

Fall 3-2-2011

Employment, Sexual Orientation, and Religious Beliefs: Do Religious Educational Institutions Have a Protected Right to Discriminate in the Selection and Discharge of Employees?

Ralph D. Mawdsley

Follow this and additional works at: <https://digitalcommons.law.byu.edu/elj>

 Part of the [Labor and Employment Law Commons](#), [Lesbian, Gay, Bisexual, and Transgender Studies Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Ralph D. Mawdsley, *Employment, Sexual Orientation, and Religious Beliefs: Do Religious Educational Institutions Have a Protected Right to Discriminate in the Selection and Discharge of Employees?*, 2011 BYU Educ. & L.J. 279 (2011).
Available at: <https://digitalcommons.law.byu.edu/elj/vol2011/iss2/7>

.

EMPLOYMENT, SEXUAL ORIENTATION, AND
RELIGIOUS BELIEFS: DO RELIGIOUS EDUCATIONAL
INSTITUTIONS HAVE A PROTECTED RIGHT TO
DISCRIMINATE IN THE SELECTION AND DISCHARGE
OF EMPLOYEES?

*Ralph D. Mawdsley**

I. INTRODUCTION

The life blood of religious educational institutions is their doctrinal statements and codes of conduct that set standards for employee and student life. The purpose of this paper is to examine the freedom of religious educational institutions to make employment decisions related to three homosexuality-related areas: sexual orientation, same-sex sexual activity outside marriage, and same-sex marriage. At the core of the discussion is the basic question whether religious educational institutions have a protected right to enforce doctrinal statements or codes of conduct addressing one or more of these areas.

This paper will examine legal issues related to the ability of religious educational institutions to declare and enforce their religious beliefs regarding same-sex relationships. This discussion involves a balancing of important interests. On one side is the interest of government in prohibiting discrimination, retaliation, and harassment against persons engaged in protected activity. On the other side are the free exercise, free speech and expressive association rights of religious educational institutions to express and enforce their religious beliefs.

* Ralph D. Mawdsley, J.D., Ph.D., is Professor and the Roslyn Z. Wolf Endowed Chair in Urban Educational Leadership at Cleveland State University, Cleveland, Ohio.

II. MARRIAGE AS A RELIGIOUS BELIEF

Religious educational institutions routinely make employment decisions relating to religious beliefs. Depending on the nature of the beliefs, those decisions may be grounded in immutable theological principles found in doctrinal statements or in codes of conduct addressing appropriate relationships between employees and their work, their students, and their families.¹ While religious beliefs in doctrinal statements, such as the Trinity, inerrancy of Scripture, and the virgin birth, are considered to be the theological bedrock of a religious institution, codes of conduct are the moral compass for day-by-day living. Both are equally important and relevant in defining the religious beliefs of an educational institution. For the purpose of this paper, doctrinal statements and codes of conduct will be considered to be equally important in framing the religious nature of a religious educational institution.

Thus, the question concerning homosexuality and religious beliefs is whether either a doctrinal statement or a code of conduct addresses issues relating to one or more of the three homosexuality-related areas—sexual orientation, sexuality activity outside marriage, and same-sex marriage. While a cognizable argument can be made for including different-sex marriage as a fundamental religious belief in a doctrinal statement,² few educational institutions appear to have done so and have chosen instead to address only out-of-wedlock sexual activity.³

1. Codes of conduct can be extraordinarily broad and can include not only acceptable movies, music and clothing, but appropriate course content.

2. See *Genesis* 2:24 (“Therefore shall a man shall leave his Father and Mother and shall cleave to his wife and they shall one flesh.”); *Ephesians* 5:25 (“Husbands, love your wives even as Christ loved the church and gave himself for it.”); *Exodus* 20:14 (“Thou shall not commit adultery.”); 1 *Thessalonians* 4:3–4 (“For this is the will of God, even your sanctification, that ye should abstain from fornication: That every one of you should know how to possess his vessel in sanctification and honor.”). Fornication includes any physical intimacy outside marriage including both homosexuality and any cohabitation or living together outside marriage. For reference to same-sex relationships, see *Romans* 1:24–32.

3. For an extensive statement of religious beliefs, albeit one not mentioning marriage, see the Doctrinal Statement for Liberty University, which advertises itself as “the world’s largest Christian university.” The only veiled reference to relationships is in the LU Distinctives where the University prohibits certain, “Behavioral standards . . . including the prohibition of drug, alcohol and tobacco use, coed residence halls, and sexual promiscuity.” (emphasis added) *Liberty University Distinctives*, LIBERTY UNIVERSITY, <https://www.liberty.edu/index.cfm?PID=6909> (last visited Sept. 5, 2010).

As will be seen from the following legal discussion in this article, religious educational institutions have two major responsibilities if they are to be successful in enforcing their religious beliefs. First, they must have a clear understanding of the theological and moral beliefs of their institutions. Second, they must have an organized program of orientation for imparting these beliefs to employees (and students). Legal protection for religious beliefs will occur either through statutory exemptions or through constitutional rights.

III. RELIGIOUS BELIEFS AND STATUTORY EXEMPTIONS

In April 2009, a Florida religious school teacher's contract was terminated following the disclosure, during her request for maternity leave, that while employed as a teacher she had conceived a child three weeks prior to her marriage. Allegedly notified in her termination letter that she was being dismissed for "fornication" pursuant to a school morals clause requiring employees to "maintain and communicate the values and purpose of [a religious elementary/secondary school]," the teacher responded by engaging an attorney. Her attorney expressed the teacher's claim under a state statute prohibiting marital status discrimination⁴ as follows, "If they (school officials) [are] going to single her out because she conceived prior to marriage, but allow people to remain employed who conceived during marriage, isn't that discriminating against her based on her marital status?"⁵ In effect, the dispute arises between conduct the religious employer considers to be morally reprehensible (fornication) and conduct the dismissed teacher considers to be protected under a state statute prohibiting discrimination on the basis of marital status.

