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## SAME-SEX FAMILY EQUALITY AND RELIGIOUS FREEDOM

Ira C. Lupu & Robert W. Tuttle<sup>1</sup>

In the spring of 2009, a seismic shift – both institutional and substantive – occurred in the fight over legal recognition of same-sex marriage. The institutional venue for the conflict changed as legislatures replaced courts as the primary decision-makers on the issue. Within a period of eight weeks, the legislatures of four states – Vermont, Connecticut, Maine, and New Hampshire – enacted legislation to recognize same-sex marriage.<sup>2</sup> Although the legality of same-sex marriage in the United States traces back to the pioneering decision in 2003 by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*,<sup>3</sup> and several additional states have legalized same-sex marriage through judicial decision,<sup>4</sup> these

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<sup>1</sup> The authors are both on the law faculty of The George Washington University. Ira C. Lupu is the F. Elwood & Eleanor Davis Professor of Law; Robert W. Tuttle is Professor of Law and the David R. and Sherry Kirschner Berz Research Professor of Law and Religion. Our thanks to Christopher Edelson, Rick Garnett, Andrew Koppelman, Steve Smith, and our colleagues at a GW faculty workshop for comments on an earlier draft of this paper, and to Jess Oyer for his invaluable research assistance. The mistakes are ours.

<sup>2</sup> The texts of the relevant statutes appear in notes to part II, *infra*.

<sup>3</sup> 798 N.E.2d 941 (Mass. 2003). Prior to the Massachusetts Supreme Court decision, a Vermont Supreme Court decision led to the creation of civil unions. See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>4</sup> See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*,

legislative measures were the first of their kind in the U.S. Moreover, among these states, only Connecticut was under court order to recognize such marriages. Legislatures in the other three states were acting without any such pressure from the state's judicial branch.

The substantive quality of the shift involves the role of religion. All four legislative enactments include provisions designed to respect the liberty of religious communities to maintain their own teaching and practices on this subject. Each state's legislation explicitly guarantees the rights of clergy to decide whether to preside at same-sex marriages, and the rights of houses of worship to decide whether to make their facilities available to solemnize or celebrate a same-sex wedding. As will be discussed below, a few states go further, by protecting the rights of religiously affiliated organizations to refuse to treat same-sex marriages equally with opposite-sex marriages. Despite some academic prodding, however, no state has yet been willing to grant to public officials or vendors of goods and services related to weddings – photographers, caterers, wedding planners, florists, and the like – exemptions from state-created obligations to serve without discrimination based on sexual orientation or the same-sex character of the event.

The conflict between state recognition of same-sex families and religious concerns is not new, and it is not limited to the United States. In June of 2009, a tribunal in the UK ruled that a Catholic adoption agency's refusal to place children with same-sex couples violated the

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763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The California ruling in *In re Marriage Cases* has since been superceded by the passing of Proposition 8, amending the California State Constitution to exclude same-sex couples from marriage. See CAL. CONST. art. I, § 7.5

governing regulations for the provision of adoption services.<sup>5</sup> In recent and widely reported cases in the U.S., a wedding photographer in New Mexico became the target of legal action when she refused to provide photography services at a same-sex wedding ceremony,<sup>6</sup> and a New Jersey Civil Rights Commission ruled that the state's public accommodation law prohibited a Methodist organization that operated a boardwalk pavilion, held open for events by people of all faiths, from excluding a same-sex commitment ceremony.<sup>7</sup>

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<sup>5</sup> In the Matter of an Appeal to the Charity Tribunal between Catholic Care (Diocese of Leeds) and The Charity Commission for England and Wales, available at [http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareDecision\\_1609v2.pdf](http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareDecision_1609v2.pdf).

See also Nichols v. Saskatchewan Human Rights Comm'n, 2009 Sk. Q. B. 299 (2009) (provincial marriage commissioner may be fined for refusing to perform same-sex marriage). Commissioner Nichols could have limited his commission to the performance of marriages for those within his own faith, but he had not done so.

<sup>6</sup> See Elane Photography v. Willock, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct.) (filed June 30, 2008) (imposing a fine on photographer for refusing on religious grounds to photograph a same-sex marriage ceremony).

<sup>7</sup> Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008 (N.J. Dep't. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>. Applying abstention principles, the federal courts have refused to enjoin the proceeding. Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, 2007 WL 3349787 (D.N.J. 2007), aff'd 2009 U.S. App. LEXIS 15741 (3d Cir., 7/15/09).

