliminating discrimination against gay people is a compelling interest and to reject the status-conduct distinction that would eviscerate gay rights laws. Under this fourth approach, the critical distinction between the cases is that the relationship between the Jaycees and their members was primarily *commercial* in nature, while the relationship between the Boy Scouts and its members is primarily *expressive*.²⁹⁰ In the modern order, the market is a public domain. When individuals, either by themselves or through formal organizations, engage in commerce, they enter a public arena in which the state may legitimately regulate their actions for a wide

289. Many commentators have offered convincing arguments that *Dale* was wrongly decided. See *supra* note 269.

290. Justice O'Connor's concurrence in *Roberts* emphasized the distinction between purely expressive association, which is protected by the First Amendment, and commercial association, which is not. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634-35 (1984) (O'Connor, J., concurring).

range of purposes.²⁹¹ One such purpose is to enforce nondiscrimination norms to protect vulnerable individuals. Equal access to participation in the market is necessary for people to obtain vital goods and amenities like employment and housing, and for people to enjoy substantively equal social and political status in modern society. In contrast, the state has no legitimate claim to enforce nondiscrimination norms on purely expressive non-commercial relationships.²⁹² Because the Jaycees sold memberships, promoted services provided to members as advantages in business, referred to their members as customers, and referred to membership as a product they were selling,²⁹³ the commercial nature of the relationships between the Jaycees and their members was rather clear.²⁹⁴ In contrast, the Boy Scouts' relationships with their members are primarily expressive, rather than commercial in nature. The Boy Scouts engage in none of the same commercial membership

291. According to Justice O'Connor, "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Id.* at 634. Further,

an organization engaged in commercial activity enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities. While the Court has acknowledged a First Amendment right to engage in nondeceptive commercial advertising, governmental regulation of the commercial recruitment of new members, stockholders, customers, or employees is valid if rationally related to the government's ends.

Id. at 635. The basic principle, then, is that "[a]n association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 636.

292. Justice O'Connor conceded that

[d]etermining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive. It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression.

Id. at 636 (citations omitted).

293. *See id.* at 639.

294. Justice O'Connor found application of the "expressive-commercial dichotomy" to the Jaycees "relatively easy." *Id.* at 638.

practices as the Jaycees. The *Dale* court found their clear “general mission” to be expressive: “[t]o instill values in young people.”²⁹⁵

e. Religious Exemptions from Nondiscrimination Laws and
Expressive Association: A Proposed Approach

Having extracted the critical insider/outsider and expressive/commercial distinctions that define the limits of the freedom of expressive association, we can return to claims for religious exemptions from nondiscrimination laws. First, claims based *solely* on the church autonomy argument are appropriately resolved by distinguishing between primarily secular and primarily religious relationships. Though the distinction can be difficult to make in close cases, the courts have generally done a satisfactory job of drawing the line. When only church autonomy is at stake, the freedom of expressive association does not add anything significant to the analysis. The church autonomy argument rests on the notion that the internal activities of religious entities should be free from state interference. In contrast, a claim for exemption from civil rights laws based on the freedom of expressive association relies on the idea that compliance with such laws involves some form of *expression* that the defendant entity wishes not to make. When a religious entity relies *only* on the church autonomy argument and does *not* raise a religiously motivated discrimination argument, it has made no claim regarding its interests in avoiding any expressive implications of following the law.

In contrast, claims for exemption from civil rights laws based on a religiously motivated discrimination argument implicate both religious liberty and the freedom of expressive association. When a defendant argues it does not want to comply with a nondiscrimination law because to do so would be to approve of conduct that it abhors, the expressive nature of its claim is clear. When addressing religiously motivated discrimination arguments, a

295. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000). Justice O’Connor presaged this conclusion by referencing the Boy Scouts as an example of an expressive organization in her concurrence in *Roberts*. See 468 U.S. at 636 (O’Connor, J., concurring) (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.” (citing Official Boy Scouts Handbook)).

full evaluation of the relevant interests at stake involves a three-part analysis. The primary concern should remain where the relationship sits on the continuum from primarily secular to primarily religious. But in close or ambiguous cases, the insider/outsider and commercial/expressive distinctions from the freedom of association context can be drawn upon to defend most courts' resolutions of such claims and to provide guidance in future difficult cases.

The first, and in some cases only, step courts should take in religiously motivated discrimination exemption cases is to evaluate the nature of the relationship between the plaintiff and the defendant to attempt to classify it as primarily secular or religious. This analysis should include consideration of the purpose of the relationship, from the perspectives of both parties, as well as the specific roles each of the parties perform. The more secular elements predominate, the less likely the burden on religious exercise is to be substantial and the greater the interest of the public in preventing discrimination. Conversely, the more religious elements predominate, the stronger the religious liberty interest and the weaker the public interest in enforcing nondiscrimination laws. When the relationship at issue is clearly primarily religious, courts should refrain from interfering. When it is clearly primarily secular, they should enforce civil nondiscrimination laws. But, unlike in cases involving only a church autonomy argument, where courts must resolve close cases as best they can by relying on the religious-secular divide, in religiously motivated discrimination cases where the relationship entails significant secular and religious elements, courts often will need to look beyond the secular/religious dimension, because expressive associational interests are also at play.