Although lacking in detail, the facts of the dispute indicate how legal rights can be used in creative ways to challenge religious beliefs that clergy and governing bodies in religious educational institutions may have thought were manifestly clear. While not addressing homosexuality under any of the three same-sex areas, the facts do expose legal trip wires

4. See FLA. STAT. § 760.10 (2004) (prohibiting employment discrimination under a variety of categories, including marital status).

5. *Fla. Christian School Fires Teacher Over 'Fornication' Claims*, FOXNEWS.COM, Jun. 9, 2010, <http://www.foxnews.com/us/2010/06/09/fla-christian-school-fires-teacher-fornication-claims/>.

encountered when claims are made under statutes prohibiting discrimination.

Defenses available to religious educational institutions when charged with discrimination fall into two broad categories: statutory exemptions and constitutional rights. While many states prohibit discrimination based on sexual orientation, the federal government has yet to legislate such protection. Nonetheless, Title VII of the Civil Rights Act of 1964,⁶ the workhorse of discrimination litigation, contains exemptions applying to religious institutions which would, presumably, also protect those institutions if Title VII were amended to include sexual orientation.

Title VII contains three exemptions applicable to religious educational institutions. The first exempts employment decisions where “religion is a bona fide occupational qualification [BFOQ] of that particular business or enterprise.”⁷ The second exempts religious institutions where “the curriculum of such [institution] is directed toward the propagation of a particular religion.”⁸ The third exempts religious institutions where employment by a religious educational institution of persons of a particular religion is necessary “to perform work connected with the carrying on by such . . . educational institution . . . of its activities.”⁹

While these exemptions appear quite exhaustive, federal courts frequently are called upon to determine whether religious beliefs (relating to BFOQ, curriculum, activities) should be exempt where they otherwise discriminate against other protected categories. In *Vigars v. Valley Christian Center of Dublin*,¹⁰ a California federal district court held that a religious school librarian—discharged for an out-of-wedlock pregnancy by the person who eventually become her second husband, but occurring while she was still married to her first husband—was entitled to go to trial under a Title VII gender discrimination claim. The librarian had received a handbook

6. Title VII makes it unlawful “to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .” 42 U.S.C. § 2000e-2(a)(1) (2010).

7. *Id.* § 2000e-2(c)(1).

8. *Id.* § 2000e-2(c)(2).

9. *Id.* § 2000e-1(a).

10. 805 F. Supp. 802 (N.D. Cal. 1992).

that “detailed the school’s and church’s mission, her role in that mission as mentor and role model, and repeatedly stressed that employees of the school were required to live a life in conformity with the fundamentalist beliefs of the church.”¹¹ The school’s effort to justify the discharge initially on the basis of pregnancy out-of-wedlock and then, on appeal, to use the religious grounds of adultery, prompted the district court to note that, even though “defendants’ dislike of pregnancy outside of marriage stem[ed] from a religious belief may be relevant to the Court’s *First Amendment* analysis, it [did] not automatically exempt the termination decision from Title VII scrutiny.”¹² The court found that neutral, generally applicable prohibition of gender discrimination under Title VII preempted defendants’ use of the Free Exercise Clause¹³ where “*only* women can ever be fired for being pregnant without benefit of marriage,”¹⁴ but the court went on to note that had the school raised only the adultery charge, such would have been “determinative of whether Title VII applies to this case.”¹⁵ In this judicial dividing-the-baby analysis, the federal district court observed that not all religious beliefs will be enforced equally. Other courts have taken the same approach as in *Vigars*, noting that employee discharge for “[engaging in] premarital sexual intercourse in violation of [a school’s] moral code” would not be a Title VII discrimination violation, while a discharge based on pregnancy would be a violation.¹⁶ Thus, while courts expound the dogma that “[i]nquiry by the courts into the religious faith required by a religious organization of its employees is constitutionally barred,”¹⁷ courts can, and do,

11. *Id.* at 804. The district court rejected the school’s “bona fide occupational qualification [BFOQ]” Title VII exemption (20 U.S.C. § 2000e-2(e)(1) (2010)) in terms of the librarian being a “role model” where “there [was] a serious disagreement about how central her moral life was to her job as librarian, whether or not she was truly expected to act as a role model . . . and what impact her pregnancy truly had on her ability to perform either of those functions.” *Id.* at 809.

12. *Id.* at 808.

13. See *Emp’t Div. v. Smith*, 494 U.S. 872, 880 (1990) (upholding state’s denial of unemployment compensation to two former state employees fired for using the banned drug peyote, allegedly for religious purposes, where the state statute criminalizing the use of peyote was a “neutral, generally applicable regulatory law”).

14. *Vigars*, 805 F. Supp. at 804.

15. *Id.* at 810.

16. *E.g.*, *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270 (N.D. Iowa 1980).

17. *Little v. Wuerl*, 929 F.2d 944, 947 (3d Cir.1991).

inquire into whether marriage-related employment criteria are implemented in a manner that is prohibited under Title VII.¹⁸

Other Title VII cases involving marriage issues have involved, as discussed above, the same kind of balancing of religious beliefs with Title VII's prohibition of protected category discrimination. In *Little v. Wuerl*,¹⁹ the teaching contract of a Protestant teacher in a Catholic school was not renewed "because she had remarried . . . without pursuing the 'proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage.'"²⁰ The Cardinal's Clause, in effect at the teacher's school, required

the dismissal of [a] teacher for serious public immorality, public scandal or public rejection of the official teachings, doctrine or laws of the Catholic Church. *Examples of the violation of this clause would be the entry by a teacher into a marriage which is not recognized by the Catholic Church . . .*²¹

The Third Circuit, relying on a Title VII exemption for religious educational institutions whose practices are "directed toward the propagation of a particular religion,"²² ruled in *Little* that the school's having hired plaintiff knowing that she was a Protestant had not served to waive the exemption as to the school's enforcement of its religious beliefs concerning marriage. The school in *Little* clearly benefited from a statement of its religious beliefs regarding marriage and changed the whole focus of the decision from discrimination to the terms of the employee's contract.

