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Religious Groups and the Gay Rights Movement: Recognizing Common Ground

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I. INTRODUCTION

Some within the gay rights movement are similar to Will Roper, who, exasperated with the law's inability to deal with "bad men," declared that he would "cut down every law in England" to get after the Devil.[1] In response, Thomas More exclaimed, "And when the last law was down, and the Devil turned round on you—where would you hide . . . the laws all being flat?"[2] This Comment considers tensions between the gay rights movement and religious speech condemning homosexuality and draws two conclusions: First, it is possible for the gay rights movement to advance their goals through the legal suppression of religious speech opposing homosexuality. Second, such a strategy would injure religious groups *and* gay rights activists by eroding fundamental freedoms of conscience that both groups rely upon.

In 2003, a trial court in Sweden convicted Reverend Åke Green[3] of hate speech.[4] During a sermon, Green characterized gay relationships as "sexual abnormalities" that were a "cancerous tumor [on] society."[5] He warned that because of the tolerance of gays and lesbians in Sweden, the country risked divinely caused disasters.[6] Furthermore, he asserted that AIDS "came into existence" because of homosexuality.[7]

1. ROBERT BOLT, A MAN FOR ALL SEASONS 66 (1990).

2. *Id.*

3. The author neither endorses nor condemns Åke Green or his sermon for purposes of this Comment. Rather, Green's conviction for religiously based speech against homosexuals is used because it effectively demonstrates that an emphasis on positive rights and equality can weaken laws that protect unpopular speech.

4. Don Hill, *Europe: Case of Swedish Pastor Convicted of Hate Speech Tests Limits of Freedom*, RADIOFREEEUROPE RADIOLIBERTY, Jan. 21, 2005, http://www.rferl.org/features/ (browse archive for Jan. 21, 2005).

5. ÅKE GREEN, IS HOMOSEXUALITY GENETIC OR AN EVIL FORCE THAT PLAYS MIND GAMES WITH PEOPLE? 6 (Anders Falk & Debra Sandstrom trans., 2003), http://www.akegreen.org/Ake%20Green%20-%20Sermon%20Transcript.pdf.

6. *Id.* at 2, 6–7.

7. *Id.* at 2.

During the trial, prosecutors characterized Green's comments as the equivalent of racist Nazi propaganda.[8] Public prosecutor Kjell Yngvesson reportedly explained the conviction as follows: "One may have whatever religion one wishes, but [the sermon] is an attack on all fronts against homosexuals. Collecting Bible [verses] on this topic as he does makes this hate speech."[9]

Åke Green's story highlights the vulnerability of the right of free speech,[10] a vulnerability that many agree must not be exploited. Justice Jackson placed free speech at the center of Americans' fundamental rights when he proclaimed:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[11]

Jackson's "fixed star" of free speech is what is typically classified as a liberty—"that sphere of activity within which the law is content to leave me alone."[12]

When advocates of any group seek equality for specific groups by denying basic free speech liberties, dangers arise that often go unseen until the loss of liberty at the hands of equality is irreversible.[13] Describing the need to recognize the danger in this shift, Alexis de Tocqueville stated:

8. Hill, *supra* note 4.

9. Lars Grip, *No Free Speech in Preaching*, CHRISTIANITY TODAY, Aug. 9, 2004, http://www.ctlibrary.com/11881 (citing KYRKANS TIDNING, a newspaper of the Church of Sweden) (alterations in original); Terry Vanderheyden, *Swedish Pastor Ake Green Acquitted of Hate Speech Against Homosexuals*, LIFESITE, Nov. 29, 2005, http://www.lifesite.net/ldn/2005/nov/05112902.html ("Sweden's new hate crimes law, enacted in 2003 . . . makes illegal any expressions of 'disrespect' or 'incitement' 'towards a group of people,' including groups with 'sexual inclinations.'").

10. U.S. CONST. amend. I. The primary textual basis for freedoms of religion and speech in the United States is found within the First Amendment to the U.S. Constitution: "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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

11. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

12. P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 225 (12th ed. 1966).

13. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 96 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1972) (1840).

> [N]one but attentive and clear-sighted men perceive the perils with which equality threatens us, and they commonly avoid pointing them out. They know that the calamities they apprehend are remote and flatter themselves that they will only fall upon future generations, for which the present generation takes but little thought . . . . The evils that extreme equality may produce are slowly disclosed; they creep gradually into the social frame; they are seen only at intervals; and at the moment at which they become most violent, habit already causes them to be no longer felt.[14]

While recognizing that equality is certainly a bedrock value of fundamental importance,[15] this Comment also demonstrates that unwary emphasis on equality can have a deleterious effect on liberty—another essential value of American society.[16] As one article

14. *Id*. This implicit call for intellectual vigilance is also present in Isaiah Berlin's 1958 address to Oxford University entitled *Two Concepts of Liberty*, in which he stated:

> [W]hen ideas are neglected by those who ought to attend to them—that is to say, those who have been trained to think critically about ideas—they sometimes acquire an unchecked momentum and an irresistible power over multitudes of men that may grow too violent to be affected by rational criticism. Over a hundred years ago, the German poet Heine warned the French not to underestimate the power of ideas: philosophical concepts nurtured in the stillness of a professor's study could destroy a civilisation. He spoke of Kant's *Critique of Pure Reason* as the sword with which European deism had been decapitated, and described the works of Rousseau as the bloodstained weapon which, in the hands of Robespierre, had destroyed the old régime; and prophesied that the romantic faith of Fichte and Schelling would one day be turned, with terrible effect, by their fanatical German followers, against the liberal culture of the West. The facts have not wholly belied this prediction but if professors can truly wield this fatal power, may it not be that only other professors, or, at least, other thinkers (and not governments or congressional committees), can alone disarm them?

Isaiah Berlin, *Two Concepts of Liberty*, *in* LIBERTY 167 (Henry Hardy ed., 2002).

15. As one of the first documents setting forth the American conception of civil liberties, the Declaration of Independence begins with the phrase: "We hold these truths to be self-evident, that all men are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Fourteenth Amendment, ratified by the states in 1868, guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Additionally, many of the most beneficial and essential gains for the civil rights and the feminist movements have been made under the principle of equality. *See generally* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

16. "The value of equality is in some measure parasitic on the value of what is equalized." W. Cole Durham, Jr. & Brett G. Scharffs, *State and Religious Communities in the United States: The Tension Between Freedom and Equality*, *in* CHURCH AND STATE TOWARDS PROTECTION FOR FREEDOM OF RELIGION: INTERNATIONAL CONFERENCE ON COMPARATIVE CONSTITUTIONAL LAW 362, 393 (Japanese Ass'n Comp. Const. L. ed., 2006).

pointed out, "we cannot forget that an equal right to non-freedom is a nugatory right."[17]

Equality is not, of course, inherently bad, but when equality chips away at liberty, everyone is left with equal but diminished liberty. Kurt Vonnegut began his short story *Harrison Bergeron* with this characterization of a nugatory right: "The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way."[18]

One common result of the shift from liberty to equality is an increase of positive rights. While the Constitution is framed in terms of negative rights (e.g., the rights to speech, association, press, and religion without government intervention),[19] positive rights demand that the government affirmatively treat people or groups in particular

17. *Id*. Perhaps one of the best characterizations of the loss of liberty at the hands of equality lies within the Greek concept of the "Golden Mean." The concept of the golden mean is the idea that all virtues may be deleterious if excessive or deficient. Thus, the golden mean must be achieved by using the virtue moderately, without excess or deficiency. *See generally* ARISTOTLE, POLITICS (Ernest Barker, trans., Oxford Univ. Press 1946).

18. Kurt Vonnegut, *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE 7 (1998). In Vonnegut's critique of equality, all persons considered to be above average are handicapped. Those with above-average intelligence are forced to use devices that limit their ability to concentrate. Those with above-average strength are forced to carry weighted bags. All these measures are taken in the name of equality.

19. As one masters the nuanced distinction between positive and negative rights, one observes that equality-based arguments often assert positive rights and liberty-based arguments often feature negative rights. One author described the distinction:

> The distinction between positive and negative rights is deceptively simple. Many scholars have attempted to define them, but they do not agree on the details. . . . "If there was no government in existence, would the right be automatically fulfilled?" If there is no government in place and the right is fulfilled, that right would be a negative right; however, if government action is necessary to fulfill the mandate, then the right is considered positive. For the purpose of this Comment, the definition of a positive right is a "right to command government action," while a negative right is "a right to be free from government."
>
> The debate surrounding the difference between positive and negative rights hinges on whether the Constitution's text even recognizes positive rights. The standard view is that the Constitution is "a charter of negative rather than positive liberties. . . ." [T]he Court has noted the distinction between positive and negative rights. In *Deshaney v. Winnebago County Department of Social Services*, the Court stated that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."