In close or ambiguous cases, courts should next evaluate the relationship along the insider/outsider axis. The more the plaintiff looks like an insider in a group pursuit, the stronger the associational interests of the defendant group, and combined with the religious liberty interests at play, the stronger the claim for exemption. The more the plaintiff looks like an outsider, the weaker the associational interests, and thus the weaker the claim for an exemption. In other words, a religiously motivated exemption claim is stronger the more a relationship with significant secular and religious elements looks

like one of membership in a joint endeavor. It is weaker the more the relationship resembles an arms length transaction. The choice to become fellow members in a purpose-driven organization, for example the choice to become a member of a church, is the quintessential location for expressive associational freedom. In contrast, the choice of which customers to deny service to or which potential renters to reject when one puts a rental property on the open market deserves far less protection. In these cases, in which the group has reached out to engage with outsiders in the public arena, the interests of the general public outweigh the attenuated interests of the group to discriminate.²⁹⁶ The insider/outsider distinction thus suggests that religiously motivated discrimination in employment or membership decisions is more protected than such discrimination in housing or the provision of other services.

When addressing religiously motivated discrimination claims in the context of relationships involving significant secular and religious elements, courts should also evaluate the relationship along the commercial/expressive dimension. Whether primarily religious or not, the interests of organizations or individuals engaged in *expressive* associational relationships in formulating and maintaining their messages trump the public's general interest in preventing discrimination. The more a particular relationship involves non-expressive *market-orientated* activity, in contrast, the weaker the claim to religious freedom becomes when balanced against the competing rights of third parties to fair and nondiscriminatory access to the public sphere of the marketplace. The owners of for-profit corporations that engage in traditional commercial activity must abide by nondiscrimination laws despite their personal religious convictions or desire to run their companies on explicitly religious terms.²⁹⁷ Houses of worship and nonprofit organizations dedicated to promoting and disseminating a religious message, as entities likely to

296. The courts have recognized that participation in the market diminishes various liberty interests because the interests of third parties are at stake. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (holding that commercial speech may be regulated in ways that other speech may not).

297. *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (mining equipment company must comply with Title VII's religious nondiscrimination prohibition despite deep religious convictions of owners).

be engaged in mostly primarily expressive relationships, deserve stronger protection. Religiously affiliated schools, hospitals, and social services organizations will generally fall in between, with some of their associational relationships being primarily expressive, and thus protected, and others primarily commercial, and thus subject to regulation.²⁹⁸ As with most claims brought under the Religion Clauses and the freedom of association doctrine, the ultimate resolution of any particular case will depend on a careful, fact-intensive balancing. Nevertheless, some general guidelines are possible.

i. Housing

My proposed balancing approach should resolve most claims for exemptions from fair housing laws relatively easily. In those cases in which an individual or entity provides housing only for members or participants in a religious activity, its decision to deny housing to any particular participant should be exempt from civil rights laws. Generally, church summer camps, seminaries, and monasteries

298. By arguing that the resolution of religiously motivated exemption claims should often turn on whether or not the organization or individual in question engages in primarily expressive religious activity, I am not arguing that the primary function of religious activity necessarily always is expressive. Certainly, churches exist to teach and to speak to members and nonmembers alike. Participation in religious rituals involves expressive conduct. Even if private silent religious activity like prayer is not necessarily expressive in the sense that it is meant or perceived to send a message to others (at least to other human beings), the act of associating with others to collectively practice one's religion usually is expressive. But not *all* associative religious activity is primarily expressive. Those who choose to work as doctors or receptionists at religious hospitals may see their jobs as examples of profound religious practice without themselves or their organization as a whole engaging in any particularly expressive activity regarding religion.

Nevertheless, though some religious activity is not primarily expressive, the balancing of interests that must be undertaken in difficult nondiscrimination exemption cases should be resolved by relying on the expressive/non-expressive distinction. Expressive activity has pride of place in our constitutional culture. The Free Speech Clause protects hateful speech and other expressive activity that causes real intangible harms to third parties. *See, e.g., Collin v. Smith*, 578 F.2d 1997, 1206-07 (7th Cir. 1978) (finding ordinance prohibiting dissemination of materials which would promote hatred towards persons based on their heritage unconstitutional despite real psychic harms likely to be caused by Nazi march through neighborhood of Holocaust survivors). The Free Speech Clause does not protect non-expressive conduct that causes similar harms. Drawing upon this same expressive/non-expressive distinction to help determine when civil rights laws may be applied to certain relationships would ensure that constitutional norms strike a consistent balance in both the speech and religion contexts between society's deep-rooted commitments to both liberty and equality.

should all be allowed to deny housing to individuals who do not conform to their religious tenets. In these cases, access to housing is only provided to insiders participating in an explicitly religious activity. Though the housing arrangement is likely to entail commercial aspects, such as a contract calling for rent payments, the combination of religious focus and exclusivity should generally lead courts to conclude that the religious liberty and associational interests at stake trump the public interest in preventing discrimination.