As these examples show, the conflict between gay equality and religious freedom is not restricted to disputes over the legality of same-sex marriage – neither the UK, nor New Mexico, nor New Jersey licenses such marriages within its borders. Nevertheless, as the number of nations and states permitting such marriage increases,<sup>8</sup> disputes involving religiously affiliated institutions and vendors in industries related to marriage are likely to appear with increasing frequency in many jurisdictions, in the U.S. and elsewhere.

A small but important academic literature exists on the potential conflicts between same-sex family formation and religious liberty. The earliest contributions to this debate typically asserted a wide variety of threats to religious liberty from the same-sex marriage movement, and implicitly relied on this bundle of threats to make a case against state recognition of same-sex marriages.<sup>9</sup>

More recently, however, a different category of academic appraisal has begun to appear. These writings focus on the need to shield religious liberty from the social and legal

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<sup>8</sup> In addition to the six states in the U.S. that license same-sex marriages, such marriages are legally authorized in Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden. See [http://en.wikipedia.org/wiki/Same-sex\\_marriage](http://en.wikipedia.org/wiki/Same-sex_marriage).

<sup>9</sup> George W. Dent, Jr., Civil Rights for Whom? Gay Rights vs. Religious Freedom, 95 Ky. L. J. 553 (2007); Roger Severino, Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty, 30 HARV. J.L. & PUB. POL'Y 939 (2007); Thomas M. Messner, Same-Sex Marriage and the Threat to Religious Liberty, EXECUTIVE SUMMARY BACKGROUNDER No. 2201 (published by The Heritage Foundation, October 30, 2008), available at [http://www.heritage.org/research/Family/upload/bg\\_2201.pdf](http://www.heritage.org/research/Family/upload/bg_2201.pdf).

consequences that might follow from recognition of same-sex marriage.<sup>10</sup> That is, these commentaries advocate some form of *modus vivendi* between those who support same-sex marriage and those who seek to protect the freedom of religious individuals and institutions to refrain from assisting such marriages or to oppose homosexual relationships more generally.

Now that a number of state legislatures have addressed this conflict, the time is especially ripe for a new assessment of the various forms this *modus vivendi* might take. Part I of this piece explores the social and legal dynamics of conflict between advocates of gay equality, including marriage equality, and advocates of a religiously-based freedom to oppose the morality and social legitimacy of an openly gay life. Part II develops and analyzes a typology of these conflicts. In Part II.A., we offer arguments to buttress the freedom of clergy and communities of worship to refuse to lend their support to the solemnization and celebration of same-sex marriage. Part II.B. turns to the context in which advocates of religious liberty have had the least success, and in which arguments for exemptions seem least persuasive – the claims of religiously motivated individuals (not employed by religious organizations) to be free of obligations not to discriminate based on sexual orientation or the same-sex quality of a relationship. Part II.C. focuses on what we think are the most difficult issues – whether religiously affiliated organizations, such as charities and educational institutions, should be exempt from non-

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<sup>10</sup> See, e.g., Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 *BROOK. L. REV.* 125 (2006). Douglas Laycock and Robin Wilson, eds, *Same-Sex Marriage and Religious Liberty* (Rowman & Littlefield Publishers, Inc. 2008) (hereinafter cited as “*Same-Sex Marriage and Religious Liberty*”).

discrimination rules with respect to the status of marriage. Here, we identify the leading policy concerns that should be relevant to legislatures in deciding whether to exempt religious organizations from rules prohibiting discrimination against same-sex couples. In light of these considerations, we sketch an over-arching approach to schemes of legislative exemption in the context of goods and services incident to weddings, more general services provided to married couples, and employee benefits.

### I. Framing the Conflict

The American partnership between civil and religious institutions over marriage is longstanding. States have recognized the convenience and social authority that derives from permitting clergy to preside over marriages that have both religious and civil significance. In addition, all states provide that public officers, such as state court judges, local justices of the peace, or court clerks may preside at marriage ceremonies.<sup>11</sup> Moreover, many church-originated doctrines with respect to prohibited marriages (i.e., underage, bigamous, and incestuous, among others), divorce, and other issues relating to marriage were absorbed first into the common law and then into the relevant statutory law of the American states.<sup>12</sup>

As family law in America became modernized in the second half of the 20<sup>th</sup> century, the substantive criteria that governed divorce became increasingly distant from the criteria that operated within many religious communities, especially those with

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<sup>11</sup> In Maryland, for example, justices of the peace could originally perform marriages, but now have been replaced in those duties by clerks of the circuit courts. See [http://usmarriagelaws.com/search/united\\_states/maryland/index.shtml](http://usmarriagelaws.com/search/united_states/maryland/index.shtml).