Jaime Kennedy, Comment, *The Right To Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 809–10 (2005) (citations omitted).

ways (as opposed to refraining from regulating them, as required by negative rights).[20] For example, the right to appeal a court decision is a positive right because it demands that the government provide the people with a right to government action or consideration.[21] The most commonly recognized forms of positive rights are the civil rights guaranteed under the Due Process Clause of the Fourteenth Amendment.[22]

Gay rights movements commonly assert claims under the Equal Protection Clause, arguing that a positive right exists that demands equal treatment.[23] While recognizing the validity of many of the gay rights movement's claims,[24] this Comment will illustrate that unwary acceptance of positive rights claims for equality could suppress the negative rights that provide for religious free speech.[25] De

20. Peter Tolsdorf, *If Separate, Then at Least Equal: Rethinking* Brown v. Board of Education *and De Facto Public School Segregation*, 73 GEO. WASH. L. REV. 668, 689 (2005). Tolsdorf gives both a definition as well as some of the disadvantages of applying positive rights:

> Some may argue that courts are institutionally ill-equipped to force states to "do" things and that courts are only good at ordering states to "not do" or "stop doing" certain things. By recognizing a right to equal education, the argument goes, courts will find themselves in a morass of enforcement difficulties and line drawing inherent in enforcing "positive rights." Professor Susan Bandes defines positive rights as those "duties to act, to provide, or to protect." The traditional role of courts is to arbitrate "negative" rights against governmental intrusion. Such rights include freedom from government intrusion, such as the right to be free from warrantless searches under the Fourth Amendment. . . . "[P]ositive" rights are far more difficult to enforce than "negative" rights. A recognition of positive rights gives rise to difficult questions. How much state action is constitutionally required?

Id. Additionally, the following have all been viewed traditionally as positive rights:

> [T]he right to a fair and public trial, to a presumption of innocence, to be treated as an equal before the law, to own property, to change nationality, to asylum, and to take part in government[,] . . . the rights to social security, to work, to rest and leisure, to an adequate standard of living, to education including compulsory primary education, to participate in the cultural life of the community, and to a social and international order in which these rights are realized.

Vincent J. Samar, *"Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Gay-Rights as a Particular Instantiation of Human Rights*, 64 ALB. L. REV. 983, 991–92 (2001).

21. White v. Johnson, 180 F.3d 648, 652 (5th Cir. 1999).

22. U.S. CONST. amend. XIV, § 1. The civil rights guaranteed by the Due Process Clause are seen, inter alia, in school segregation claims, *see, e.g.*, Tolsdorf, *supra* note 20, at 689–90, and reproduction claims, *see*, *e.g.*, Elizabeth Price Foley, *Human Cloning and the Right To Reproduce*, 65 ALB. L. REV. 625, 627–28 (2002).

23. *See* Samar, *supra* note 20.

24. *See infra* notes 36–41 and accompanying text.

25. *See infra* Parts III–IV.

Tocqueville pointed out that "political liberty is more easily lost [than equality]; to neglect to hold it fast is to allow it to escape."[26] As a pair of commentators stated:

> The difficulty is that today there appears to be a tacit assumption that all religion-state issues should be evaluated through the lens of equality. The equalitarian principle has achieved such a dominant position that it has resulted in a distortion and even diminution in the degree of constitutional protection of religious liberty. Yet the grip of the equalitarian paradigm is so strong that the distortions it creates are largely unrecognized by those for whom viewing the world in this way seems natural or even inevitable.[27]

Although the dominant worldview may be an equality-based view, this issue ought to be evaluated with the objective of finding what is best for society, whether it promotes equality or liberty.

Part II of this Comment focuses on the problem—that some religious groups' condemnation of the lesbian, gay, bisexual, and transgender (LGBT) community has caused some to call for, and sometimes receive, legal restrictions on religious speech. Part III looks at the current legal protections in the United States that preserve religious speech and equality-based actions taken by some within the gay rights movement in an apparent effort to break these barriers down. Part IV examines the increasingly pro-gay attitudinal shift currently developing in America and the effect this may ultimately have on the legal landscape. Finally, Part V discusses the similarities of conscience that both the LGBT community and religious groups share and the possible negative consequences of limiting religious free speech.

II. THE PROBLEM

The story of Åke Green is a prime example of the effects of limiting religious speech in the interest of protecting a specified social group from potentially damaging language. In essence, the gay rights movement's quest for rights and freedom[28] has, at least in the

26. DE TOCQUEVILLE, *supra* note 13, at 96.

27. Durham & Scharffs, *supra* note 16, at 364.

28. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 560, 567 (2003); Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

case of Åke Green, opened chapel doors and censored words spoken from the pulpit.[29]

The conflict between some religious teachings and homosexuality is nothing new. For the past several millennia, major religions have condemned homosexuality, and that condemnation has been reflected in various religious laws against homosexual practices.[30]

Among recent social changes, the increasing acceptance of homosexuality by society has created inroads for claims of equal rights among homosexuals—particularly the rights of child adoption and same-sex marriage.[31] These developments are, in some sense, indicative of the current and future conflict between religious rights and the gay rights movement. On one side, the gay rights movement has sought not only to secure rights, but also to attain societal acceptance,[32] which they seek by way of two major fronts—the law and public opinion.[33]

29. It should be noted that Green's alarming conviction was short-lived. He was acquitted by a Swedish court of appeals, and the Supreme Court of Sweden sustained his acquittal. Vanderheyden, *supra* note 9.

30. This is particularly true of Islam, Judaism, and Christianity, all of which have traditionally condemned homosexuality, although this has changed in some branches that now condone homosexuality. Many in the Islamic faith point to passages in the Qur'an 7:80–81 stating "And (We sent) Lut when he said to his people: What! do you commit an indecency which any one in the world has not done before you? Most surely you come to males in lust besides females; nay you are an extravagant people," and 26:165–166, which states, "What! do you come to the males from among the creatures, And leave what your Lord has created for you of your wives? Nay, you are a people exceeding limits." THE HOLY QUR'AN (M.H. Shakir trans., 1983). Jews look within the Hebrew Bible, wherein *Leviticus* 18:22 (King James) states "Thou shalt not lie with mankind, as with womankind: it *is* abomination," and for Christians, in addition to the text in Leviticus, the New Testament, *Romans* 1:26–27 (King James) reads:

> For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.

Additionally, *I Timothy* 1:9–10 (King James) reads: "For whoremongers, for them that defile themselves with mankind, for menstealers, for liars, for perjured persons, and if there be any other thing that is contrary to sound doctrine."

31. *See* Evan Wolfson, *All Together Now*, THE ADVOCATE, Sept. 11, 2001, at 34, 35; *see also* DEBORAH L. FORMAN, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004); KARLA J. STARR, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497 (1998).

32. Many have noted that the gay rights movement has the end goal of acceptance. *See, e.g.*, Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIANS, GAY MEN,

On the other side, many religious groups remain unwilling to back away from their stance against homosexuality.[34] Several major religions in America teach that homosexuality is wrong by divine mandate and conclude that they cannot support social and legal trends favorable to homosexuals without ignoring the commands of the God they worship.[35]

The gay rights movement's desire to suppress anti-gay speech is not without its own valid basis.[36] In 2004, sexual orientation bias motivated 15.6 percent of the 9021 reported offenses within single-bias hate crime incidents in the Unites States.[37] In 1998, Matthew Shepard died after he was "tied to a split-rail fence, tortured, beaten and pistol-whipped by his attackers, while he begged for his life."[38] Many of the gay rights movement's efforts attempt to address the legitimate concern of anti-gay violence that has followed, and continues to follow, the gay community.

Violence against the LGBT community may occur not only through actions, but also through words. Hate speech is defined as "[s]peech that carries no meaning other than the expression of hatred for some group, such as a particular race, esp[ecially] in circumstances in which the communication is likely to provoke violence."[39] Hate speech can cause serious symptoms of emotional distress including "fear in the gut, rapid pulse rate and difficulty in

AND THE LAW 401, 402–03 (William B. Rubenstein ed., 1993); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1381–82 (2000); Robert F. Bodi, Note, *Democracy at Work: The Sixth Circuit Upholds the Right of the People of Cincinnati To Choose Their Own Morality in* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, *128 F.3d 289 (6th Cir. 1997)*, 32 AKRON L. REV. 667, 667–68 (1999); Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 952–53 (1998); Wolfson, *supra* note 31.

33. *See infra* Part IV.

34. *See* Russell Shorto, *What's Their Real Problem with Gay Marriage? It's the Gay Part*, N.Y. TIMES MAG., June 19, 2005, at 34; *see also supra* note 30 and accompanying text.

35. *See generally* Shorto, *supra* note 34, at 34.

36. Hate speech has been regulated under the fighting words exception to the First Amendment to "[help] ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

37. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2004, at 5 (2005), *available at* http://www.fbi.gov/ucr/hc2004/tables/HateCrime2004.pdf.