Placing such housing on the open market, however, dramatically alters the situation. The landlord's relationship with current and prospective tenants then loses both its predominately religious and insider nature, becoming in effect no different from any secular, commercial housing transaction. Here, the public interest in avoiding discrimination in access to a vital basic good like housing outweighs any vestigial religious liberty interest at stake. A religious entity or individual who chooses to place property on the open market for rental or sale cannot then choose to infringe upon the rights of others in the open market because of personal religious beliefs.²⁹⁹

The case of housing at religiously-affiliated colleges and universities falls somewhere between the two poles of housing provided as part of a purely religious activity and housing offered on the open market. Whether courts should recognize religious exemptions to fair housing laws in this context will depend on the specific facts. Some religiously-affiliated colleges provide an almost entirely secular educational experience open to anyone who qualifies, while others infuse religion into every aspect of their activities, only admit students who share a certain faith, and decline state funding. The more a college's relationship with its students

299. See *Thomas v. Anchorage Equal Rights Comm'n (Thomas III)*, 102 P.3d 937 (Alaska 2004) (denying exemption from marital status nondiscrimination law to landlord with religious objection to renting to unmarried cohabiting couples); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998) (same), *vacated in part and remanded*, 593 N.W.2d 545 (Mich. 1999); *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996) (same); *Jasniowski v. Rushing*, 687 N.E.2d 743 (Ill. App. Ct. 1997) (same), *vacated without comment*, 685 N.E.2d 622 (Ill. App. Ct. 1997).

resembles the latter archetype, the more expressive and membership-like that relationship, and thus the greater likelihood that an exemption should be granted. Conversely, the more the relationship resembles the former model, the less reason to grant such an exemption.³⁰⁰

ii. Public Accommodations

The resolution to public accommodations exemption claims should largely track the *Roberts-Dale* divide. First, when a plaintiff challenges the primarily expressive insider relationships of a defendant organization that engages in primarily religious activity, the combination of interests involved should conclusively tip the scales toward requiring an exemption.³⁰¹ Membership in a church is the quintessential example of such a primarily expressive insider relationship. To force a church or temple to accept members, or, for example, conduct religious marriage ceremonies for, individuals whom the church condemned, either for their conduct or their status, would be to infringe on the core purposes of religious association. Outsiders seeking membership generally know up front whether the message of any particular group supports discriminating against them.³⁰² The prospective member of a primarily religious

300. In *Levin v. Yeshiva University*, 96 N.Y.2d 484 (N.Y. 2001), two lesbian students sued Yeshiva for refusing to provide the same housing benefits to married students and students in committed same-sex relationships. The New York Court of Appeals reversed the lower courts' summary judgment award for the university by holding the plaintiffs had stated a valid "disparate impact" claim of sexual-orientation discrimination, which Yeshiva would have to defend by either showing there was no disparate impact or justifying the policy as bearing a "significant relationship to a significant business objective." *See id.* at 496. The court noted that Yeshiva had not raised a religious liberty defense. *See id.* at 489 n.1 ("All parties agree that Yeshiva's religious affiliations have no bearing on this appeal."). Under the approach I suggest, Yeshiva could raise such a defense on remittal, and the court would decide whether or not to accept it by evaluating the religiosity, insider-nature, and expressiveness of Yeshiva's relationship with its students.

301. In these cases, exemption claims can rely on the combination of the Religion Clauses and the doctrine of freedom of expressive association. In the terms of *Employment Division v. Smith*, such claims are rightly understood as "hybrid" in nature, because two protected rights are implicated simultaneously. *See* 494 U.S. 872, 882 (1990).

302. One of the problematic aspects of the *Dale* opinion is that this seems not to have been the case. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 668-78 (2000) (Stevens, J., dissenting) (arguing that, before expelling Dale, the Boy Scouts had no clear collective position on homosexuality). Of course, since *Dale*, gay people are on rather clear notice that the Boy Scouts will discriminate against them if they try to join.

organization at some level assumes the risk of being subject to discrimination.³⁰³

In contrast, exemption claims raised by religious organizations related to primarily commercial or otherwise non-expressive relationships with outsiders, for example relationships between for-profit corporations and their customers or nonprofit service providers like hospitals and rehab centers and their clients, should generally be denied because such organizations generally cannot claim a right to freedom of expressive association to go along with their religious liberty interests in these contexts. As with housing, once providers of goods and other services open their doors to the general public, the public interest in avoiding discrimination in public accommodations outweighs the religious liberty interests of the providers who have chosen to engage in the civil domain. Even if the service provider conceives of its activities as religious in nature, many—if not most—of its clients, as members of the general public, will legitimately perceive the relationship as primarily secular. When the parties involved are not joined in common cause but rather interact as separate actors engaged for the particular purpose of completing an exchange or delivering and receiving worldly services, then the interests of members of the public in enjoying equal access to basic goods and services so that they may fully participate in civil society should trump the religious liberty interests of the providers of those goods and services.³⁰⁴

If a religious entity provides services only to insiders, however, for example by providing marriage counseling, small low interest loans, or temporary shelter only to members of its own congregation, then the decision to deny such services to certain members deserves protection. By only serving members of the group, such an entity would be clearly expressing its sense that the relationships at issue

303. Perhaps society would be more truly democratic if all associations, expressive or not, were required to accept all comers; perhaps then the voices of interest groups in the marketplace of ideas would more truly represent the democratic will of the people. But in our current system, the rights of those with minority (and majority) viewpoints to keep their expressive associations pure are strongly protected. My thanks to Prof. Richard D. Parker for raising this possibility.