<sup>12</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164-165 (1878) (describing reception of ecclesiastical prohibition on plural marriage into common law and statutory law of England, and then U.S. colonies and states).

traditional views of marriage. In particular, civil divorce law moved sharply away from the norms of the Roman Catholic, Orthodox Jewish, Mormon, and other conservative religious communities. Nevertheless, for reasons of custom, convenience, and religious freedom – including the freedom to marry without any religious vows, symbols, or commitment – American practices continued to recognize the simultaneous availability of pure civil marriage, administered by a public official, and joint civil-religious marriage, typically administered by a member of the clergy and governed by state laws.

Because marriage, far more than divorce, remained fixed in the minds of many as a joint venture between religious communities and the state, it is no great surprise that the same-sex marriage movement set off a storm of protest from traditional religious quarters.<sup>13</sup> The response to the first hints of legalized same-sex marriage in the 1990's,<sup>14</sup> amplified loudly by the more pervasive and powerful response to the *Goodridge* decision in Massachusetts in 2003, was a flurry of opposition that gathered under the cultural and legal rubric of “the defense of marriage.”<sup>15</sup> Thus, until very recently, the conservative

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<sup>13</sup> See Mary Anne Case, *How Same-Sex Marriage Threatens Evangelical Protestant Marriage*, in the *Immanent Frame and the Future of Marriage* (SSRC 2008).

<sup>14</sup> In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court had appeared to pave the way for same-sex marriage in that state, but the state amended its Constitution to bar same-sex marriage before the litigation concluded. The story of the political reaction to *Baehr* is well-summarized in William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation Press, 2d ed. 2004) 1076-1080 (hereafter cited as *Eskridge & Hunter*).

<sup>15</sup> See William N. Eskridge, Jr. & Darren R. Spedale, *Gay Marriage: For Better or for Worse?* 26-29 (Oxford University Press 2006) (discussing the passing of the 1996 Federal Defense of Marriage Act). After *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), many states also scrambled to enact state constitutional amendments designed to protect against similar state court decisions, *Eskridge & Spedale*, *supra*, at 41. See generally *An Overview of the Same-Sex Marriage Debate*,



religious response to the movement for same-sex marriage was the assertion, as a sword against that movement, of a religious understanding of marriage as a male-female bond.

As time went on, however, it became increasingly difficult to persuade moderate voters that religious opposition to same-sex marriage required legal prohibition of such marriage. By political necessity, in the fight over Proposition 8 in California, the religion-based arguments took a new turn. Opponents of same-sex marriage argued that if such unions were recognized by the state, as they had been at that point by the California Supreme Court,<sup>16</sup> religious communities would be coerced through a variety of means into accepting the legitimacy of such marriages. If these arguments were right, continued recognition of same-sex marriage would become a zero-sum game. The gains for same-sex families would come at the direct expense of religious communities that refused to accept the legal legitimacy of those families.

In the heated political struggle over Prop 8, these assertions came to the forefront. To the extent voters believed that the freedom of their own religious leaders to preach as they chose on matters of sexuality and family, and the freedom of their own faith communities to accept or reject particular family arrangements, were at stake in the outcome, the voters were that much more likely to vote for Prop 8. Exit polls conducted on Election Day in 2008 suggested that those arguments had indeed influenced the outcome.<sup>17</sup>

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Pew Forum on Religion and Public Life, available at <http://pewforum.org/docs/?DocID=288>.

<sup>16</sup> In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

<sup>17</sup> See Martin Wisckol, *Gay Marriage Advocates Bristle at Religion's Role in Prop. 8 win*, ORANGE CTY. REG., Dec. 5, 2008, available at

This reframing of the debate between traditional religious concerns and proponents of same-sex marriage, however, carried within it the seeds of a new and powerful reconciliation of competing interests. If opponents of same sex marriage believe that the practice is inherently sinful and destructive to the community, then compromise is very unlikely. But if opponents are primarily concerned about the loss of religious freedom for faith communities that do not accept same-sex marriage, then provision of assurances about protecting that freedom might well soften the opposition and pave the way to a *modus vivendi* between opposing sides.<sup>18</sup> What form might such a *modus vivendi* take?