38. Matthew Shepard Foundation, Matthew's Life, http://matthewsplace.com/mattslife.htm (last visited Sept. 27, 2006).

39. BLACK'S LAW DICTIONARY 1435, 1436 (8th ed. 2004) (under the entry "speech").

breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide."[40] In studying the effect between racist hate speech and mental illness, one author expressed:

> Human beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth . . . . The accumulation of negative images . . . present[s] them with one massive and destructive choice: either to hate one's self, as culture so systematically demand[s], or to have no self at all, to be nothing.[41]

Despite derogatory speech against the LGBT community, the gay rights movement has been a highly visible example of successful attainment of increased rights and freedoms.[42] The movement has also enjoyed an increasingly positive public perception.[43] In the wake of these changes, many religious institutions feel increasingly threatened.[44] One explanation may be that such organizations sense that while the gay rights movement may not be purposefully attacking religious liberties, the tide of rights and freedoms gained by the gay rights movement could break down the legal barriers that protect religious free speech. Such organizations may fear, perhaps legitimately, that an increase of equality-based positive rights could eventually usurp and destroy the negative rights found within the First Amendment[45]—specifically the right to condemn actions they believe are morally wrong.

40. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989).

41. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136–37 (1982) (quoting KENNETH CLARK, DARK GHETTO 63–64 (1965); J. KOVEL, WHITE RACISM: A PSYCHOHISTORY 195 (1970)).

42. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

43. For example, public opposition to gay marriage decreased from 63% in February of 2004 to 51% in March of 2006. The poll also showed less opposition to gays in the military and gay adoption. The Pew Research Ctr. for the People and the Press, *Only 34% Favor South Dakota Abortion Ban: Less Opposition to Gay Marriage, Adoption and Military Service* 2 (Mar. 22, 2006), http://people-press.org/reports/pdf/273.pdf.

44. *See infra* Part III.

45. *See infra* Part IV. It is important to note that religious rights and liberties are manifest within each of the rights to non-establishment, free exercise, speech, press, and assembly of the First Amendment (as discussed in Part IV). While this Comment focuses specifically on religious speech, it also acknowledges that the other liberties expressed within

Some within the gay rights movement seek to cause wide societal acceptance of homosexuality by advocating a shift to equality that would override laws and social norms that currently protect the right to religious free speech.[46]

The method of conflict between the gay rights movement and religious groups is not entirely unique among other historical clashes of conscience. The Supreme Court described clashes of faith and belief, stating that

> [i]n the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[47]

In an effort to persuade others towards LGBT acceptance, some within the gay rights movement believe that the obstacle of religious speech should be removed as a tactic to reach their goal.[48] In other words, the achievement of the ultimate goal of the gay rights movement—acceptance—could have the derivative effect of placing religious speech condemning homosexuality in the societal closet.

Although the legal framework has not allowed positive rights of particular groups to overcome the liberty of religious speech, laws may be modified to weaken current religious liberty protections and

the First Amendment cannot be divorced from one another, and must therefore be included to a limited extent.

46. *See infra* Part III.

47. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

48. *See* Morris Floyd, *The Church and Anti-gay Violence*, Mar. 15, 1999, http://www.umaffirm.org/gaither.html ("[N]o amount of denial can obscure the link between hateful rhetoric and hate-filled brutality."). See also hatecrime.org, *The Religious Right and Anti-gay Speech: In Their Own Words,* http://www.hatecrime.org/subpages/hatespeech/hate.html (last visited Sept. 3, 2006), in which the authors of the site have compiled lists of anti-gay statements made by the religious right and listed links on their site. While the site does not explicitly call for a limitation on free speech, it does list statements from the religious right in hopes that people can "demand the passage of state and federal hate crimes laws that include sexual orientation." *Id*. Additionally, the site compares infamous racist and anti-Semitic speeches with speech from the religious right about homosexuality.

to allow groups to dictate the bounds of religious speech and freedom.[49] The momentum of equality is creating a barrage against these barriers that is effectively breaking down free speech protections.[50]

III. THE LAW

A. Legal Barriers

Legal barriers—including the Constitution, case law, and statutes—provide an initial defense against possible threats to religious liberty and specifically to religious speech. As de Tocqueville asserted, liberties are in constant "peril" of being lost at the hands of equality.[51] As a result of this peril, several legal barriers have been included to strengthen the position of American liberties.

1. The First Amendment

The First Amendment on its face guarantees various civil liberties, providing a structural protection to counteract the shift towards equality that constantly challenges those liberties. Despite the effects of some legal challenges to those liberties, the First Amendment is not hollow, nor is it defenseless. The First Amendment is the source of most protections of religious freedom. Among the rights set forth by the First Amendment, the Free Exercise Clause, Establishment Clause, freedom of speech, and freedom of assembly provisions protect religious rights.

a. Free Exercise Clause. The current state of the Free Exercise Clause is far from strong. From 1963 to 1990, this Clause could only be overcome when there was a compelling state interest.[52] The compelling interest test required that any law that "unduly burden[ed] the free exercise of religion" without a compelling interest would be unconstitutional even if the law was "neutral on its

49. *See infra* Part IV.

50. *See infra* Part III.

51. *See* DE TOCQUEVILLE, *supra* note 13, at 96. *See generally* Durham & Scharffs, *supra* note 16.

52. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

face."[53] In the 1990 case of *Employment Division v. Smith*, the Supreme Court significantly narrowed the compelling interest test by declaring that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[54] In essence, the compelling interest test, which had been highly protective of religious liberties, was weakened to a test protecting religious exercise only in the face of intentional state discrimination.[55]

Although *Smith* restricted the reach of the Free Exercise Clause, religious organizations can still be exempt from antidiscrimination laws that would otherwise stifle religious practices that discriminate against homosexuality. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, a church fired an employee after discovering that the employee did not qualify for a certificate of approval (known as a recommend) to enter the church's temples.[56] The employee sued under section 703 of the Civil Rights Act of 1964, which prohibited discrimination on a religious basis.[57] The church moved to dismiss on the grounds that section 702 provided an exemption for religious groups.[58] The lower court found section 702 to be unconstitutional,[59] but the Supreme Court reversed this ruling and held that religious groups could be exempted from legislative acts.[60] The Court reasoned that laws allowing the exclusion of persons on the basis of religion within church organizations were permissible under the Establishment Clause because the goal of such laws was to avoid burdening

53. *Yoder*, 406 U.S. at 220.

54. 494 U.S. 872, 879 (1990) (Stevens, J., concurring in judgment) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

55. Durham & Scharffs, *supra* note 16, at 388.

56. 483 U.S. 327, 330 (1987). As Justice White explained, "[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.

57. *Id.* at 331.

58. *Id.*

59. *Id.* at 333.

60. *Id.* at 334–39.

religious exercise.[61] The constitutionality of statutes allowing religious organizations to discriminate in employment based on the beliefs and lifestyles of applicants remains intact.[62] Thus, discrimination against homosexuals by religious groups would likely pass muster under the same reasoning, where the purpose of statutory exemptions allowing such discrimination is to protect religious exercise.

Smith weakened the ability of the judiciary to carve out exemptions for religious actions by increasing judicial deference to the legislative branch. Despite this, the Free Exercise Clause continues to serve liberty interests to a limited extent by protecting legislatively made religious exceptions to statutes, as shown by *Amos*.

b. Establishment Clause. The Establishment Clause is typically viewed as an attempt to keep what Thomas Jefferson termed a "wall of separation" between church and state.[63] However, current Establishment Clause jurisprudence has become increasingly focused on promoting equality-based positive rights. This is especially apparent in light of an overview of foundational Establishment Clause case law.

The Establishment Clause is generally interpreted using the *Lemon* test. Under *Lemon v. Kurtzman*,[64] to survive scrutiny under the Clause, a state action (1) must have a secular purpose, (2) must have a primary effect that does not advance or inhibit religion, and (3) cannot create an excessive entanglement between church and state.[65] Under the strict language of the *Lemon* test as originally formulated, the Establishment Clause should act to both inhibit and protect religion. According to the second prong of the *Lemon* test, a state action is prohibited if the action will advance religion. Conversely, a state action is also prohibited if it inhibits religion.[66]

61. *Id*. at 335–36 ("[I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious.").

62. *Id*. at 339 ("It cannot be seriously contended that § 702 impermissibly entangles church and state.").

63. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

64. 403 U.S. 602 (1971).

65. *Id*. at 612–13.

66. *Id*.