304. See *N. Coast Women's Care Med. Group, Inc. v. Superior Court*, 189 P.3d 959 (Cal. 2008) (finding no free exercise right for doctor to deny fertility treatments to lesbian in violation of state sexual orientation nondiscrimination law).

were primarily religious, and recipients of such services, knowing they were restricted to fellow members, would most likely perceive them in the same way.

iii. Employment

While the insider/outsider distinction can guide the results in many housing and public accommodations cases, it is not enough to help resolve claims for exemptions from employment nondiscrimination laws. The employment relationship uniquely combines elements that are both membership-like and commercial. While employees work jointly in the pursuit of a common objective, much as members of quintessential expressive associations, the relationship between employee and employer is also fundamentally an economic one. The labor market is just that—a market. Allowing discrimination in the employment market would cause harm in similar ways as allowing discrimination in the housing or public amenities markets. Indeed, the interest of third parties in acquiring jobs that fit their skills, financial needs, and aspirations is usually more compelling than the interest in access to public amenities like restaurants, hotels, or amusement parks. At the same time, the interest of religious employers in ensuring those who are tasked with carrying out the mission of the organization are committed to and abide by the organization's fundamental principles is greater than the interest such organizations have in avoiding interacting in the market with individuals to whom they object.

The courts generally have concluded that the solution to this dilemma should turn on the nature of the function of the particular *employee*.³⁰⁵ Such an approach is appropriate when the employer *only* claims an exemption because of a church autonomy argument. But when the employer makes a religiously-motivated discrimination argument, the approach proposed here, drawing on principles of both religious liberty and freedom of association, suggests that courts should first look to the nature of the *organization* as a whole. If the organization is primarily engaged in *expressive* activity, its

305. See *supra* notes 173-77 and accompanying text (discussing “ministerial exception” to nondiscrimination laws).

relationship with *all* its employees is similar to the relationship of shared membership in a joint, religious endeavor. If the organization is primarily engaged in *non-expressive* or market-oriented activity, then its relationship to its employees is generally more like a commercial transaction in which the organization pays the employee to provide certain skills so that the organization can provide a certain service to others. Nevertheless, in such cases, courts should also look to the particular relationship with the individual employee at issue and determine if, despite the generally non-expressive nature of the organization as a whole, the relationship with this particular employee is primarily expressive. To summarize, in cases where the relationship is not easily categorized as either primarily religious or primarily secular, exemptions based on a religiously motivated discrimination argument should be granted either when the organization as a whole, or the individual employee, is engaged in primarily expressive activity.

Churches and other houses of worship should be able to violate employment nondiscrimination laws if their religious tenets condemn certain protected behaviors or statuses. Forcing a church that teaches that all women should stay home to hire a female janitor would seriously compromise that church's ability to sincerely express its religious commitments.³⁰⁶ But a hospital or drug rehabilitation center affiliated with that same church would not be in the same position if it wished to hire only male doctors. When a religious organization's primary activity is expressive, those who choose to work there assume the risk that their behavior or identity might subject them to religiously motivated discrimination. But when the organization primarily exists to provide non-expressive services, employees engaged in providing those services do not necessarily assume a similar risk. It is unfair to the gay doctor or the unmarried mother medical insurance coder to allow the only hospital in town to discriminate against them simply because the hospital is religious.

306. My approach supports the courts' basic approach to church autonomy arguments, which generally permits judicial resolution of discrimination claims by secular employees of churches and other expressive religious bodies, so long as the defendant religious entity denies any discrimination has occurred. *See supra* notes 179-98 and accompanying text. But my approach suggests that exemptions should be granted to such expressive entities when they raise religiously motivated discrimination arguments. Courts have rarely confronted such situations.

In contrast, the hospital should be allowed to hire only male or straight chaplains if its religious tenets so require. While the activities of the hospital as a whole are primarily non-expressive, the activities of the chaplain are primarily expressive. Thus, with respect to the particular relationship between the chaplain and the hospital, the hospital's religious liberty and association interests outweigh the public interest in eradicating discrimination.

iv. Religious Schools: A Particularly Difficult Case

As with so many Religion Clause issues, the most difficult and likely most contentious problems regarding exemptions from nondiscrimination laws for religiously motivated actors arise in the context of religious schools. Should such schools be allowed to discriminate against students in protected classes because of religious disapproval of the conduct or statuses that define such classes? Should such schools be allowed to discriminate against teachers for the same reasons?

First, at some schools, the relationship between students or teachers and the school is clearly primarily religious. Schools that are dedicated to teaching religion, such as seminaries and other institutions dedicated to training future religious leaders, should be granted exemptions.³⁰⁷ Students and teachers alike go to such schools to engage in a predominantly, if not purely, religious endeavor. It should be clear that civil interference in these relationships would seriously erode religious liberty.

But at schools like parochial high schools that offer a combination of religious and secular education in place of the purely secular offerings of the public schools, the relationship between the school and its students and teachers involves both significant religious and secular elements. Here, the insider/outsider and expressive/commercial distinctions become critical.

307. See *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413, 1416 (E.D. Mo. 1989) (finding ADEA and Equal Pay Act do not apply to seminary's relationship with faculty, where seminary's primary goal is preparing students for Roman Catholic priesthood); *Jocz v. Labor & Indus. Review Comm'n*, 538 N.W.2d 588, 596 (Wis. App. Ct. 1995) (holding sex discrimination claim by field director at Roman Catholic seminary barred by constitutionally required ministerial exception to Wisconsin Fair Employment Act).