## II. Same-Sex Partners and Religious Freedom – A Typology of Conflict

In this part, we explore a variety of ways that same-sex marriage might collide with the religious liberty of institutions and individuals. We identify the relevant legal parameters for analyzing those conflicts, and evaluate legislative measures for ameliorating them.

One case, *Bernstein v. Ocean Grove Camp Meeting Association*,<sup>19</sup> provides an

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<http://www.oregister.com/articles/religious-church-campaign-2247442-state-gay>; see also Exit Polls, California Proposition 8: Ban on Gay Marriage, available at <http://www.cnn.com/ELECTION/2008/results/polls/#CAI01p1> (last visited July 8, 2009).

<sup>18</sup> See Blankenhorn & Rauch, Op-Ed, A Reconciliation on Gay Marriage, N.Y. TIMES, Feb. 21, 2009, at WK11, available at <http://www.nytimes.com/2009/02/22/opinion/22rauch.html>.

<sup>19</sup> *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>. A federal district court refused, on abstention grounds, to enjoin the proceeding. *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 2007 WL 3349787 (D.N.J. 2007), affirmed 2009 U.S. App. LEXIS 15741 (3<sup>rd</sup> Cir. 7/15/09).

especially illuminating context for exploring the conflict. Ocean Grove Camp Meeting Association (OGCMA) is a Methodist ministry organization that owns Ocean Grove, N.J., an unincorporated beach front community. OGCMA was formed in the late 19<sup>th</sup> century as a place for religious revivals, known as “tent meetings,” and summer vacations in a Christian environment.<sup>20</sup> The Association subdivided the property, and conveyed residential and commercial lots subject to 99 year renewable leases.<sup>21</sup> OGCMA retained possession over the common areas, including places for worship and assembly, the boardwalk, and the beach.<sup>22</sup> Over the past century, OGCMA has maintained a vibrant ministry in the community, with worship and other religious activities at the core of the summer events.

In 2007, Harriet Bernstein and Luisa Paster, a lesbian couple who reside in Ocean Grove, asked to reserve the Boardwalk Pavilion<sup>23</sup> for their civil union commitment ceremony. OGCMA denied the request, explaining that the proposed use was

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<sup>20</sup> Morris S. Daniels, *The Story of Ocean Grove: Related in the Year of Its Golden Jubilee 1869-1919* (New York: The Methodist Book Concern, 1919), 23-42, available at: [http://books.google.com/books?id=sQwWAAAAYAAJ&pg=PA263&dq=Ocean+Grove&as\\_brr=1](http://books.google.com/books?id=sQwWAAAAYAAJ&pg=PA263&dq=Ocean+Grove&as_brr=1). See also *State of New Jersey v. Celmer*, 80 N.J. 405, 410-412 (1979).

<sup>21</sup> *Celmer*, 80 N.J. at 410-412.

<sup>22</sup> *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008), at 2-3, available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>.

<sup>23</sup> As described in the decision of the New Jersey Division for Civil Rights, “the Boardwalk Pavilion is a rectangular open-sided structure covered by a roof. It contains fixed wooden benches facing a small raised area usable as a stage. The benches also face the beach and ocean.” *Id.* at 3.

inconsistent with church teaching that does not recognize same-sex marriage.<sup>24</sup> The couple filed a complaint with the state, alleging that the denial violated the New Jersey Law Against Discrimination (LAD). The state found probable cause to proceed with the investigation, ruling that the Boardwalk Pavilion was a “place of public accommodation” under LAD, and that OGCMA had impermissibly denied complainants access to the Pavilion because of their sexual orientation.<sup>25</sup> In the wake of the complaint, a different state agency revoked OGCMA’s property tax exemption for the parcel containing the Boardwalk Pavilion.<sup>26</sup>

For those concerned about recognition of same-sex marriage, the OGCMA case represents the first wave of an assault on religious liberty.<sup>27</sup> Told from that perspective, this is a story of a religious ministry forced to open its place of worship, where regular worship services and daily religious education events are held, for use in a ceremony that the religious community believes is sinful, with civil liability and loss of tax benefits as the penalty for refusal.