The third prong of the *Lemon* test can protect religious freedom if a law would excessively entangle church and state.[67]

As currently applied, the *Lemon* test can be used to forbid state promotion of religion, while failing to protect religion from state inhibition of religion. State actions prohibited because they have been found to advance religion include moments of silence,[68] prayer at extra-curricular activities,[69] graduation prayers,[70] public posting of the Ten Commandments,[71] public funding to private religious schools,[72] and bans of several religious symbols on public property.[73]

While the Establishment Clause has been read increasingly to favor an equalitarian paradigm, *Amos* permitted an exception to an antidiscrimination statute on the hybrid principles of both the Establishment Clause and the Free Exercise Clause.[74] The Court upheld the law in *Amos* because it (1) avoided entanglement of church and state and (2) possessed the objective of not creating a burden on religious exercise.[75]

The *Lemon* test has created an Establishment Clause analysis that is both uneven and unpredictable.[76] Despite the unpredictable nature of the test, it has consistently moved towards an equality regime.[77] In 1997, the *Lemon* test was revamped in *Agostini v. Felton*.[78] In that case, public school teachers and other public employers were allowed to enter religiously associated schools to perform non-religious instruction.[79] The Court restructured the *Lemon* test by combining the excessive entanglement prong with the effects prong.[80] Thus the new *Lemon* test has only two-prongs and requires (1) that a purpose

67. *Id*.

68. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

69. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

70. *See* Lee v. Weisman, 505 U.S. 577 (1992).

71. *See* Stone v. Graham, 449 U.S. 39 (1980).

72. *See* Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973).

73. *See* Van Orden v. Perry, 125 S. Ct. 2854 (2005); McCreary County v. ACLU, 125 S. Ct. 2722 (2005); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lynch v. Donnelly, 465 U.S. 668 (1984); Stone v. Graham, 449 U.S. 39 (1980).

74. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987).

75. *Id*. at 338.

76. *See Van Orden*, 125 S. Ct. at 2860-61.

77. *See* Durham & Scharffs, *supra* note 16, at 370–78.

78. 521 U.S. 203 (1997).

79. *Id*. at 218.

80. *Id*. at 232–33.

of the state action be secular and (2) that the state action does not have the effect of advancing or inhibiting religion.[81]

The changes implemented in *Agostini* served the interests of equality to a greater extent than the interests of liberty.[82] By removing the excessive entanglement test, the Establishment Clause was no longer as concerned about the involvement of religion within the state and vice-versa. Rather, the emphasis on the purpose and the effect of the state action opened the door to greater positive rights by allowing further claims for government action and intervention without the limiting factor of excessive entanglement. This shift of emphasis effectively ushered in an "accommodation" between religion and state that was based on non-discrimination and neutrality—both of which are equality-based principles.[83] Religious groups have benefited at times by the equality shift in Establishment Clause jurisprudence, but the price of this benefit has been a loss of liberty.[84]

It is likely that laws that foster conflicts between homosexuality and religious beliefs could not be overturned under the Establishment Clause alone.[85] For example, if a statute required public school students to study curriculum that endorsed

81. *Id*. at 218, 232–33.

82. *See* Durham & Scharffs, *supra* note 16, at 376–78.

83. *Id*. at 373–78.

84. *Id*. at 401 nn.82–84 (citing Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (allowing the use of vouchers in both public and private schools); Freedom from Religion Found. v. McCallum, 324 F.3d 880 (7th Cir. 2003) (allowing a Christian halfway house to act as a rehabilitation center for a state prison-parole program)). Additionally, in 2004, the federal government granted 1968 grants to faith-based organizations totaling over $1.3 billion, which was a twenty percent increase in grants given over the 2003 totals, and a fourteen percent increase in total spending. WHITE HOUSE OFFICE OF FAITH-BASED AND CMTY. INITIATIVES, GRANTS TO FAITH-BASED ORGANIZATION FISCAL YEAR 2004, at 5 (2005), *available at* http://www.whitehouse.gov/government/fbci/final-report.pdf.

85. It should be noted that such a law could probably be overturned under a combination of several structural barriers, although it would not be overturned under an Establishment Clause analysis on its own. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court stated:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interests of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare (them) for additional obligations."

Id. at 214. Thus, the combination of the Free Exercise Clause, the Establishment Clause, and the traditional interests of parents would come into consideration.

homosexual families, the Establishment Clause alone would probably not strike down the statute in a claim that the statute inhibited religions that condemn homosexuality.[86] Such a statute on its face would not have the purpose of inhibiting religion because the law does not specifically bring any religion into direct government contact, and the statute is not facially aimed at religion. If there were a religious exemption carved out by the legislature, the exemption would probably survive scrutiny under the Establishment Clause, but this would require the legislature's foresight.

c. Free speech. The legal framework protecting freedom of speech is arguably the strongest force protecting religious rights. While the free speech right covers more than religious speech, it does include religion within the purview of its protection. The strength of the free speech right is exemplified by *Collin v. Smith*, in which a Nazi group in the village of Skokie, Illinois chose the village as the site of a rally to express anti-Jewish views.[87] The court declared the town's ordinance prohibiting the use of religious and racial slurs was unconstitutional under the First Amendment.[88] Thus, even in the most virulent of free expression cases, American jurisprudence provides a structural safeguard.

In *R.A.V. v. City of St. Paul*,[89] the Supreme Court declared a city ordinance banning the burning of crosses[90] to be unconstitutional on First Amendment free speech grounds.[91] The Court reasoned that the government could not impose prohibitions on speakers merely because they express abhorrent speech.[92] The Court also noted that

86. In the Ninth Circuit, a case loosely paralleled this hypothetical scenario, although it did not include the element of religious rights. In *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), a school administered a psychological survey to students and included questions about sexual topics. The parents objected to these questions, and the court found that despite the fundamental right to control their child's education, parents who choose to send their children to public school do not have the right to exempt their children from elements of the curriculum that offend the parents' values. *Id.* at 1205–06. The parents' remedy was either to educate their students in a different institution or work through the political process. *Id.* at 1207.

87. Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978).

88. *Id.* at 702.

89. 505 U.S. 377 (1992).

90. St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

91. *R.A.V.*, 505 U.S. at 391.

92. *Id.*

while the city had a compelling interest in preserving the peace, the ordinance was not sufficiently limited in scope.[93]

Currently, the strong negative rights that prevent the government from regulating free speech protect the rights of religious groups to express their views against homosexuality. This does not mean, however, that free speech is an insurmountable barrier.

d. Free association. Within the First Amendment, the right to assemble grants the right to free association.[94] Under this right, private groups have discriminated against homosexuality.[95] In *Boy Scouts of America v. Dale*,[96] the Court upheld the right of a private organization to exclude homosexuals from their ranks. While not a religious organization, the Boy Scouts of America is conceptually similar to religions in that its goal of instilling certain values[97] in its members runs parallel to that of many religious organizations. In reaching its decision, the Court used a compelling interest standard and found that requiring the Boy Scouts of America to allow homosexuals in their youth leadership would be "a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[98]

93. *Id.* at 395 (citing Young v. Am. Mini Theatres, 427 U.S. 50 (1976)).

94. U.S. CONST. amend. I. The Court has stated the following on the link between assembly and association:

> [F]reedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the 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. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

95. One of the cases addressing the subject is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In this case, the Court upheld the South Boston Allied War Veterans Council's decision to exclude a homosexual organization from a parade because compelling the Council to allow the homosexual group to join the parade would impair the message of the parade. The Court went on to compare the role of the council to that of a composer who may choose "the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574.

96. 530 U.S. 640 (2000).

97. *Id.* at 653.

98. *Id.* at 659.

While the freedom of association continues to exist in the form of negative rights that exclude the government from dictating the association decisions of private individuals and groups, some important issues are still unresolved as they apply to religious freedom. Some of these involve determining what an expressive association is, striking a balance between religious freedom and the state's interest in imposing antidiscrimination laws, and whether the balancing formula is the same for gay antidiscrimination laws as for other antidiscrimination laws. Despite these uncertainties, the right to free association is currently one of the major barriers preserving religious liberties amid the assertion of equality-based rights.

2. Federal statutes

a. Religious Freedom Restoration Act (RFRA).[99] As a response to the *Smith* decision, Congress passed RFRA as an attempt to protect religious rights. RFRA required the government to show that the burden it seeks to impose on a religious adherent furthers a "compelling governmental interest" and is "the least restrictive means" of furthering that interest.[100] Thus, Congress provided, by statute, higher protections for religious freedoms than the Supreme Court found in the language of the First Amendment. RFRA was declared unconstitutional insofar as it applied to the states in the case of *City of Boerne v. Flores.*[101] Recently, the Court found that RFRA was constitutional as a statutory limit to facially neutral federal statutes.[102]

99. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (2000)), invalidated in part by City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

100. 42 U.S.C. § 2000bb-1 (1993) (invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997)).

101. 521 U.S. 507 (1997). The Court found that although Congress could "enforce the provisions" of the constitution (under section 5 of the Fourteenth Amendment) through "appropriate legislation," Congress went too far by making "a substantive change in constitutional protections." *Id.* at 532. The Court characterized the application of RFRA against the states as a displacement of the balance between federal and state power.

102. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 126 S. Ct. 1211 (2006).

b. Religious Land Use and Institutionalized Persons Act (RLUIPA).[103] This act restored the pre-*Smith* compelling state interest test within a very limited scope: land use regulations and regulations of institutionalized persons (persons in prisons and mental hospitals).[104] RLUIPA overcame Establishment Clause challenges and effectively demonstrated that some of the protections lost under *Smith* can be restored on a limited basis through legislation.[105]

3. State-level "RFRAs"

Despite the limiting of a federal RFRA under *Boerne*, states were still able to pass state-level protections to religious freedoms. As such, at least thirteen states have passed state constitutional amendments or statutes that act with the same protective purposes of RFRA.[106] Additionally, at least eleven states hold that their state constitutions provide increased protection for religious freedom than was laid out in *Smith*.[107]

103. Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc-5 (2000)).

104. *See, e.g.*, 42 U.S.C. § 2000cc-1 (2000) ("No government shall impose a substantial burden on the religious exercise of [an institutionalized person], even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . (1) is in furtherance of a compelling governmental interest[] and (2) is the least restrictive means of furthering that compelling governmental interest.").

105. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).

106. *See* Durham & Scharffs, *supra* note 16, at 405–06 n.135 (citing ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2003); CONN. GEN. STAT. ANN. § 52-571b (West 2003); FLA. STAT. ANN. §§ 761.01–.04 (West 2003); IDAHO CODE ANN. §§ 73-401 to -404 (Supp. 2002); 775 ILL. COMP. STAT. ANN. §§ 35/1–/99 (West 2002); MO. ANN. STAT. §§ 1.302, 1.307 (West 2004); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2002); OKLA. STAT. ANN. tit. 51, § 251 (West 2003); 71 PA. CONS. STAT. § 2401–2407 (2003); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2001); S.C. CODE ANN. § 1-32-10 (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (Vernon 2003)).

107. *Id.* at 406 n.136 (citing Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); State v. Evans, 796 P.2d 178 (Kan. 1990); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); Attorney Gen. v. Disilets, 636 N.E.2d 233 (Mass. 1994); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992); *In re* Browning, 476 S.E.2d 465 (N.C. 1996); Rourke v. N.Y. State Dep't of Corr. Servs., 603 N.Y.S.2d 647 (Sup. Ct. 1993); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992); State v. Miller, 549 N.W.2d 235 (Wis. 1996)).

B. Momentum Against the Legal Barriers

In recent years, the gay rights movement has found ways around the barriers protecting religious speech to assert positive rights claims. Although not always in direct conflict with religious rights, strategies seeking to limit the expression of religious groups expressing disapproval of homosexuality have been increasingly successful.

Asserted rights or actions that have limited the expression of religious expression include the following: prohibitions on discrimination in employment;[108] mandatory attendance of state employees at training sessions discussing gays and lesbians in the workplace;[109] limits on government employee expression of anti-homosexual religious views;[110] requirements for public school presentations favorably discussing homosexuality;[111] proscription of parental teaching against homosexuality;[112] termination of private-

108. *See* Under 21 v. New York, 482 N.E.2d 1 (N.Y. 1985). In *Under 21*, a charitable religious organization brought suit against the mayor and city after the mayor issued an executive order to prohibit employment discrimination by city contractors on the basis of sexual orientation. The court held that the mayor lacked authority to promulgate such an executive order because sexual orientation is not "conduct covered by the 14th Amendment." *Id*. at 9–10. *But see* Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454 (3d Cir. 1994) (holding that the same controversy was ripe for a pastor in his rights as a minister and a citizen but was not ripe with respect to the churches).

109. In Minnesota, religiously motivated employees sued the State for requiring mandatory attendance at a training session entitled "Gays and Lesbians in the Workplace," which the complaining employees saw as "state-sponsored propaganda promoting homosexuality." Altman v. Minn. Dep't of Corr., 251 F.3d 1199, 1204 (8th Cir. 2001) (reversing lower court's ruling allowing religious freedom claim).

110. Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156 (2d Cir. 2001) (holding that state action preventing a state sign language interpreter from expressing religious views about homosexuality to clients was not an excessive burden on her free exercise of religion).

111. *See, e.g.*, Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780 (E.D. Mich. 2003) (Students and parents sued a school district on religious grounds after the school district invited a group of clergy to speak at schools in which they advocated the idea that homosexuality was consistent with religion, but the school district refused to allow anyone on the panel that viewed homosexuality as immoral or wrong. The court held that the action violated the Establishment Clause and the Equal Protection Clause, but not the Free Exercise Clause.); *see also* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995) (Religious students and parents sued a corporation and school officials for sponsoring a sex education program and compelling attendance in a presentation where presenters portrayed explicit sexual material and advocated masturbation and homosexual behavior. The court dismissed the suit because the plaintiff parents "failed to demonstrate an intrusion of constitutional magnitude" on their rights to rear their children.).

112. During a custody dispute, a judge ordered that a mother could not teach her daughter that homosexuality is wrong. The judge ordered the mother to "make sure that there

sector employees on account of religiously based, anti-homosexual expression;[113] exclusion of anti-gay groups from public facility use;[114] requirements for equal benefit dispersal;[115] and same-sex marriage.[116] With this shift in mind, this Comment now examines four cases—not all of which were successful—that employed the current legal

is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic." Valerie Richardson, *Mother Appeals Ruling on Gays*, WASH. TIMES, Nov. 5, 2003, at A1.

113. *See, e.g.*, EEOC v. News & Observer Publ'g Co., 180 F. Supp. 2d 763 (N.D.N.C. 2001) (An employer successfully dismissed an employee's suit when he was fired after expressing the view that homosexuality can be corrected as he had changed from a homosexual to a heterosexual after a religious conversion. Because his supervisor disagreed with his opinions, the relationship deteriorated and he was fired.); *see also* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 601 (9th Cir. 2004) (HP company began displaying five "diversity posters" showing an HP employee with captions: Black, Blonde, Old, Gay or Hispanic. An employee that was a devout Christian posted three biblical verses condemning homosexuality. When the employee refused to take down his biblical passages, he was fired.); Bounanno v. AT&T Broadband, 313 F. Supp. 2d 1069 (D. Colo. 2004) (An employee was fired because he refused to sign a certificate agreeing to comply with the employer's diversity policy because he "believed that some behavior and beliefs were deemed sinful by [s]cripture, and thus, that he could not 'value'—that is hold in esteem or ascribe worth to—such behavior or beliefs without compromising his own religious beliefs.").

114. *See, e.g.*, Barnes-Wallace v. Boy Scouts of Am., 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (allowing suit brought by lesbian and agnostic parents claiming that the county's leasing of a park to Boy Scouts violated the Establishment Clause, but holding that issues of material fact still existed as to whether the lease discriminated against homosexuals and agnostics). Admittedly, boy scouts are not a religious group, however their views closely mirror some religious values and could be seen as religious in nature. *See also* Dignity Twin Cities v. Newman Ctr. & Chapel, 472 N.W.2d 355 (Minn. Ct. App. 1991) (overturning administrative ruling and holding that a Catholic organization could not be required by antidiscrimination law to rent space to a homosexual organization that refused to attest that it accepted church teachings on homosexuality).

115. For example, a private Catholic university was required to give the same benefits to gay student organizations that it offered to other student organizations because of the government's compelling interest to eradicate discrimination against gays. Gay Rights Coal. of Georgetown Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987); *see also* Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) (organization with close ties to the Catholic Church was denied funds from Portland city because they refused to sign a contract agreeing to comply with an ordinance that required them to give health benefits and employment fringe benefits to employees with domestic partners).

116. According to the highest court in Massachusetts, the state did not identify a constitutionally rational basis for denying the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wished to marry, and such denial was unconstitutional. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). *But see* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding state law that denies homosexual partners the right to adopt a child); Hernandez v. Robles, Nos. 86–89, 2006 WL 1835429 (N.Y. July 6, 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

framework to promote equalitarian claims for the gay community over religious free speech.

Recently, a district court in the Eleventh Circuit allowed authorities to deny a church group access to public advertising when it attempted to publicize a conference promoting the idea that homosexuality is a preventable and changeable condition.[117] The ad showed a human face with the words "Love Won Out: Addressing, Understanding and Preventing Homosexuality in Youth" printed over the face.[118] Eventually the district court's decision was vacated and the case was remanded,[119] but the initial success serves as an example of the possibility of the subordination of religious free speech.

Similarly, *Good News Employee Ass'n v. Hicks*[120] upheld the constitutionality of a city's act to remove a flyer opposing homosexuality. Plaintiffs were employees at the Community and Economic Development Office (CEDA) in Oakland, California and posted notices about a group to which they belonged—The Good News Employee Association (GNEA).[121] The fliers described GNEA as "a forum for people of Faith to express their views on contemporary issues of the day. With respect for Natural Family, Marriage and Family [V]alues."[122] After CEDA received several complaints from lesbian co-workers, the flyers were removed pursuant to the city's Equal Employment Opportunity/Anti-Discrimination/Non-Harassment Policy and Complaint Procedure.[123] A CEDA officer sent all employees an email stating that flyers had been removed because they "contained statements of a homophobic nature and were determined to promote sexual orientation based harassment."[124] The court applied the *Pickering* test (weighing the interests of the government in providing services

117. Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263 (11th Cir. 2003).