Second, are schools organizations that are primarily engaged in expressive activity? At first blush, they seem to be. After all, schools exist to develop and impart messages to their pupils. The courts have repeatedly recognized that one of the core missions of religious schools is to impart religious messages to their students, and those messages are meant to be conveyed, explicitly or implicitly, in every class.³⁰⁸ But upon deeper inspection, the description of schools as primarily expressive breaks down. The state legitimately regulates the curricula and teacher qualifications of all private schools.³⁰⁹ Thus, all general education schools, religious or not, are in fact engaged in the primarily non-expressive activity of providing a vital service—secular education. And in the case of private schools, that service is provided on a commercial basis, for a fee.

We must look, then, as the courts have concluded, to the individual relationships involved in particular cases to decide when nondiscrimination laws may be enforced. Theology teachers at religious schools surely have relationships with their employers that are primarily religious, and thus exempt from such laws.³¹⁰ They are employed, after all, to impart a specifically religious message. But the relationship between a math, science, or other secular subject teacher and her religious school employer is more nuanced. Such teachers provide pupils with a secular service that is appropriately regulated by the state. In addition, depending on the circumstances, they may also be engaged for the expressive purpose of imparting

308. See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979) (recognizing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school”); *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971) (asserting that the line between religious and secular education is in many respects blurred in parochial schools).

309. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”).

310. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (ministerial exception applies to selection of tenured faculty member in department of religious canon law at Catholic university).

specifically religious messages.³¹¹ As noted above, an employment relationship involves both insider and outsider elements.³¹² Thus, whether a religious school may rely on a religiously motivated discrimination argument to discriminate against a teacher of secular subjects will depend on whether the teacher's relationship with the school is primarily one of expressive association or, in contrast, more akin to a market exchange of wages for providing the secular service of instruction in regulated secular curricula. Such a determination will depend on a fact-intensive inquiry. Some relevant factors will include (1) whether the school accepts public funding to assist in the instruction provided by the teacher in question (for example, state-provided textbooks, or tuition dollars from a publicly-funded voucher scheme)—in which case the employment relationship is more likely to be tilted toward the non-expressive end of the spectrum; and (2) whether the teacher is also employed to provide specifically religious instruction (for example, teaching a regular theology class or giving sermons at regular worship services)—in which case the balance would be shifted toward the expressive end.³¹³

In contrast with the school-teacher relationship, which involves both insider and outsider elements and could be either primarily expressive or not depending on the particular facts, the school-student relationship in religiously-affiliated schools that provide a core of secular educational curricula is generally more one of service provision than joint membership in a common expressive endeavor. Students almost always pay to receive the school's services and generally are not directly involved in controlling the operations or messages of the school. Further, in many instances students choose

311. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 168 (2d Cir. 1993) (addressing ADEA claim by math teacher at parochial school whose duties included leading students in prayer and taking them to Mass); *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (addressing Title VII sex discrimination claim by elementary school teacher at Seventh-day Adventist school whose teaching duties were "primarily secular," yet included "one hour of Bible instruction per day and attending religious ceremonies with students . . . once per year").

312. *See supra* Part IV.B.1.e.iii.

313. My proposed approach supports the results of most of the cases in which courts have found it permissible to adjudicate discrimination claims against religious schools brought by teachers of secular subjects. *See supra* note 177 (collecting cases). However, my approach casts doubt on those cases in which the teacher involved had significant religious duties in addition to his or her primarily secular functions. *See supra* note 311 (collecting cases).

to enroll in religious schools predominantly to receive the secular service of a general education.³¹⁴ Given the particularly vital role education plays in preparing individuals to be productive and equal members of society as a whole, when a school purports to offer an alternative to public education, the interests of the public in avoiding invidious discrimination in the provision of education should outweigh the interest of a school in discriminating against current or prospective students.

2. Permissible Legislative Exemptions for Religious Entities

The limits imposed on the enforcement of gay rights and all other civil rights laws by the Religion Clauses and the doctrine of freedom of expressive association only mark the outer boundaries of what legislatures may choose to enact. Legislatures, of course, may be more protective of religious liberty by choosing not to pass laws that reach the full sweep of relationships permitted by the Constitution. But they do not have free reign when crafting statutory exemptions from such laws for religious entities. Such efforts must comply with the Establishment Clause's prohibition against government action that favors one religion over another, or all religion over nonreligion.³¹⁵

The question of legislative exemptions from generally applicable laws raises a long-running debate about the proper relationship between the Free Exercise and Establishment Clauses. The Supreme Court's jurisprudence in the 1960s and 1970s brought to the fore the potential irreconcilability of the demands imposed by the two clauses if each is taken to the extreme. An absolutist approach to the principle of free exercise would seem to require that the state grant exemptions from generally applicable laws except in

314. *See* *Zelman v. Simmons-Harris*, 536 U.S. 663, 704 (2002) (Souter, J., dissenting) (noting, when discussing Cleveland's voucher scheme, that "almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.") (citations and footnotes omitted).

315. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

the most extreme cases.³¹⁶ By the same token, a rigid approach to the nonestablishment principle would seem to prohibit those very exemptions as impermissible government favoritism of religion over nonreligion.³¹⁷ Both strong views cannot coexist.³¹⁸

The Court has recognized as much by adopting more lenient approaches to both clauses. Even before *Employment Division v. Smith*, when its rhetoric often seemed to support a strong accommodationist approach to free exercise, the Court repeatedly denied exemptions in what clearly were not the most extreme circumstances.³¹⁹ The Court brought its doctrinal approach more in line with its practice in *Smith*, where it explicitly held that the Free Exercise Clause does not require religious exemptions from neutral, generally applicable laws.³²⁰ At the same time, however, the Court explicitly approved of legislative exemptions.³²¹

The Court's relaxation of the Establishment Clause can be seen in its decision in *Corporation of the Presiding Bishop of the Church*

316. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (requiring state to have compelling interest to justify "any incidental burden on the free exercise of appellant's religion"); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

317. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that government action may not have a purpose or "primary or principal effect" that advances religion).

318. As Justice O'Connor noted in her concurrence in *Wallace v. Jaffree*, 472 U.S. 38 (1985):

On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights. . . . It is obvious that either of the two Religion Clauses, if expanded to a logical extreme, would tend to clash with the other.

Id. at 82 (O'Connor, J., concurring) (internal quotation omitted).

319. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 464 (1988). (federal government may build road through religiously-significant land, despite fact that doing so "would virtually destroy the Indians' ability to practice their religion"); *Bowen v. Roy*, 476 U.S. 693 (1986) (federal government's use of social security number for daughter of Native American plaintiff did not violate the First Amendment despite Plaintiff's belief that doing so would steal his daughter's spirit); *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer must pay social security taxes despite religious objection).

320. See *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

321. See *id.* at 890.

of *Jesus Christ of Latter-Day Saints v. Amos*.³²² In *Amos*, the Court held that the extension of Title VII's exemption from its prohibition on religious discrimination in employment to cover the secular nonprofit activities of religious organizations³²³ does not unduly favor religion in violation of the Establishment Clause.³²⁴ A building engineer at a gymnasium run by a corporation affiliated with the Mormon Church was fired for failing to receive a temple recommend, which is "a certificate that he is a member of the Church and eligible to attend its temples."³²⁵ His duties clearly were not religious, yet the exemption in section 702 of Title VII allowed the corporation, as a religious organization, to discriminate against him on the basis of his religion.³²⁶ The Court concluded that allowing religious organizations, and only religious organizations, such an exemption from the nondiscrimination law was acceptable, because

it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. . . . [T]here is ample room for accommodation of religion under the Establishment Clause. Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.³²⁷

A strong argument could be made that the *Amos* majority got it wrong. Legislative exemptions of only *religious* organizations from otherwise applicable laws clearly favor religion over nonreligion. But even taking the Court's precedent as established, legislatures do

322. 483 U.S. 327 (1987).

323. Title VII's religious exemption, 42 U.S.C. § 2000e-1(a) (2006), originally only allowed a religious organization to discriminate on the basis of religion in the employment of individuals "to perform work connected with the carrying on . . . of its religious activities." Pub. L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255. In 1972, the exemption was expanded by eliminating the word "religious" between "its" and "activities." See Pub. L. 92-261, § 3, Mar. 24, 1972, 86 Stat. 103.

324. See *Amos*, 483 U.S. at 335.

325. *Id.* at 330.

326. See *id.* at 332.

327. *Id.* at 335-38 (citations omitted). The district court below had found section 702 to violate the *Lemon* test by having the impermissible primary effect of advancing religion. See *id.* at 333. The Supreme Court disagreed. The majority found section 702 to be a legislative accommodation, not an unlawful fostering of religion. See *id.* at 334.

not have carte blanche to craft exemptions to sexual orientation nondiscrimination laws as they see fit.

Even if religious entities may be granted special exemptions to civil rights laws, the Constitution places two critical constraints on how legislatures may craft such exemptions. First, as discussed above, some exemptions are required; to put it another way, some limitations on the scope of civil rights must be respected.³²⁸ Whether legislatures explicitly adopt them or not, the courts should honor exemptions regarding from civil rights laws primarily religious relationships and the membership-related decisions of organizations engaged in primarily religiously expressive activity.

The second constraint, though less commonly recognized, is just as important. Under Establishment Clause principles, legislatures should not be permitted to craft exemptions from laws prohibiting discrimination on the basis of sexual orientation unless they adopt the same exemptions to laws prohibiting any other form of discrimination. For example, for Congress to adopt a revised version of the Employment Non-Discrimination Act (“ENDA”) that exempted all religious organizations from prohibitions on discrimination on the basis of sexual orientation with respect to employees who perform primarily secular functions,³²⁹ Establishment Clause principles should require that Title VII be amended to exempt religious organizations from prohibitions of discrimination based on race, color, sex, and national origin.³³⁰ To do otherwise would be, in effect, to favor one set of religious tenets above another. If some actors may discriminate against gay people because of their religious beliefs, then others must be permitted to discriminate against women,

328. See *supra* Part III.B.1.

329. As with Title VII, the ministerial exception would require that religious organizations be exempt from ENDA with respect to employees who perform primarily *religious* functions, regardless of whether Congress explicitly included such an exemption.