Closer examination of the OGCMA case reveals a more complicated story. First, Ocean Grove functions as a diverse town, not simply a religious ministry. Second,

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<sup>24</sup> *Id.* at 5.

<sup>25</sup> OCGMA filed suit in federal district court to enjoin the state's proceeding under LAD, arguing that imposition of LAD violated the Association's constitutional rights. The district court dismissed the suit, *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 2007 WL 3349787 (D.N.J. 2007), and the U.S. Court of Appeals for the Third Circuit affirmed, 2009 U.S. App. LEXIS 15741 (3<sup>rd</sup> Cir. 7/15/09).

<sup>26</sup> *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008), at 6.

<sup>27</sup> *Wilson*, *supra* note XX, at 78; *Messner*, *supra* note XX, at 9.

OGCMA obtained public funding and a special property tax exemption for the Boardwalk Pavilion site based on a representation that the property would be open to the general public, rather than restricted to use by the religious group.<sup>28</sup> The advantageous property tax treatment was not a function of OGCMA's religious status, but rather a result of its promise not to develop the property and to provide open public access to the site.

Third, until it denied the request from Bernstein and Paster, OGCMA consistently treated the boardwalk and Pavilion as public space. OGCMA accepted secular and religious reservations, subject to payment of a standard fee, and when not reserved the Pavilion was open for all to use.<sup>29</sup> OGCMA displayed no signs indicating that the boardwalk or Pavilion were private property.

The OGCMA case highlights the crucial distinction between public and private realms. The distinction reflects widely shared and legally embodied beliefs about the exercise of authority by individuals, intermediate associations, and state institutions. On the private side, the political community has only a limited authority to regulate the bonds of intimacy and association.<sup>30</sup> Various reasons can be given for this limit, including the relationship between privacy and personal flourishing, the role of independent associations in the development and preservation of liberal political order,

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<sup>28</sup> Bernstein v. Ocean Grove Camp Meeting Ass'n, note xx supra, at 4-6. For more detail on the Green Acres tax exemption, see Real Property Taxation of Recreation and Conservation Lands Owned by Nonprofit Organizations, N.J.A.C. 7:35.

<sup>29</sup> Bernstein v. Ocean Grove Camp Meeting Ass'n, note xx supra, at 3-4.

<sup>30</sup> See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Lawrence, 539 U.S. at 584-85; Dale, 530 U.S. at 655-656.

the value of pluralism in belief and expression, and the recognition that unfettered public control over private life has historically led to dire abuses.<sup>31</sup> But we also recognize that the political community has a legitimate interest in ensuring that all people have equal access to publicly available goods and services, whether provided by the state or by commercial entities. This interest primarily arises from concern about those who are excluded from such benefits. Exclusion may imperil health and safety, limit opportunities for personal development, deny political and social equality, or impose psychic distress. State policies protecting against such exclusion also express the political community's concerns about its own character and experience, because such exclusion may result in segregation and conflict.

The OGCMA case tests our intuitions about how to reconcile these competing interests and concerns. On the one hand, OGCMA regards the Boardwalk Pavilion as a place of worship, and believes that celebration of a same-sex union in that space would be offensive to its religious commitments. On the other hand, Bernstein and Paster see the Pavilion as part of their town, a facility enjoyed by all and available, by reservation and payment of a fee, to celebrate significant events. At first glance, the case seems to reflect an irreducible clash of sensibilities. Someone will have deeply felt beliefs and expectations disappointed; the best law can do is to attempt to resolve the dispute in the manner that causes the least damage. But a comparative assessment of subjective experiences cannot produce a reliable and principled method for resolving these disputes. Decision-makers are likely to favor whichever beliefs they happen to share, and in any event it is difficult to measure the extent of an individual's or an institution's sincere

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<sup>31</sup> See Jed Rubenfeld, *The Right to Privacy*, 102 Harv. L. Rev. 737 (1989).

attachment to a particular belief.