118. *Id.* at 1269.

119. *Id.* at 1267.

120. No C-03-3542 VRW, 2005 U.S. Dist. LEXIS 5270 (N.D. Cal. Feb. 14, 2005).

121. *Id.* at *1.

122. *Id.*

123. *Id.* at *2.

124. *Id.* at *3.

to its citizens against the employee's interest in protected speech)[125] and found for CEDA, despite recognizing that "the suppressed speech was not patently inflammatory 'fighting words'" and that it was unclear that this amounted to a "cognizable workplace disruption under *Pickering*."[126]

The characterization of "natural family" and "marriage and family values"[127] as "homophobic" terms that "promote sexual orientation based harassment"[128] inappropriately discriminated against the religious expression of plaintiffs in *Good News Employee Ass'n*. The employees' ability to express the viewpoint of traditional family in a favorable light was held to be offensive to others.

In *American Family Ass'n v. City and County of San Francisco*,[129] a Ninth Circuit panel upheld, in a 2-1 decision, the state's formal disapproval of a series of ads against homosexuality. Several religious groups sponsored a campaign in local papers and on local television stations proclaiming that "Christians love homosexuals, but that 'God abhors any form of sexual sin,' [including] homosexuality."[130] Additionally, some of the ads included statistics on homosexuality and stated that homosexuals had merely succumbed to temptation and could therefore change their behavior.[131] The San Francisco Board of Supervisors sent the following letter in response:

> Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people.

125. Pickering v. Bd. of Educ., 391 U.S. 563 (1968). This test weighs the interests of the government providing services to its citizens against the employee's interest in protected speech.

126. *Good News Employee Ass'n*, 2005 U.S. Dist. LEXIS 5270, at *8.

127. *Id*. at *1.

128. *Id*. at *3.

129. 277 F.3d 1114 (9th Cir. 2002).

130. *Id*. at 1119. Additionally, the ad stated:

> For years, Christians have taken a stand in the public square against aggressive homosexual activism. We've paid a heavy price, with sound-bite labels like "bigot" and "homophobe." But all along we've had a hand extended, something largely unreported in the media . . . an open hand that offers healing for homosexuals, not harassment. We want reason in this debate, not rhetoric. And we want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope.

Id.

131. *Id*.

> What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatment.
>
> It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.[132]

In addition to sending this letter, the City and County of San Francisco adopted a resolution which called for "the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes."[133]

The City and County adopted a second resolution specifically directed at "anti-gay" television ads.[134] The resolution stated that anti-gay organizations "promote an agenda which denies basic equal rights for gays and lesbians and routinely state their opposition to toleration of gay and lesbian citizens."[135] The resolution also asserted that the characterization of gays or lesbians as "immoral and undesirable create[s] an atmosphere which validates oppression of gays and lesbians," and that a "marked increase in anti-gay violence" had coincided with "defamatory and erroneous [anti-gay] campaigns" (although evidence of this marked increase was not offered).[136] Additionally, the resolution urged "local television stations not to broadcast advertising campaigns aimed at 'converting' homosexuals."[137]

Plaintiffs sued claiming that the resolutions and city actions violated the Free Exercise Clause, the Establishment Clause, and others of the plaintiffs' rights asserted in a hybrid free exercise and free speech claim.[138] The trial court dismissed all claims,[139] and the appeals court affirmed the lower court's decision.[140]

132. *Id*. In addition to sending the letter to plaintiffs, the letter was also sent to Newt Gingrich, Trent Lott, and Jesse Helms—none of whom were parties to the case. *Id*. at 1119 n.1.

133. *Id*.

134. *Id*.

135. *Id*. at 1120.

136. *Id*.

137. *Id*.

138. *Id*.

The appeals court applied the *Lemon* test[141] stating that the test is applied "not only to official condonement of a particular religion or religious belief, but also to official disapproval or hostility towards religion."[142] The court looked to see if the state actions "(1) have a secular purpose, (2) [did] not have as [their] principal or primary effect advancing or inhibiting religion and (3) [did] not foster an excessive government entanglement with religion."[143] Perhaps most importantly, this case demonstrates, first, that some groups would advocate to formally discourage religious speech against homosexuality, and second, that such advocacy may be upheld under government speech doctrine.

In another case, a school prohibited a student from protesting against what he believed "endorsed, encouraged, subsidized and promoted" homosexual behavior.[144] He wore a T-shirt to school with the words "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED"[145] printed on the front of the shirt and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" written on the back.[146] The next day he wore another T-shirt with the words "BE ASHAMED" "OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and the same quote from Romans on the back.[147] He was removed from classes for the remainder of the day and was later visited by school officials and the local sheriff.[148] A school vice principle told him that he must "leave his faith in the car."[149] The student refused and was ordered to leave the school.[150] The court denied the student's request for a preliminary injunction, holding that he was not likely to prevail on

139. *Id.*

140. *Id.* at 1125–26.

141. *See supra* notes 64–67 and accompanying text.

142. *Am. Family Ass'n*, 277 F.3d at 1120–21 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 523 (1993)).

143. *Id.* at 1121.

144. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1100 (S.D. Cal. 2004).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1101.

149. *Id.*

150. *Id.*

the merits (largely due to the decreased rights enjoyed by students in a public school setting).[151]

Each of these cases illustrate that the strategy of limiting religious expression by appealing to positive right claims is a viable and potentially successful strategy.

IV. THE ATTITUDES

Attitudinal barriers provide the second protection against possible threats to the negative rights of religion in the face of the gay rights movement's claims for positive rights. Admittedly, it is difficult to analyze public attitude in an exhaustive and dispositive fashion. Public perception and attitude are key elements in legal debate because ultimately, cultural principles become law,[152] changing the legal framework of the debate. Attitude has an effect on law and vice-versa. With this in mind, this Comment will now review attitudinal barriers resisting the gay rights movement, then describe the recent shift in public opinion in favor of the gay rights movement.

A. Attitudinal Barriers

One of the strongest barriers against the gay rights movement is the influence of religion in America,[153] and the general discouragement of homosexuality in a religious context[154] provides the strongest attitudinal barrier to the gay rights movement. In the United States, approximately 160 million American adults self-

151. *Id.* at 1119–22.

152. In Ronald M. Dworkin's discussion of legal principles and legal standards, he commented, "We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards . . . about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards." Ronald M. Dworkin, *The Model Of Rules*, 35 U. CHI. L. REV. 14, 41 (1967). Dworkin identified the natural law not as a static platonic ideal, but rather as a culturally based set of principles. By observing societal expressions like religion, science and politics one can identify the principles that define the natural law and vice-versa.

153. *See* U.S. CENSUS BUREAU, THE 2006 STATISTICAL ABSTRACT: THE NATIONAL DATA BOOK, at tbl. 69 (2006), *available at* http://www.census.gov/compendia/statab/tables/06s0069.xls.

154. *See* Pew Forum on Religion & Pub. Life, *Republicans Unified, Democrats Split on Gay Marriage: Religious Beliefs Underpin Opposition to Homosexuality* (Nov. 18, 2003), http://pewforum.org/publications/surveys/religion-homosexuality.pdf.

identified with a religion, while only approximately 40 million did not. Of Americans that claim a high level of religious commitment, 76% believe homosexuality is wrong.[155] Additionally, 39% of the clergy discouraged homosexuality in church services, while only 2% of the clergy discussed the issue in terms of acceptance.[156] The strongest movement against homosexuality comes from the Evangelical Protestant groups, consisting of 44% of all Americans.[157] Among Evangelical Protestants, 68% reported that their pastors spoke on the subject of homosexuality and 59% of the pastors discouraged it.[158] Within this group, 52% felt that acceptance of homosexuality was bad for the country, and 65% felt that homosexuality can be changed.[159] All of these factors show that the discourses occurring within the religions of America are resisting the gay rights movement.[160]

According to the Pew Forum on Religion and Public Life, 55% of Americans believe that homosexuality is wrong, and roughly half of the population has an unfavorable view of gay men (50%) and lesbian women (48%).[161] Regarding the issue of acceptance, 31% of Americans believe that greater acceptance of homosexuality would be bad for the country, while only 23% believe that greater acceptance would be good for the country.[162] The debate of whether homosexuality can be changed is split down the middle, with 42% believing that it can be changed and 42% believing that it cannot.[163] Additionally, one scholar stated that "although antigay public attitudes tend to be strongly expressed, pro-gay attitudes were significantly weaker and more ambivalent. Lesbians and gay men should reasonably anticipate, at best, toleration, and often grudging

155. *Id*. at 2.