18. Compare *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 666 (6th Cir. 2000) (emphasizing that, where a female employee is discharged or nonrenewed for premarital sex, her prima facie case requires only that she produce evidence that, apart from the premarital sex issue, "she was meeting [her employer's] legitimate expectations;" the burden then shifts to the school to produce evidence of its religious beliefs as a nondiscriminatory basis for its decision; whether employee is able to produce evidence that the proffered reason is pretextual will affect the outcome of the case, but is not part of the employee's prima facie case) with *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410 (6th Cir. 1996) (upholding summary judgment for a religious school regarding its termination of an unmarried pregnant preschool teacher where the teacher was not able to refute the school's nondiscriminatory reason for discharge in that it enforced its anti-adultery policy against both males and females).

19. 929 F.2d 944 (3d Cir. 1991).

20. *Id.* at 946.

21. *Id.*

22. 42 U.S.C. § 2000e-2(c)(2) (2010).

The Title VII religious exemptions have protected religious educational institutions' enforcement of religious beliefs in cases not directly related to marriage. For example, in *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*,²³ the Third Circuit upheld, against a claim of gender discrimination, the discharge of a female Catholic school teacher who had signed a public pro-abortion advertisement in a local newspaper, reasoning that "the pro-choice advertisement was not protected conduct under Title VII's opposition clause."²⁴ In effect, in the absence of an allegation that male employees had attacked the Catholic Church's position on abortion and had been punished differently, a court would be called upon to determine whether "the repudiation of Catholic doctrine on when life begins and the responsibility to preserve life *in utero*"²⁵ violates Catholic doctrine, something that "would infringe upon the First Amendment Religion clauses."²⁶ Similarly, the Seventh Circuit upheld, against a claim of gender discrimination, the refusal of a Catholic university to hire a female Catholic with strong pro-abortion views for a theology position, reasoning that the same result would have occurred for a male applicant.²⁷ In *Equal Employment Opportunity Commission v. Mississippi College*,²⁸ the Fifth Circuit limited jurisdiction of the EEOC to inquire into a Baptist institution's refusal to hire a Presbyterian, female part-time instructor for a full-time position where the College was owned by the state Baptist convention, the College's employment requirements specified hiring of Baptists

23. 450 F.3d 130, 142 (3d Cir. 2006) (*Curay-Cramer II*) (rejecting Title VII claims by terminated female Catholic school teacher and rejecting gender discrimination based on male employees in the past having been treated less severely for other kinds of violations, the Third Circuit reasoning that "comparable conduct [must be] sufficiently similar to avoid raising substantial [First Amendment Religious Clauses] constitutional questions.").

24. *Id.*

25. *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 344 F. Supp. 2d 923, 934 (D. Del. 2004) (*Curay-Cramer I*).

26. *Curay-Cramer II*, 450 F.3d at 140.

27. *Maguire v. Marquette Univ.*, 814 F.2d 1213 (7th Cir. 1987).

28. 626 F.2d 477 (5th Cir. 1980) (while not resolved on the merits, the Fifth Circuit was clear that on remand the EEOC, once it had determined that the College had a religion-based employment requirement, could not inquire further into other discrimination claims).

except in situations where none were available for critical areas, and 95% of the faculty was Baptist.²⁹

One final exemption exists, although it takes its force from the Free Exercise Clause rather than statutory exemptions. Religious schools and universities can claim a ministerial exemption under the Free Exercise Clause in making employment decisions even though those decisions are discriminatory, the rationale being that courts cannot inquire into an institution's qualifications for those who perform religious functions. However, this exemption is very narrowly defined.³⁰

Religious exemptions from state nondiscrimination statutes can involve difficult interpretative questions, not significantly different from those under Title VII. In a student case, *Romeo v. Seton Hall University*,³¹ a New Jersey appeals court held that a Catholic university that denied recognition of a student gay and lesbian group was not prohibited from doing so by the state's nondiscrimination statute. New Jersey has a broad nondiscrimination statute prohibiting discrimination on the basis of a variety of categories, including "sexual orientation,"³² in "any college and university"³³ but exempting from that statute "any educational facility operated or maintained by a bona fide religious or sectarian institution."³⁴ Two judicial observations regarding the facts of this case are worth noting. First, the state appeals court observed that the university's broad nondiscrimination provision, prohibiting discrimination in employment and student programs in a variety of areas including sexual orientation,³⁵ cannot be read as a contractual

29. The Fifth Circuit in *Mississippi College* relied on the Title VII exemption where "the employment of individuals of a particular religion [is necessary] to perform work connected with the carrying on by such . . . educational institution . . . of its activities." 42 U.S.C. § 2000e-1(a) (2010).

30. Compare *Redhead v. Conf. of Seventh-day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) (finding that termination of pregnant female not protected by ministerial exemption where teacher's duties were secular in nature) with *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (ministerial exemption applied in gender discrimination claim where plaintiff's position was that of a chaplain at a religious university).

31. 875 A.2d 1043 (N.J. Super. Ct. App. Div. 2005).

32. N.J. STAT. ANN. § 10:5-3 (West 2006).

33. *Id.* § 10:5-5(l).