Instead of focusing on the subjective experiences of those involved in such conflicts, both law and policy should attend to objective characteristics that lead to principled decisions and better reflect the interests at stake. Under the New Jersey Law Against Discrimination, a facility or activity that is “private” has no obligation to comply with non-discrimination rules, but a “place of public accommodation” must comply, and may only exclude for good – non-discriminatory – reasons.<sup>32</sup> The distinction between public and private focuses on the scope of invitation and the character of the use. The OGCMA extended a broad invitation to use the Pavilion, on a casual basis for anyone visiting the boardwalk, and by reservation for anyone willing to pay the fee. Although the Association held worship events in the Pavilion, the facility was also used for events that had no religious connection, including secular weddings. Moreover, the dispute arose in the context of an already blurred line between religious and civil community, analogous to the situation in other privately-owned towns, where expectations of individual civil liberties are protected even on private lands.<sup>33</sup> And most importantly, OGCMA expressly promised, as a condition of receiving its Green Acres tax exemption, that the public would have equal access to the property.

While treatment of the Pavilion as a public accommodation might offend the religious sensibilities of OGCMA, the Pavilion’s character as a public accommodation

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<sup>32</sup> New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et. seq.*

<sup>33</sup> See *Marsh v. Alabama*, 326 U.S. 501, 509-10 (1946) (holding that a private, company-owned town could not circumscribe the free speech rights of individuals within its borders); *NJ Coalition Against the War v. J.M.B Realty*, 650 A.2d 757, 780 (N.J. 1994) (holding that the free speech rights of citizens could be exercised within a privately owned mall).

distanced OGCMA from an expressive affiliation with particular uses of the facility. If the Pavilion had been available only for worship or other events connected with the Association's religious ministry, then OGCMA would have had a stronger claim that forced inclusion of the same-sex ceremony intruded on their legitimate expectations for the space. But if OGCMA had not been selective with respect to other uses of the Pavilion, and had not been a visible co-sponsor of all prior events, OGCMA cannot reasonably be perceived as endorsing the same-sex ceremony. Bernstein and Paster did not ask OGCMA to furnish a minister to officiate at their ceremony, or to publicize the ceremony in the Association's newsletter, or in any other way to participate in the event. Of course, OGCMA had – and indeed eventually exercised – the power to withdraw the Pavilion from public use by refusing all reservations of the space, or by adopting religiously selective criteria for its use.<sup>34</sup> But, taken alone, the decision to exclude Bernstein and Paster did not convert the Pavilion into a private space.

This public-private divide can be traced into the three settings that we examine below. These include the right of clergy and religious communities to choose which marriages to solemnize; the rights of religiously motivated individuals who oppose same-sex marriage to refuse to facilitate it; and the rights of religious organizations to

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<sup>34</sup> Following the decision to deny Bernstein and Paster's request to use the Pavilion, OGCMA changed its policy on use of the facility. It ended the practice of allowing people to reserve the Pavilion for weddings. *Bernstein v. Ocean Grove Camp Meeting Ass'n*, note xx supra, at 5-6. After that change in policy, another lesbian couple, Janice Moore and Emily Sonnessa, attempted to reserve the Pavilion for a commitment ceremony, and OGCMA again denied the request. However, when Moore and Sonnessa complained to the state civil rights division, the state found no probable cause to further pursue their allegations. *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 2009 U.S. App. LEXIS 15741 (3<sup>rd</sup> Cir. 7/15/09).



determine the status incidents of family life.

*A. The Rights of Clergy and Religious Communities to Choose which Marriages to Solemnize.*

The debate over Prop 8 in California included assertions that clergy and faith communities would be forced against their will to solemnize same-sex marriages.<sup>35</sup> However constitutionally or politically implausible those claims may have been, they gained some traction with voters. Although such a coercive policy is politically inconceivable, the government could treat the celebration of marriage as a public accommodation, and prohibit discrimination by providers of that service. Or, the government could impose a condition on its grant of the authority to solemnize marriages, requiring the celebrant to be willing to serve all couples. In response to fears of this character, the four states that have now enacted same-sex marriage legislation have provided explicit assurances that neither clergy nor religious communities will be forced to cooperate in these ways. For example, Section 7(a) of the Connecticut law provides that “No member of the clergy authorized [by state law] to join persons in marriage . . . shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion [as guaranteed by the federal and state constitutions].”<sup>36</sup> And Section 7(b) of the Connecticut law provides that “No church or qualified church-

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<sup>35</sup> See e.g., The New American Foundation, *The Blockbuster Democracy Blog*, <http://www.newamerica.net/blog/blockbuster-democracy/2009/prop-8-decision-word-and-question-12046>.