156. *Id*.

157. Gallup Organization, August Wave One Questionnaire, Aug. 27, 2000, http://brain.gallup.com/documents/questionnaire.aspx?STUDY=P0007036. The question about being "born-again" or "evangelical" (no. 52) was based on self-identification, and included all who identify themselves as such, including Protestants, Catholics, Latter-day Saints, Orthodox, etc. *Id*.

158. PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 154, at 1.

159. *Id*.

160. *See id*.

161. *Id*.

162. *Id*.

163. *Id*. (the other 16% claimed that they did not know if homosexuality could be changed).

toleration at that, in many parts of the country as well as at the highly distilled national level.[164]

Thus, the attitudinal barrier of a strong negative public perception of homosexuality has likely made it difficult for the homosexual movement to assert claims for equal treatment.

B. Momentum Against Attitudinal Barriers

The attitudinal momentum is currently in favor of the gay rights movement. The focus of the movement is not merely changing laws, but a change in the hearts and minds of society.[165] In other words, the current framework of free speech is having an effect on the debate, and the gay rights movement is accomplishing their goals without restricting religious speech. Despite this, with a greater number of gay rights apologists, those favoring future laws restricting religious speech may have a more fertile population with which to promote their ideas.

In 1987, 74% of Americans believed that homosexuality was "always wrong," with only 12% of Americans believing that homosexuality was "not wrong at all."[166] Contrastingly, in 2002, only 53% of Americans believed that homosexuality was "always wrong," and 32% of Americans believed that homosexuality was "not wrong at all."[167] Additionally, in 2003, 88% of Americans felt that homosexual men and woman should have equal job opportunities, "up from 71% in 1989 and 56% in 1977."[168] When asked in the same poll if "homosexuality should be considered an acceptable lifestyle or not, 54% of Americans responded 'Yes' in May of [2003], up from 34% in 1982."[169]

Another indicator of the gay rights movement's momentum is the acceptance of homosexual teachers. In 1987, 51% of Americans believed that school boards should be able to fire homosexual teachers because of their sexual preference while only 42% believed that they should not be able to fire homosexual teachers.[170] In 2003,

164. Stephen Clark, *Federal Jurisprudence, State Autonomy: Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 756 (2003).

165. *See* Wolfson, *supra* note 31, at 34.

166. Pew Forum on Religion & Pub. Life, *supra* note 154, at 17–18.

167. *Id.*

168. *Id.* at 18.

169. *Id.* at 17–18.

170. *Id.* at 17.

American's attitudes had changed dramatically with 62% believing that school boards should not be able to fire homosexual teachers and only 33% believing that school boards should be able to fire homosexual teachers.[171]

Not surprisingly, older Americans are more likely to have a negative attitude towards homosexuality. In 2003, 74% of Americans age 65 and older were opposed to gay marriage, a closely related issue.[172] This number consistently decreases with age: 64% of Americans ages 50 to 64, 58% of Americans ages 30 to 49, and only 46% of Americans ages 18 to 29.[173] Among all groups, reasons why people felt that homosexuality is wrong are very telling. Religious conviction was almost constant across all age groups, while the idea that homosexuality was unnatural was much greater among the older groups than the younger generations.[174] As a more accepting generation grows and replaces the older generations that oppose homosexuality, the attitude of Americans will continue to change.

One gay rights activist stated, "Shimmering within our reach is a legal structure of respect, inclusion, equality, and enlarged possibilities, including the freedom to marry. Let us build the new approach, partnership, tools, and entities that can reach the middle and bring it all home."[175] According to the numbers, the gay rights movement is succeeding. Whether one agrees with the success of the movement, the combination of changes in the structural and attitudinal makeup of the issue could be the beginning of an equalitarian system that could limit religious speech.

C. Attitudes on Free Speech and Why They Matter

Recent attitudes are surprisingly in favor of regulating hate speech. In a 1999 survey, 61% of respondents were in favor of "regulat[ing] or restrict[ing] racial hate speech."[176] Another survey

171. *Id.* at 15–16.

172. *Id.*

173. *Id.*

174. Religious conviction numbers are as follows: 23% among Americans ages 18 to 29, 29% among ages 30 to 49, 31% among ages 50 to 64, and 27% among those 65 and older. *Id.* The view that homosexuality was just wrong or unnatural or opposed gay marriage for other reasons increased as generations grew older: 9% among Americans ages 18 to 29, 13% among ages 30 to 49, 15% among ages 50 to 64, and 23% among those 65 and older. *Id.*

175. *See* Wolfson, *supra* note 31, at 37.

176. JOHN GOULD, SPEAK NO EVIL 178 (2005).

found that nearly two-thirds of those polled felt that government action should be taken to stop internet attacks on race, religion, or ethnicity.[177] While these results are not dispositive of the issue, they show a general opinion that some type of action should be taken to limit or punish certain types of speech. Certainly this attitude, coupled with the increased perception of homosexuality, may have the effect of limiting anti-homosexual religious speech.

Ultimately we must ask ourselves why attitude matters when considering legal questions. While some may reason that "the law is what it is,"[178] the law is a much more fluid concept than the legal community typically likes to admit.[179] When dealing with the law, we must recognize that law is made at several different levels, including voter resolutions, state legislatures, Congress, and courts, to name just a few. Upholding current laws, changes in law, and interpretations in law lie on the decisions of lawmakers.[180] Indeed, sustaining the power of law relies upon a "sense of appropriateness being sustained."[181] In other words, when a lawmaker deems the limiting of religious speech to be appropriate, older principles of law are eroded as the new "appropriate" logic takes its place.[182]

V. THE SOLUTION

As we consider solutions for a very contentious issue, it appears easy for advocates to assert righteous certainty for one position or the other. Operating through the current legal framework with the momentum of public opinion behind them, the gay community's power has grown, power that could be wielded to limit the expression of groups opposing the gay community—including some expressions of religious groups. Before brandishing such a powerful weapon, the gay rights movement must ask: "Now that the rights allowing anti-gay speech could be stricken down, should they be?" In striking down such laws, would they follow Roper in their zealous indignation with hopes of "cut[ting] a great road through the law to

177. *Id.*
178. John Galsworthy, *Justice*, *in* FIVE PLAYS 59, 90 (1984).
179. *See* Dworkin, *supra* note 152, at 14.
180. *Id.* at 41.
181. *Id.*
182. *Id.*

get after the devil?"[183] Do advocates have the wisdom of Thomas More to ask, "And when the last law [i]s down, and the Devil turned 'round on [us], where would [we] hide . . . the laws all being flat?"[184]

Although valid motivations for restrictions on certain speech may exist, the principle that both religious groups and gay-rights groups seem to have forgotten in their zeal is that the substantive position argued for will make less difference to how society is shaped than the methods employed in making that argument. No matter which side wins the debate, both religious groups and gay-rights groups will have lost if this battle leads to a restriction in expressing conscience. While the Constitution plays a part in protecting the right of conscience, the Constitution cannot accommodate these principles as absolute.[185] We cannot sit back and rely on the federal and state judiciary to strike an appropriate balance. Each one of us should work to protect the freedom of conscience for all people, even those with whom we disagree.

A. The Value of Conscience—Liberty as the Necessary and Common Foundation of Adversaries

To hold to a belief, unfettered by government restrictions, is a core principle of American society. While no reference to human conscience is written in the Constitution, its shadow is evident in the First Amendment freedoms of religion, speech, and assembly.[186] When we think of conscience, we tend to think of religion. The founders of the United States were concerned with compulsion in belief.[187] This is expressed in the religion clauses of the First Amendment. Judge Michael McConnell suggests that courts should seek to follow the Madisonian view of religious factions found in Federalist No. 51.[188] He further explains:

> While the government is powerless and incompetent to determine what particular conception of the divine is authoritative, the free

183. BOLT, *supra* note 1, at 66.

184. *Id.*

185. *See* Dworkin, *supra* note 152, at 61.

186. U.S. CONST. amend. I.

187. *See* THE FEDERALIST No. 51, at 280 (James Madison) (J.R. Pole, ed., 2005).

188. Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1515 (1990).

> exercise clause stands as a recognition that such divine authority may exist and, if it exists, has a rightful claim on the allegiance of believers who happen to be American citizens.[189]

Madison encouraged religious "pluralism, rather than assimilation, ecumenism, or secularism, as the organizing principle of church-state relations."[190] Madison's view changes the question that we ask when dealing with religions from "Will this advance religion?" to "Will this advance religious pluralism?"[191] Additionally, the Court would not ask the question, "'Will this be religiously divisive?,' but rather, 'Will this tend to suppress expression of religious differences?'"[192]

The Supreme Court has interpreted the religion clauses as protective of religious conscience by halting restrictions on religious belief[193] and prohibiting mandatory participation in religious ceremony that is against one's conscience.[194] This protection goes beyond what is classically defined as religion. In *United States v. Seeger*,[195] the Court held that an exemption from conscripted military service based on "an individual's belief in a relation to a Supreme Being"[196] applied to "a given belief that is sincere and meaningful [that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[197] While the decision in *Seeger* was not based on the Religion Clauses, it still demonstrates a commitment in American law to conscience.