330. Some states have explicitly exempted religious entities from sexual orientation nondiscrimination provisions while applying analogous provisions barring race, sex, and other forms of discrimination against such entities. See, e.g., MINN. STAT. ANN. § 363A.20(2) (West 2009) (explicitly permitting religious and fraternal organizations to treat sexual orientation and religion, but not race, color, creed, national origin, sex, marital status, status with regard to public assistance, disability or age, as bona fide occupational qualifications for employment). Others, in line with Establishment Clause principles, have exempted religious organizations from nondiscrimination laws in their entirety. See, e.g., California and Vermont statutes cited *supra* note 149.

racial minorities, or other protected groups for their analogous religious commitments. Though the Court has never addressed this argument, it has been clear that “laws discriminating *among* religions are subject to strict scrutiny.”³³¹ There is no compelling state interest in allowing some actors to engage in some forms of religiously motivated discrimination while denying others the same right for other forms of discrimination.

Let us be clear. Granting broad exemptions to sexual orientation nondiscrimination laws cannot be done in isolation. The real question here is how to properly resolve the tension between religious actors and *all* civil rights laws, not just those protecting gay people.³³² Opponents of gay rights laws may see this as a reason to block the adoption of such laws in the first place. The courts cannot prevent a legislature from declining to adopt a law for fear that it will impinge on the religious tenets of certain religions despite having adopted analogous laws that impinge on similar religious tenets of other religions. But legislators committed to the disestablishment principle should recognize that, in principle, such lack of action, driven by favorable deference to some religions not granted to other religions, is just as threatening as active discrimination among religions to the core religious liberty principles upon which the Religion Clauses rest.

3. The Effects of Exemptions from Laws Prohibiting Discrimination on the Basis of Religion

A complete understanding of the relationship between gay rights laws and claims of religious objectors must address one final issue. Many civil rights laws prohibit discrimination on the basis of *religion*, but include legislative exemptions from this requirement,

331. *Amos*, 483 U.S. at 339 (emphasis in original).

332. Martha Minow argues that the courts have treated claims for religious exemptions from race, sex, and sexual orientation nondiscrimination laws differently, and that these differences can be explained by the different histories and stages of the social movements involved. *See* Minow, *supra* note 107, at 782. My analysis suggests that the courts have not been as inconsistent as she suggests. Nevertheless, even if her claims are accurate descriptively, as she notes, such a pattern of inconsistent treatment should be “disturbing to anyone who cares about consistent normative analysis.” *Id.* Judges should be such people.

though not others like race or sex, for religious organizations.³³³ These exemptions apply not only to primarily religious relationships, but to secular relationships engaged in by religious entities, as well. For example, as noted in *Amos*, Title VII currently allows religious entities to discriminate *on the basis of religion* against *all* kinds of employees.³³⁴ But does an exemption that allows religious institutions to limit their hiring, renting, or services to members of their faith allow them to discriminate against those whom they believe have violated the tenets of their faith? May a Catholic hospital that qualifies for such a legislative exemption not only refuse to hire non-Catholics, but also refuse to hire gay people or divorced women or unmarried individuals who live with their partners, even if they are Catholic? May a religious group that forbids miscegenation reject interracial couples from renting apartments it allows only to be rented to members of its faith, even if those couples are members of that faith? In other words, does a statutory rule allowing religious entities to discriminate on the basis of religion also require that those entities succeed whenever they raise a religiously motivated discrimination argument?

Some courts have said yes. For example, in *Little v. Wuerl*,³³⁵ a Catholic high school refused to rehire a lay teacher who divorced and remarried, in violation of the Catholic Church's doctrine prohibiting remarriage without annulment. The Third Circuit held that section 702 of Title VII, which allows religious organizations to choose only to employ persons "of a particular religion,"³³⁶ includes permission to employ only people whose beliefs and conduct are consistent with the organization's religious purpose. The court reasoned:

We recognize that Congress intended Title VII to free individual workers from religious prejudice. But we are also persuaded that Congress intended the explicit exemptions to Title VII to enable

333. See, e.g., Title VII, 42 U.S.C. § 2000e-1(a) (2006). The *Amos* Court strongly suggested that exempting religious organizations from *religious* discrimination laws with respect to employees who perform *religious* functions is required by the Religion Clauses. See *Amos*, 483 U.S. at 336 ("We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more.").

334. See *Amos*, 483 U.S. at 329; 42 U.S.C. § 2000e-1(a) (2006).

335. 929 F.2d 944 (3d Cir. 1991).

336. 42 U.S.C. § 2000e-1(a) (2006).

religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.³³⁷

In contrast, a federal District Court in *Dolter v. Wahlert High School*³³⁸ held Title VII's religious discrimination exception did not apply to the sex discrimination claim of an English teacher at a Catholic high school who was fired for getting pregnant while unmarried. The Court argued that the teacher was a Catholic, so the school was not exercising its right to employ only members of a certain faith when it dismissed her.³³⁹

While the *Little* approach has much to be said for it, it ultimately fails to adhere to legislative intent. Legislators know how to exempt religious organizations from all nondiscrimination laws.³⁴⁰ When, instead, a legislature specifically exempts religious organizations from *religious* nondiscrimination laws without exempting them from nondiscrimination laws based on race, sex, and other characteristics, the legislators have clearly expressed their intent that the latter laws should apply to those organizations. Title VII is a prime example. As we have noted, the Constitution requires that some religious organizations under certain circumstances must be permitted to discriminate against individuals who they believe have violated their

337. *Little*, 929 F.2d at 951.

338. 483 F. Supp. 266 (D. Iowa 1980).