34. *Id.*

35. *Romeo*, 875 A.2d at 1048. The university's nondiscrimination provision is a fairly standard one: "No person may be denied employment or related benefits or admission to the University or to any of its programs or activities, either academic or

exemption from the state statute. In distinguishing nondiscrimination contract provisions in employment from student organizations, the appeals court refused to recognize a nondiscrimination provision creating a unilateral contract for students and, even if such were to exist, the provision in the Seton Hall Student Handbook declared that student clubs, organizations, and associations could only be formed that “respect[ed] the values and mission of the University.”³⁶ Second, the court held that “a private religious university’s values and mission must be left to the discretion of the university.”³⁷ The plaintiff students’ emphasis on forming an organization directed at one protected class amounted to a “reductionist reference to . . . sexual orientation”³⁸ which was inconsistent with the Church’s position “that every person has a fundamental Identity: the creature of God, and by grace, his child and heir to eternal life.”³⁹

While the appeals court in *Romeo* ruled in favor of the university, it did not paint with a broad brush. Even though a nondiscrimination provision (that included sexual orientation) in a student handbook might not be considered the basis of a unilateral contract for purposes of enforcing the nondiscrimination provision against a religious university, such would not necessarily be the case in an employment handbook. The *Romeo* appeals court found that, in the absence of a language indicating a religious employer’s nondiscrimination employment provision is not binding, “a manual’s provisions on job security constitutes a binding contract between the employer and the employee A policy manual that provides for job security grants an important, fundamental protection for workers. If such a commitment is indeed made, obviously an employer should be required to honor it.”⁴⁰ Thus, in a state such as New Jersey that exempts religious colleges and universities from its state law nondiscrimination statute, a college or university employee

nonacademic, curricular or extracurricular, because of race, color, religion, age, national origin, gender, sexual orientation, handicap and disability, or veteran’s status.” *Id.* at 1046.

36. *Id.* at 1049.

37. *Id.* at 1050.

38. *Id.*

39. *Id.*

40. *Id.* at 1048.

handbook that prohibits discrimination on the basis of sexual orientation would be sufficient to constitute an enforceable contract. One could reasonably anticipate that, if a religious college or university included sexual orientation in its nondiscrimination provision and then sought to deny benefits to same-sex married employees that were available to opposite-sex married employees, or otherwise sought to discharge a current employee who had recently entered into a same-sex marriage, the statutory exemption would no longer apply to the religious educational institution.⁴¹

Most states also have nondiscrimination statutes similar to Title VII with a provision, such as the one in the case at the beginning of this section, prohibiting discrimination on the basis of marital status. In *Parker-Bigback v. St. Labre School*,⁴² the Supreme Court of Montana interpreted its marital status provision as not applying to the school's termination of a teacher living with a man not at that time her husband⁴³ in violation of Catholic religious beliefs. The school's employment contract contained a provision not addressing marriage directly but declaring that employees agreed

[t]o conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the school and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church.⁴⁴

In resolving the case in favor the school, the Montana Supreme Court determined that “[t]his case is not about marital status or gender. It is about conduct which [the

41. *But see* *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App. 2004) (finding, in a case not involving marriage, that Minnesota's nondiscrimination statute's religious exemption applied to discharge of gay organist, and determining that the church's Personnel Handbook prohibiting discrimination on the basis of sexual orientation did not constitute a waiver of the statutory exemption, the appeals court reasoning that such a result avoided an Establishment Clause problem). For another case involving Minnesota's Human Rights Act and reaching the same conclusion as *Egan*, see *Thorson v. Billy Graham Evangelistic Ass'n*, 687 N.W.2d 652 (Minn. Ct. App. 2004).

42. 7 P.3d 361 (Mont. 2000).

43. The facts in the case are not clear, but apparently plaintiff was married to her husband from 1974 to 1984 and remarried him in 1995 after her termination. Thus, plaintiff appeared to have been living with her former husband at the time of her termination even though they were divorced. *See id.* at 363.

44. *Id.* at 363–64.

employee] agreed to avoid when she signed her employment agreement with St. Labre School.”⁴⁵ By deftly shifting the issue from marital status to adulterous conduct, the court determined that whether the employee was married or single “made no difference If she had cohabited with someone of the opposite sex to whom she was not married, the same result would have occurred.”⁴⁶

Judicial recognition in *Vigars* and *Parker-Bigaback* of a religious claim to support employee termination for adultery finds some traction in states that still continue to criminalize adultery.⁴⁷ However, as applied to same-sex relationships the statutes may be subject to ambiguity in interpretation or, even more seriously, to the law of unintended consequences. For example, the state of North Dakota declares that “[a] married person is guilty of a class A misdemeanor if he or she engages in a sexual act with another person who is not his or her spouse,”⁴⁸ but does not specify whether a spouse must be a person of a different gender. Oklahoma defines adultery as the “the unlawful voluntary sexual intercourse of a married person

45. *Id.* at 364.

46. *Id.*

47. *See, e.g.*, Alabama: ALA. CODE § 13A-13-2 (2005) (“A person commits adultery when he engages in sexual intercourse with another person who is not his spouse and lives in cohabitation with that other person when he or that other person is married” can be punished under a Class B misdemeanor.); Georgia: GA. CODE ANN. § 16-6-19 (2007) (“A married person commits the offense of adultery when he voluntarily has sexual intercourse with a person other than his spouse” can be punished with a misdemeanor.); Illinois: 720 ILL. COMP. STAT. 5/11-7 (2010) (“Any person who has sexual intercourse with another not his spouse commits adultery, if the behavior is open and notorious, and (1) The person is married and the other person involved in such intercourse is not his spouse; or (2) The person is not married and knows that the other person involved in such intercourse is married” can be punished under a Class A misdemeanor.); Maryland: MD. CODE ANN., CRIM. LAW § 10-501 (LexisNexis 2009) (declaring that “A person may not commit adultery” and upon being found guilty of the misdemeanor of adultery the person “shall be fined \$10”); New Hampshire: N.H. REV. STAT. ANN. § 645:3 (2007) (“A person is guilty of a class B misdemeanor if, being a married person, he engages in sexual intercourse with another not his spouse or, being unmarried, engages in sexual intercourse with another known by him to be married.”); Utah: UTAH CODE ANN. § 76-7-103 (LexisNexis 2008) (“A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse [and is guilty of] a class B misdemeanor.”); Virginia: VA. CODE ANN. § 18.2-365 (2009) (“Any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor.”); Wisconsin: WIS. STAT. § 944.16 (2005) (finding a first class felony for “[a] married person who has sexual intercourse with a person not the married person’s spouse; or [a] person who has sexual intercourse with a person who is married to another”).