Similar to many religions, the struggle for gay rights is at its heart a movement of conscience, and so owes much to the freedom of

189. *Id.* at 1516.

190. *Id.*

191. *Id.*

192. *Id.*

193. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

194. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (disallowing, under the Establishment Clause, prayer at public school extra-curricular activities); Lee v. Weisman, 505 U.S. 577 (1992) (proscribing prayer at public school graduation); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down statute authorizing daily periods of silence in public schools); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (prohibiting Bible reading exercises in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating official prayer in public schools).

195. 380 U.S. 163 (1965).

196. *Id.* at 165.

197. *Id.* at 166.

conscience enshrined in American traditions. It is an expression of morals,[198] albeit morals outside of the mainstream, and like many other minority religious movements throughout American history,[199] homosexuals were oppressed because they departed from the norms of mainstream society.[200]

The gay rights movement's best tool for achieving equality relies upon the ability to express conscience.[201] Speaking on the effect of the First Amendment for the movement,

> Bill Rubenstein, the former head of the ACLU's Lesbian and Gay Rights Project [stated] that the First Amendment has done more for gay rights than the Fourteenth Amendment. . . . It is the First Amendment that begins the attempt to apply the Fourteenth Amendment. The first fight for equality is often the fight for an equal right to *speech*. That is what drove the civil rights movement in the 1950's and 1960's in the South. . . . It's what drives the gay rights movement today. Speech is often the first equality issue that you win.[202]

The right to believe according to one's conscience means little without being allowed to express those beliefs. The freedom of conscience includes the ability to express what one believes without a license from the government[203] or fear of prosecution,[204] even if the

198. DAVID A.J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM *BOWERS* TO *LAWRENCE* AND BEYOND 108 (2005) ("Claims by lesbian and gay persons today . . . are in their nature claims to a self-respecting personal and moral identity in public and private life through which they may reasonably express and realize their ethical convictions of the moral powers of friendship and love in a good, fulfilled, and responsible life protesting against . . . [a] sectarian tradition of moral subjugation.").

199. ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES, at xxiv–xxv (1999).

200. Richard Thompson Ford, *Hate and Marriage*, SLATE, July 12, 2006, http://www.slate.com/id/2145620.

201. Ira Glasser, *Hate Crimes/Hate Speech*, *in* SPEECH AND EQUALITY: DO WE REALLY HAVE TO CHOOSE? 55, 60 (Gara LaMarche ed., 1996).

202. *Id.* at 62–63.

203. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943). The Court struck down a licensing scheme for door-to-door religious proselytizing, noting that "[t]he way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found." *Id.* at 115.

204. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (dismissing a prosecution for unauthorized distribution of religious tracts).

message may be offensive to some.[205] Intertwined with that right is the right to refuse to express something that would violate one's conscience,[206] as well as the right to freely assemble with like-minded individuals.[207]

Just as freedom of conscience cannot flourish without expression, it cannot long survive under the watchful eye of the state. Justice Brandeis expressed this view in his dissent in *Olmsted v. United States*:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[208]

This recognition of the value of conscience brings us to the current debate. In the quest for full equality, it is important that the gay-rights movement not trample other groups' freedom of

205. *See* Cohen v. California, 403 U.S. 15, 30 (1971) (reversing a conviction for offensive conduct for a protester's display of "f— the draft" on his jacket). The Court's defense of the importance of free discussion and conscience is worth noting:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 30.

206. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'").

207. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . .").

208. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

conscience, particularly those of religion. It is the denial of the freedom of conscience, of the ability to say and to believe and express that which is politically unpopular, that oppressed the LGBT community in the past. It is the recognition of the freedom of conscience that allowed gay men and lesbians to demand claims to equal treatment. With this history in mind, the LGBT community should be especially sensitive to the conscience rights of others and reluctant to create a society where people cannot believe and say things according to what they think is right, even if it is hurtful or condemnatory at times.

B. Limits on Expression—Unintended Consequences

Despite the intense harm that may result from such hate speech and the initial appeal of regulating such speech, limiting speech can in fact exacerbate the problems for the victims of such speech.[209] In other words, when society creates a legal sword of speech regulation, it is placed in the hands of the majority, and by so doing, it merely creates another tool with which the majority can establish its dominance. This principle is perhaps best illustrated by Ira Glasser:

> Consider that in the year that the University of Michigan speech code prevailed, before it was struck down in court, there were about twenty instances where whites charged blacks with violations, even though the purpose of the code was to protect and "empower" blacks. To my knowledge, there was not a single instance of a white student making antiblack comments who was punished. One black student was punished, however, for using the term "white trash." Is that what the advocates of speech restrictions had in mind?[210]

Anti-speech laws could have an effect on nearly anyone fighting for societal justice. For example, if an anti-racist hate speech law had been enacted during the 1960s, the anti-white views of both Malcolm X and Eldridge Cleaver would likely have been censored.[211] Additionally, when a group of Jewish students banned racist speech from their English campus, the ban was eventually employed to stop a Zionist teacher on the grounds that Zionism was a form of

209. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992) (arguing that regardless the victory, the majority (whites) will adapt the victory to assert dominance).

210. Glasser, *supra* note 201, at 60.

211. *Id.*

racism.[212] When a minority group seeks to use speech restrictions to protect their own interests, we must remember that the minority is depending on a group in power that is likely not committed to the same goals, and is just as likely to use such a speech restriction against them. As Glasser observed, "It is like using poison gas—it seems like a powerful weapon to use against your enemy, but the other side blows it back on you and they have stronger and more powerful fans."[213]

By limiting the right of one group to speak against another, in many ways, we are limiting future causes for equality by removing the central tool of equality—the liberty of speech.[214] Professor Eugene Volokh illustrated the debate of allowing expression of conscience:

> Which would you trust more: A broadly shared judgment that gays are not more likely than straights to be child molesters, reached after a debate in which both sides were free to present their best arguments? Or a broadly shared judgment that gays are not more likely than straights to be child molesters, reached after a debate in which people weren't allowed to express the contrary views? . . . [T]he victories of the gay rights movement came through free speech; free speech helped us, I think, come closer to the truth there. Are we really sure that we've now figured everything out? Are we sure, for instance, that gays can't become happier by becoming straight? Again, I doubt it. But how can we have any confidence in our estimation if one side is prevented from expressing its views?[215]

As professor Volokh has illustrated, there is a problem in regulating the arguments of the different sides of the debate. Although unrestrained debate may lead to harm, limiting that debate brings with it an end to potentially helpful discourse under the assumption that one side is correct while the other is mistaken. If both sides can assume that the other side is arguing from a position of sincerity and with a thirst for what is best for society, the debate can lead us closer to truth, rather than bitterness and anger. Seamus Hasson of the Beckett Fund for Religious Liberty advocates that

212. *Id.*

213. *Id.* at 60.

214. *Id.* at 61.

215. Austin Cline, *Certainty & Anti-gay Speech*, About.com, Nov. 17, 2003, http://atheism.about.com/b/a/042711.htm (quoting a statement by Eugene Volokh).

> while we [cannot] agree on who God is, we [can] and should agree on who we are. That we share a thirst for the true and the good, and a conscience that drives our quest to find them and then insists that we embrace and express publicly what we believe we've found. That if we can agree on this much, then we share a profound truth: The truth about man is that man is born to seek freely the truth about God.[216]

VI. CONCLUSION

As Alexis de Tocqueville observed, equality can become a peril threatening the founding liberties of America. The tactic of calling for restrictions on religious speech condemning homosexuality is such a shift to equality. If this tactic is successful, the conviction of Sweden's Åke Green could potentially occur here, notwithstanding legal barriers. In the wake of unrestrained equality-based claims, the nation could potentially reach a time when religious groups could not take a moral stance of conscience against homosexuality. The question then becomes whether that should happen. In the interest of both groups and future groups to come, the answer is a resounding "no."

Considering the value of discourse in changing public attitudes toward the LGBT community, the strategy of limiting religious speech condemning homosexuality is unnecessarily risk-laden for the the gay-rights movement, religious groups, and potentially for future groups seeking societal justice. At the core of both the gay rights movement and religious groups lie expressions of conscience. In the interests of this fundamental similarity, both appeal to the same civil liberties to advance their respective agendas. As Thomas More stated, "I'd give the Devil benefit of law, for my own safety's sake."[217] Ultimately, each side can best further their causes by providing the benefit of law and liberty to one another.

J. Brady Brammer

216. KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG 145 (2005).

217. BOLT, *supra* note 1, at 66.