<sup>36</sup> Connecticut Public Act No. 09-13, “An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples,” Sec. 7 (a) (signed into law on April 23, 2009), available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

controlled organization . . . shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of the church or qualified church-controlled organization.”<sup>37</sup> The recent same-sex marriage legislation in Vermont,<sup>38</sup> Maine,<sup>39</sup> and New Hampshire<sup>40</sup> all contain similar provisions concerning the freedoms of clergy and

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<sup>37</sup> Id., Sec. 7 (b). The law also exempts any religiously affiliated organization from any obligation “to provide services, accommodations, advantage[s], facilities, goods or privileges to an individual if the request for such services is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of [the organization’s] religious beliefs and faith.” Id., sec. 17. In Part II. C., below, we discuss this broader exemption in section 17.

<sup>38</sup> Section 9 of the recently enacted Vermont legislation (“An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage”) provides in part: “This section does not require a member of the clergy or [any religious society] to solemnize any [particular] marriage,” (amending 18 V.S.A. sec. 5144). Section 11 of the Act provides in part: “. . . a religious organization . . . or a [religiously affiliated] organization shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage.”

<sup>39</sup> Maine, “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom,” Section 5: “19-A MRSA §655, sub-§3 (available at [http://www.mainelegislature.org/legis/bills/bills\\_124th/chappdfs/PUBLIC82.pdf](http://www.mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC82.pdf)) is enacted to read: “3. Affirmation of Religious Freedom. This Part does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition as guaranteed by the Maine Constitution, Article 1, Section 3, or the First Amendment of the United States Constitution. A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.”(signed into law on 5/6/09)

<sup>40</sup> . The New Hampshire law, An Act Affirming Religious Freedom Protections with Regard to Marriage, secs. III, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html>, includes the following provision: “Notwithstanding any other provision of law, a religious organization, association, or society, or any individual who is managed, directed, or supervised by or in

religious communities.

It is the common intuition of lawyers and scholars that the First Amendment, as well as state constitutional guarantees, protect these categories of religious freedom, but there has thus far been little explanation of why this is so. It will be much easier to analyze other, less muscular claims of religious liberty if we explain the conventional wisdom that neither clergy nor faith communities can be directly coerced into celebrating weddings for anyone, same-sex couples included.

The idea that clergy are agents of the state, authorized to solemnize civil marriage, and therefore subject to considerable state control, is deeply inconsistent with a core aspect of religious liberty. The state's power with respect to the role and identity of clergy is, and long has been, extremely limited. In colonial America, some states licensed clergy, and therefore exercised precisely this sort of control over which clergy – and which faiths – could solemnize a marriage.<sup>41</sup> One of the central purposes of the

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conjunction with a religious organization, association or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if such request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of their religious belief and faith.” (HB 73). The New Hampshire law also contains the following provision relating to clergy: “Members of the clergy as described in RSA 457:31 or other persons otherwise authorized under law to solemnize a marriage shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment to the United States Constitution or by part I, article 5 of the New Hampshire constitution.”

<sup>41</sup> Thomas J. Curry, *The First Freedoms: Church and State to the Passage of the*

religious liberty provisions in the First Amendment was to eliminate governmental control over the clergy.<sup>42</sup> This understanding is reflected in modern decisions like *McDaniel v. Paty*,<sup>43</sup> in which the Supreme Court invalidated a statute that disabled clergy from serving in a state legislature, as well as in *Locke v. Davey*,<sup>44</sup> in which the Court upheld an exclusion of clergy training from a state scholarship program. This insulation of clergy from both controls and support normally attached to other learned professions is also reflected in common law decisions rejecting the concept of clergy malpractice.<sup>45</sup> In addition, the “ministerial exception” bars judicial review of a wide range of legal issues arising from the employment relationship between clergy and religious communities.<sup>46</sup> Thus, across a broad range of legal contexts, our constitutional tradition recognizes a very strong policy that the state keep its hands off the selection, training, and role of the clergy. These matters are constitutionally committed to the exclusive jurisdiction of communities of faith.

Accordingly, the state may not require those ordained by faith communities as clergy to lend their imprimatur or participation to any social function, matrimonial or

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First Amendment xx (1986).

<sup>42</sup> *Id.* at xx.

<sup>43</sup> 435 U.S. 618 (1978).