48. N.D. CENT. CODE § 12.1-20-09 (1997).

with one of the opposite sex,⁴⁹ language suggesting that same-sex partners married in another state who engage in same-sex sexual conduct in the state of Oklahoma could not be prosecuted for adultery. The effect of these statutes, one can argue, is that while they provide some insight into a public policy of fidelity in marriage, they should not take the place of religious institutions creating their own definitions of marriage.⁵⁰

IV. RELIGIOUS BELIEFS AND CONSTITUTIONAL RIGHTS

Where the religion-based claims of religious educational institutions are not protected by state nondiscrimination statutes, the ultimate question is whether the institutions are entitled to protect their religious beliefs under federal constitutional provisions. The most frequently litigated constitutional protections are all found in the First Amendment:⁵¹ Free Exercise of Religion Clause, Establishment Clause, and the Free Speech Clause (including right of expressive association).

Federal courts have uniformly held an inquiry can be made into whether a religious educational institution's claim that its discrimination is consistent with its religious beliefs or whether the claim is pretextual.⁵² However, even if alleged

49. OKLA. STAT. tit. 21, § 871 (2002). Less clear is South Carolina's statute declaring that "[a]ny man or woman who shall be guilty of the crime of adultery or fornication shall be liable to indictment and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court." S.C. CODE ANN. § 16-15-60 (2009).

50. Other state statutes touch upon the benefits associated with marriage without defining the nature of the marriage partners. See *Godfrey v. Spano*, 892 N.Y.S.2d 272 (N.Y. 2009) (upholding state executive order recognizing out-of-state same-sex marriages for purposes of qualifying for public health insurance coverage and other benefits); *Lewis v. N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (N.Y. App. Div. 2009) (refusing to find recognition of same-sex marriages from other states as violating New York policies, including that same-sex marriages were not so abhorrent to New York public policy as to fall into exception including incestuous and polygamous marriages which would prohibit application of marriage recognition rule).

51. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .").

52. See *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993) (finding no violation of the Religion Clauses where a limited inquiry under the Age Discrimination in Employment Act (29 U.S.C. § 623 (2010)) was made to determine whether firing a teacher who had been dismissed for marrying contrary to

discrimination is consistent with its religious beliefs, a court can still determine that compelling public policy arguments supersede application of the religious beliefs.⁵³

The U.S. Supreme Court's odyssey in balancing nondiscrimination with religious beliefs has resulted in benchmarks that suggest diminished protection for religious beliefs. In *Reynolds v. United States*,⁵⁴ the Court articulated a belief-practice dichotomy in upholding a criminal bigamy conviction for a person who had alleged that his religious beliefs permitted polygamy.⁵⁵ In a sweeping statement, the Court opined that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."⁵⁶ As a result, the Court reasoned that "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion"⁵⁷ and, just as government can prohibit religious practices such as human sacrifices and wives burning themselves on the funeral pyre of their husbands, so also can government prohibit polygamy.⁵⁸ To allow a person to practice his religious beliefs in all situations would have the effect of "permit[ting] every citizen to become a law unto himself."⁵⁹

One hundred five years after *Reynolds*, the Court was called upon to determine whether the Internal Revenue Service could revoke the tax exempt status for a religious university,⁶⁰ Bob Jones University,⁶¹ whose religious beliefs prohibited

Canon Law had been done according to religious beliefs or was pretextual); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (finding no Establishment Clause violation in applying ADEA to religious school).

53. See *Nat'l Relations Labor Bd. v. Catholic Bishop*, 440 U.S. 490 (1979) (setting forth a framework for analyzing whether federal statutes apply to religious educational institutions and, if so, whether the statute can be applied even considering constitutional claims).

54. 98 U.S. 145 (1878).

55. *Id.* at 161.

56. *Id.* at 166.

57. *Id.*

58. *Id.*

59. *Id.* at 167.

60. Rev. Rul. 71-447, 1971-2 C.B. 230. The IRS News Release both denied tax exempt status to the university and declared that donations to the university would not be considered to be charitable for purposes of tax deductions.

61. 461 U.S. 574 (1983).

interracial dating and marriage.⁶² In upholding revocation of the university's tax-exempt status, the Supreme Court opined that religious practices could be denied protection where a "most fundamental national public policy" was at stake.⁶³ Similar to the government's interest in *Reynolds* in criminalizing the practice of polygamy, the government's "fundamental, overriding interest in eradicating racial discrimination in education"⁶⁴ in *Bob Jones University* was so supportive of an overwhelming public policy that for the Court to have reached any other conclusion would have undercut the Court's determination in *Brown v. Board of Education*⁶⁵ "that racial discrimination in education violates a most fundamental national public policy."⁶⁶ The effect of *Bob Jones University* is much broader than an educational institution's tax exempt status; the decision reinforces *Reynolds* that the enforceability of religious beliefs can be overridden by public policy concerns.

The prominence of public policy in countering religious beliefs was examined four years after *Bob Jones University* in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.⁶⁷ In *Georgetown University*, the District of Columbia Court of Appeals, relying on *Bob Jones University* held that "the District of Columbia [had] a compelling or overriding governmental interest in the eradication of sexual orientation discrimination"⁶⁸ and in finding that the University had violated the District's nondiscrimination statute in refusing to recognize a gay and lesbian student group. The court of appeals determined that the University's Catholic "moral norms," which distinguished between recognizing

62. *See id.* at 580–81.

There is to be no interracial dating

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

63. *Id.* at 593.

64. *Id.* at 604.

65. 347 U.S. 483 (1954).

66. *Id.* at 593 (*see* Court's iteration of cases and statutes eradicating race discrimination).

67. 536 A.2d 1 (D.C. 1987).