339. *See id.* at 269, n.2.

340. *See, e.g.*, CAL. GOV'T CODE § 12926(d) (West 2009) (exempting from the definition of "Employer" in state employment nondiscrimination law any "religious association or corporation not organized for private profit"); VT. STAT. ANN. tit. 21, § 1301(6)(C)(vii)(I) (2009) (exempting from the definition of "employment" in state employment nondiscrimination law any service performed "in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches").

religious beliefs.³⁴¹ But in those cases when such discretion is not required, courts should not create it against the clear intent of Congress or a state legislature. If the legislature wishes to exempt religious organizations from nondiscrimination laws beyond those dealing with religious identity, it can (subject to the conditions noted above).³⁴²

V. CONCLUSION

While opponents of gay equality tend to raise religious liberty objections most vocally in debates over legal recognition of same-sex marriage, the real context in which conflicts between religious freedom and gay equality must be confronted is in the area of sexual orientation nondiscrimination laws. Despite the largely religiously-grounded nature of opposition to sexual orientation nondiscrimination laws, such laws on their face do not violate the Establishment Clause. And despite dire warnings to the contrary, the courts are likely to provide appropriate exemptions from such laws when principles of religious liberty require them to do so. A long line of cases confronting claims for religious exemptions to race, sex, and other nondiscrimination laws provides courts with a useful foundation.

Recognition that religious objectors' claims for exemptions from sexual orientation nondiscrimination laws are not only Religion

341. See *supra* Part IV.B.1.e (proposing approach to resolving religiously motivated discrimination arguments for exemptions from nondiscrimination laws).

342. See *supra* Part IV.B.2 (discussing limits on permissible legislative exemptions drawn from Establishment Clause principles). Some might argue that the Supreme Court implicitly adopted the *Little* approach when it agreed that Title VII's religious discrimination exemption applied to the Mormon Church's decision not to employ a building engineer who failed to receive a temple recommend. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987). The Court noted that "[t]emple recommends are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Id.* at 330 n.4. While one reading of these facts would be that the statutory exemption allowed the Church to discriminate against those who failed to abide by its religious tenets, a better reading, which more closely fits the statutory language and Congress's clear intent, is that the Church was able to rely upon the statutory exemption because the temple recommend is an explicit method of demarcating different kinds of membership within the Mormon religion. Denying employment to those without temple recommends is analogous to denying employment to non-ministers in other Christian denominations. Discriminating against members of the religion who happen to behave in a particular way, but who do not have their membership status altered thereby, is fundamentally different.

Clause claims, but are also claims to freedom of expressive association, should help courts appropriately untangle any unresolved issues. In particular, when determining whether the Religion Clauses permit the state to enforce a nondiscrimination law against a religious objector, courts should continue to enforce such laws when the relationship at issue is primarily secular in purpose and function and decline to do so when that relationship is primarily religious. When the relationship involves significant religious and secular elements, courts should draw on the principles underlying the doctrine of freedom of expressive association, enforcing nondiscrimination laws unless the relationship involves insiders and is primarily expressive in nature.

Though justified on shaky grounds, current Supreme Court doctrine permits legislatures to exempt religious entities from nondiscrimination laws without exempting their secular counterparts. But even accepting this proposition, the Establishment Clause should prevent legislatures from exempting religious organizations only from gay rights laws, without also exempting them from laws prohibiting discrimination on the basis of race, sex, and other characteristics. Doing so would be to prefer certain religions over others.

Finally, legislative exemptions from prohibitions on discrimination on the basis of religion should not be interpreted to permit religious organizations to discriminate on the basis of other protected characteristics, even if their religious tenets direct them to do so. To hold otherwise would fail to follow legislative intent.

A final note about the process of social change is in order. Despite the ample tools courts have to resolve potential conflicts between gay equality and religious liberty, the best possible solution to such conflicts is social rather than legal. To achieve their ultimate goals of societal acceptance and an embrace of sexual minorities, gay rights advocates must convince their opponents on their opponents' own terms, using explicitly religiously grounded principles. The Civil Rights Movement did not succeed by simply convincing the courts. Rather, advocates of racial equality engaged in a deeply spiritual debate and convinced everyday people, denomination by denomination and individual by individual, that the basic moral

principles of equality, dignity, compassion, and tolerance at the core of most every religion should be understood to embrace racial equality and condemn discrimination.³⁴³ A similar personal, moral, and profoundly religious evolution is already taking place in most major American religious denominations regarding same-sex sexuality.³⁴⁴ Indeed, voices promoting gay equality on explicitly religious grounds have dramatically increased in number and volume in recent years.³⁴⁵ Though courts should feel secure in knowing that they have a healthy body of doctrine on which to rely when confronted with particular instances in which gay rights laws and religious liberty are in tension, in the end, the more gay rights advocates show that gay equality and religion can and should be harmonious, rather than in conflict, the more likely they will be to succeed.

343. See Dailey, *supra* note 65, at 130-34 (discussing internal struggles within various Christian denominations during the 1950s and 60s that eventually led to shifts from previously pro-segregationist to pro-integrationist positions).

344. See Knight & Ervin, *supra* note 79 (discussing internal struggles currently ongoing within most major American denominations regarding same-sex sexuality).

345. See *id.*; *supra* note 29 (discussing religious denominations that support full gay equality).