68. *Id.* at 32. *See* D.C. CODE § 2-1401.01(2001) (prohibiting discrimination, among other categories, for "marital status, . . . sexual orientation, gender identity or expression . . .").

homosexual conduct (which it found objectionable) and homosexual orientation (which it did not find objectionable), would not be burdened by recognizing the student organization.⁶⁹ However, while the court of appeals held that the University could be required to provide the facilities and services available to other student organizations,⁷⁰ any effort to compel the University to “endorse” the gay/lesbian student groups would violate the Free Exercise and Free Speech Clauses.⁷¹ In language reminiscent of *Reynolds*, the District of Columbia Circuit observed that “government is without power to intrude into the domain of the intellect or the spirit and that only conduct may be regulated.”⁷²

Both *Reynolds* and *Bob Jones University* viewed public policy through the protective lens of Free Exercise Clause. Although public policy prevailed in *Reynolds* and *Bob Jones University*, the Free Exercise Clause still became an effective counterweight in other cases involving religious beliefs and education.⁷³ However, the vitality and viability of the Free Exercise Clause came largely to an end in 1990 in *Employment Division v. Smith*.⁷⁴ In this case, the Supreme Court upheld denial of unemployment compensation benefits to two state employees who had been dismissed for using a prohibited substance, peyote, allegedly during a Native American religious ceremony.⁷⁵ In rejecting the former employees’ benefits claim under the Free Exercise Clause, the Court acknowledged that exercise of religion applied “not only [to] belief and profession but the performance of (or abstention

69. *Id.* at 18.

70. *See id.* at 31 (the court of appeals acknowledges the University’s “all or nothing” position that applied both to endorsement and facilities/services while later noting that the latter could be provided without requiring the former).

71. *Id.* at 21.

72. *Id.*

73. *See Wis. v. Yoder*, 406 U.S. 205 (1972). In upholding exemption for Amish children from compulsory attendance past grade eight, the Supreme Court observed that “courts must move with great circumspection in performing the sensitive and delicate task of weighing a State’s legitimate social concern when faced with religious claims for exemption from generally applicable education requirements.” *Id.* at 235.

74. 494 U.S. 872 (1990). For an early discussion of the dramatic impact of this case on the application of the Free Exercise Clause, see generally Ralph Mawdsley, *Employment Division v. Smith Revisited: The Constriction of the Free Exercise Rights Under the U.S. Constitution*, 76 ED. LAW REP. 1 (1992).

75. *Emp’t Div.*, 494 U.S. at 883.

from) physical acts.”⁷⁶ However, in a sweeping decision, the Court took its decisions in *Reynolds* and *Bob Jones University* one step further and determined that free exercise of religion would no longer be a viable defense when dealing with “a neutral, generally applicable law.”⁷⁷ After *Employment Division*, the Court recognized that Free Exercise Clause would have legal vitality only in two situations: where combined with another constitutional provision such as the Free Speech Clause or when dealing with facts demonstrating hostility towards religion.⁷⁸

Three years after *Employment Division*, the Supreme Court furnished, in *Lamb’s Chapel v. Center Moriches Union Free School District*,⁷⁹ a replacement for the Free Exercise Clause, holding that religious speech is a fully protected subset under the Free Speech Clause. For the Court in *Lamb’s Chapel*, the Free Speech Clause’s prohibition of viewpoint discrimination became a powerful force in upholding religious beliefs.

However, the Supreme Court’s decision in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez (CLS)*⁸⁰ has cast a shadow over meaning of viewpoint discrimination. The Court was called upon to determine whether the law school’s nondiscrimination requirement for student organizations violated the free speech and associational rights of the Christian Legal Society student organization that sought to limit membership to persons subscribing to its religious beliefs.⁸¹ The law school’s policy prohibited discrimination in a broad number of categories, including “sexual orientation”⁸² and required that “registered

76. *Id.* at 877.

77. *Id.* at 881.

78. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating city ordinances prohibiting ritual slaughter of animals, finding the ordinances to be neither neutral nor of general applicability and finding them to be targeted at religious activity).

79. 508 U.S. 384, 393 (1993) (holding that a school district “discriminate[d] on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint”).

80. 130 S. Ct. 2971 (2010).

81. *Id.* at 2980–81.

82. *Id.* at 2979 (“[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.”).

student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.⁸³ In contrast to the Law School's "all-comers policy,"⁸⁴ the CLS bylaws

required members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman. CLS interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct" or holds religious convictions different from those in the Statement of Faith.⁸⁵

The effect of CLS being denied law school sponsorship was that, while it could use law school facilities for meetings and activities, access to chalkboards, and availability of bulletin boards to announce events,⁸⁶ it was denied access to a wide range of services, including financial assistance from the law school to subsidize events, use of law school channels to communicate with students, placing of announcements in a weekly Office of Student Affairs newsletter, use of the law school logo, and participation in a student organizations fair designed to advance recruitment efforts.⁸⁷

Choosing to merge the Supreme Court's separate lines of free speech rights⁸⁸ and associational right⁸⁹ cases, the *CLS*

83. *Id.* at 2982.

84. *Id.* at 2982 n.5.

85. *Id.* at 2974. CLS is a national organization that imposes the same religious requirements on all law school CLS chapters. On the organization's webpage, the CLS Board of Directors has adopted a Resolution amending its Statement of Faith on "Faith and Sexual Morality Standards"; however, this amendment currently can be accessed only by its members. CHRISTIAN LEGAL SOCIETY, <http://www.elsnet.org> (last visited Sept. 4, 2010).

86. *CLS*, 130 S. Ct. at 2981.

87. *Id.* at 2979. The Court minimizes the impact of denying these benefits to CLS in that "students [can] communicate through email, websites, and hosts like MySpace." *Id.* at 2991.

88. For three key cases relying on free expression, see *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000) (finding facially invalid university policy permitting student groups to be defunded on the basis of a student vote); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (finding impermissible viewpoint discrimination when university refused to provide the same printing privileges to a student religious group that it had provided to nonreligious student groups); *Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating university refusal to permit student religious group to meet on university premises on the basis of a university policy refusing religious groups to meet).

89. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding, on an as

majority found the College of Law's all-comers policy to be "reasonable and viewpoint neutral."⁹⁰ In response to the CLS claim "[t]here can be no diversity of viewpoints in a forum if groups are not permitted to form around viewpoints,"⁹¹ the Court responded that a state restriction on a limited public forum "need not be the most reasonable or the only reasonable limitation."⁹² Once the Court found that the law school's refusal to recognize CLS was reasonable, the student organization's free expression claim ceased to be viable under *Employment Division*.⁹³ While the Court declared that "[i]t is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers,"⁹⁴ the Court remanded the case to the Ninth Circuit to determine whether the Law School had "selectively enforce[d] its all-comers policy."⁹⁵

V. ANALYSIS

As suggested by the above discussion, the definition of marriage in religious educational institutions has been framed by federal and state courts striving to navigate a path between protecting religious beliefs and implementing public policy prohibiting discrimination. In *Varnum v. Brien*,⁹⁶ the Supreme Court of Iowa invalidated a state statute prescribing that "[o]nly a marriage between a male and a female is valid."⁹⁷ Examining the statute under the Iowa Constitution's equal privileges and immunities provision,⁹⁸ the state supreme court

applied basis, that state nondiscrimination statute prohibiting sexual orientation discrimination violated Boy Scouts right of expressive association).

90. *CLS*, 130 S. Ct. at 2995.

91. *Id.* at 2992.

92. *Id.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985)).

93. *Id.* at 2995.

94. *Id.* at 2993.

95. *Id.* at 2995. For example, the CLS queried whether student groups formed on the basis of race (African American), ethnicity (Hispanic), or gender (women) would also be open to full participation by non-blacks, non-Hispanics, or men. See Appellant Brief at 8–9, *CLS Chapter of Hastings Law Sch. v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371) for the CLS view on the Law School's failure to enforce its all comers policy uniformly.

96. 763 N.W.2d 862 (Iowa 2009).

97. IOWA CODE § 595.2(1) (2009).

98. IOWA CONST. art. 1, § 6 ("[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall

applied an intermediate level heightened scrutiny under a quasi-suspect standard,⁹⁹ finding that the statute furthered “deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,”¹⁰⁰ was based on “irrelevant stereotypes and prejudice,”¹⁰¹ was not the kind of human trait so “highly resistant to change . . . [that] it allowed courts to relax their standard of review because the barrier is temporary or susceptible to self-help,”¹⁰² and addressed a group politically powerless to effect changes in the law.¹⁰³

Same-sex marriage clearly has become the legal frontispiece for discussing sexual orientation issues in general. A statutory or judicial pronouncement on homosexuality-related areas of sexual orientation or marriage is likely to leave some religious educational institutions uncertain as to the

not equally belong to all citizens.”).

99. See *United States v. Virginia*, 518 U.S. 515 (1996) (in adapting the heightened scrutiny standard to the constitutionality of the Commonwealth of Virginia’s refusal to admit women to the Virginia Military Institute, the Court determined that the Commonwealth had failed to satisfy the “exceedingly persuasive justification” test in order to uphold its admission policy). See also *In re Marriage Cases*, 183 P.3d 384, 444–45 (Cal. 2008) (Supreme Court of California, in invalidating state statute stating that “only marriage between a man and a woman is valid or recognized in California [CAL. FAM. CODE § 308.5 (2004)],” held that classification based on sexual orientation was subject to “strict scrutiny analysis”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) (“[W]e conclude that, as a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling them out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping.”). *But see*, *Conaway v. Deane*, 932 A.2d 571, 609, 616 (Md. 2007) (while holding state statutes prohibiting same-sex marriages to be unconstitutional, state supreme court held “that gay and lesbian persons [were not] so politically powerless that they constitute a suspect [or quasi-suspect] class”).

100. *Varnum*, 763 N.W.2d at 890. *But see* *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (in upholding state’s Defense of Marriage Act [DOMA], the state supreme court found that DOMA was rationally related to state’s interests in procreation and children’s well-being, and thus did not violate the privileges and immunities clause).

101. *Varnum*, 763 N.W.2d at 890. For other jurisdictions adopting the same position, see *In re Marriage Cases*, 183 at 445 (“we conclude that in the present context, affording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples”).

102. *Varnum*, 763 N.W.2d at 894.

103. *Id.* at 895 (We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation. Gays and lesbians certainly possess no more political power than women enjoyed four decades ago when the Supreme Court began subjecting gender-based legislation to closer scrutiny.).

status of their religious beliefs. The notion that nondiscrimination statutes may have exemptions for religious beliefs is comforting only if the exemption is broad enough to include the full range of those beliefs. The challenge with statutory exemptions is that they are subject to legislation manipulation. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,¹⁰⁴ the U.S. Supreme Court upheld, against an Establishment Clause challenge, the broadening of a Title VII exemption¹⁰⁵ that permitted the Church of Jesus Christ of Latter-day Saints to extend its temple recommend requirement¹⁰⁶ to employees in entities owned by the church even though those employees did not engage in religious activities. Presumably, if Congress had moved in the opposite direction to change the Title VII's exemption from all activities to only religious activities, the church's religious beliefs would have been adversely affected to some extent.

Similar issues relate to students. If a federal funding statute were enacted prohibiting discrimination on the basis of sexual orientation, would the religious beliefs of religious institutions opposing homosexuality or same-sex marriage be enforceable? Could the institutions punish students (or faculty) expressing views in opposition to religious beliefs and proscribe faculty or student organizations opposing the organization's religious views? The difficulty is that, in the absence of a statutory exemption permitting religious schools and universities to enforce otherwise discriminatory rules, nondiscrimination statutes, one can argue, would prevail over statements of religious beliefs because, as reflected in *Employment Division* and *CLS*, such statutes would be generally applicable and viewpoint neutral.

104. 483 U.S. 327 (1987).

105. See 42 U.S.C. § 2000e-1(a) (1972), where Title VII exempts from coverage the employment by religious organizations of persons of a particular religion who are required to carry out the organization's "activities" (amended language) rather than just "religious activities" (old language), 42 U.S.C. § 2000e-1(a) (1964).

106. As explained by the Court, a temple recommend is a "certificate that [a person is] a member of the Church and eligible to attend its temples Temple 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." *Amos*, 483 U.S. at 327, 330 n.4.

The fundamental constitutional challenge to implementing religious beliefs is grounded in the belief-practice doctrine of *Reynolds*. To suggest, as *Reynolds* would have us believe, that beliefs and practices are two equally balanced sides of a religious institution's statement of its religious beliefs is disingenuous. Religion takes form and shape only to the extent that it can be practiced. The notion that government should be able to regulate the practice of religion because it does not probe into persons' minds to change their religious thoughts is proverbial strawman logic. We are led to believe that government restriction of religious practices is reasonable because it affects only one side of the equation.

However, one can argue that too much legal water has flowed over the regulatory dam to change the rules in place to deal with discrimination and religious beliefs. The legal legacies of *Reynolds*, *Bob Jones University*, *Employment Division*, and *CLS* have served to frame the law, suggesting that religious beliefs will have limited impact in defining the discrimination debate.

The dialogue between endorsement and facilitation as reflected in *CLS* and *Georgetown University* contain the seeds of future and, to date, yet unresolved legal disputes. In *Georgetown University*, the District of Columbia Court of Appeals, in directing the university to provide services and facilities to a gay and lesbian rights group, declared that "nothing can penetrate the constitutional shield protecting against official coercion to remove a religious belief or to endorse a principle opposed to that belief."¹⁰⁷ One wonders, though, how much assurance a religious educational institution can have that permitting same-sex advocates on campus will still allow the institution to declare its beliefs on homosexuality. Would allowing chaplains and pastors to teach and preach the institution's dogma in chapel services and in religion courses concerning the sinfulness of homosexuality be treated as a form of harassment or retaliation? If so, does such an outcome reflect the futility and folly of the belief-practice doctrine?

107. Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 25 (D.C. 1987).

VI. CONCLUSION

Same-sex marriage is a high stakes debate, but one cannot help but wonder why, if so much is at stake in terms of religious beliefs, so little has been affirmed by religious educational institutions. However, even if religious schools and universities have clear statements on marriage and religious beliefs, one wonders whether those beliefs, in the end, will prevail. Should federal protection against sexual orientation discrimination be adopted, thus joining existing laws in many states, municipalities and public educational institutions protecting against sexual orientation and marital status discrimination, the refusal to recognize same-sex marriages will be difficult to sustain. Once sexual orientation acquires protected status, to substitute terms such as civil union for marriage is, one can argue, simply another way of perpetuating discrimination.

The same-sex marriage and religious beliefs debate has moved forward on three interrelated fronts. First, and most broadly, if federal legislation prohibits discrimination based on sexual orientation, should a religious exemption be granted for religious beliefs that oppose homosexuality? If so, should the exemption apply to all aspects of the issue—hiring and discharge of gay/lesbian employees, admission or expulsion of gay/lesbian students, admission or expulsion of children of gay/lesbian couples, discipline of employees or students espousing gay/lesbian rights even if not gay or lesbian themselves? The *Bob Jones University* case suggests that creation of a fundamental protected status for may leave little room to invoke religious beliefs in opposition to that status.

Second, punishment of sexual activity outside marriage, to the extent that different-sex partners are treated the same as same-sex partners, would seem to be a safe harbor. However, the implications of punishing sexual activity for same-sex partners are significantly different, because, while different-sex partners have a reference point for legitimizing sexual conduct (marriage), such would not be the case for same-sex persons. In effect, is marriage for same-sex partners being treated as a form of sexual misconduct, thus requiring that homosexual persons maintain a life of celibacy, and would such a requirement be defensible under nondiscrimination statutes?

Third, a religious educational institution's decision to punish a same-sex relationship as a marriage can be a slippery slope. If the institution lacks a religious belief regarding marriage, one can question whether the subject is really a matter of a sincerely held religious belief. However, publishing a religious belief opposing same-sex marriage could serve to increase both the institution's visibility and vulnerability to litigation. If sexual orientation receives federal protected status comparable to race and gender, one can speculate whether denying marriage status to same-sex partners will simply be treated as a form of discrimination that depreciates the protected status of sexual orientation.¹⁰⁸

Almost forty years ago, in *Wisconsin v. Yoder*,¹⁰⁹ the Amish prevailed in acquiring an exemption from the state's compulsory attendance statute under the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Liberty Clause right to direct their children's education. The Court reasoned that "[t]he values underlying these two [constitutional] provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance."¹¹⁰ As stunning as the *Yoder* case was at the time,¹¹¹ it was limited to "the traditional way of life of the Amish [that was] not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."¹¹² One can argue that nothing in the debate concerning sexual orientation, premarital sexual activity, or same-sex marriage rises to the level of the protection accorded the Amish way of life in *Yoder*, and, in light of the post-*Yoder* cases of *Bob Jones University*, *Employment Division*, and *CLS*, any constitutional protection for religious beliefs opposing same-sex marriage seems doubtful. To quote the great religious liberty advocate William Bentley Ball:

108. For a South African perspective, see *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (declaring that, under the South Africa Constitution prohibiting discrimination on the basis of sexual orientation, partners in same-sex unions are entitled to have union recognized as a valid marriage).

109. 406 U.S. 205 (1972).

110. *Id.* at 214.

111. See Douglas W. Kmiec, *A Review Essay of Mere Creatures of the State? Education, Religion, and the Courts: A View from the Courtroom*, 70 NOTRE DAME L. REV. 1247, 1268-72 (1995).

112. *Yoder*, 406 U.S. at 216.