<sup>44</sup> 540 U.S. 712 (2004).

<sup>45</sup> *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Calif. 1988)..

<sup>46</sup> *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). For discussion of the ways in which the ministerial exception has become very widespread, see Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and their Leaders*, 7 *Geo. J. L. & Pub. Pol’y* 119 (2009).

otherwise. The state may strip the clergy of the power to solemnize civil marriage,<sup>47</sup> though such a move would cause great inconvenience and enormous howls of protest. But the state cannot commandeer the clergy in the state's efforts to gain social approval for a particular form of marriage, be it inter-faith, inter-racial, same-sex, or otherwise. In this context, as in many others, the First Amendment operates as a separation of powers provision, remitting the question of who may be entitled to religious marriage entirely to the judgment of clergy and the faith communities they represent.<sup>48</sup>

Moreover, if the relevant religious community has norms with respect to who may marry within its traditions – and virtually all traditions have such norms – the state is disabled from substituting its judgment for that of the faith community on the content of those religious norms. Imagine, for example, a state policy that required religious communities to celebrate a marriage if “at least one partner to the marriage belonged to the faith.” Such a requirement would substantially hamper a faith's ability to determine its own membership and to define the religious significance of participation in its sacraments.

Put more generally, a proposition crucial to religious liberty is that religions, to maintain their integrity, must and do discriminate. They may do so based on ancestry, on professed belief, on participation in ritual, and on behavioral fidelity to religious norms. State interference with these forms of selectivity cannot possibly be consistent with the

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<sup>47</sup> Laycock, Afterword, *supra* note XX, at 201-207 (proposing bifurcation of civil and religious marriage).

<sup>48</sup> For a similar conception of the role of the Religion Clauses in separating private from governmental power, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *Iowa L. Rev.* 1 (1998).

free exercise of religion.

*Boy Scouts of America v. Dale*<sup>49</sup> suggests that more general principles of freedom of association similarly support provisions of this character. The Boy Scouts and other non-commercial voluntary associations also represent normative communities, and they are entitled to exclude from membership or leadership those who do not share their beliefs. The lesson of *Dale* is that non-discrimination laws may not constitutionally trump the freedom to form and maintain such associations, however divergent from the mainstream their views may be. Like the *OGCMA* case, *Dale* arose from a complaint, brought under the New Jersey Law Against Discrimination, alleging that a public accommodation engaged in discrimination based on sexual orientation. The difference between *Dale* and *OGCMA* is telling. In *Dale*, the complainant sought a position of leadership, in which he would represent the Boy Scouts through guiding the character formation of members and facilitating relations with the general public. In *OGCMA*, however, Bernstein and Paster asked to use a facility that was not specifically identified with Methodist worship, that ordinary observers would see as public space, and that had been available for rental by anyone willing to pay the fee. *Dale* was asking for the Boy Scouts' blessing; Bernstein and Paster were asking for equal access to public space.

These differences suggest an important limit on the reach of both *Dale* and *OGCMA*. The ruling in *Dale* applies only to the expressive activities of non-commercial entities.<sup>50</sup> Commercial entities do not enjoy the same protected interest in associational

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<sup>49</sup> 530 U.S. 640 (2000).

<sup>50</sup> For the expression of related principles, see *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 340-346 (1987) (Brennan, J., concurring) (Title VII exemption for religious organizations to engage in religion-based hiring should not extend to for-profit

freedom, in part because sellers have no legitimate reason for treating customers as anything other than fungible, and in part because protection of associational freedom for commercial actors would systematically trump civil rights laws. Similarly, the result in *OGCMA* would have been different if *OGCMA* had not treated the Boardwalk Pavilion as publicly available space. By adopting a more restrictive policy on use of the Pavilion, *OGCMA* could have demonstrated that control over the facility served important and legitimate expressive purposes.<sup>51</sup>

*B. Accommodation of Religiously Motivated Individuals Opposed to Same-Sex Families*

Some commentators have argued that the law should accommodate the religious concerns of individuals who object on religious grounds to same-sex marriage, and whose jobs or livelihoods would require them to facilitate such a marriage in some way.<sup>52</sup> For example, Professors Robin Fretwell Wilson and Douglas Laycock have defended the notion that public employees such as marriage license clerks, and private vendors in the wedding industry should be afforded a “right . . . to refuse to facilitate same-sex

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entities); *Sports & Health Club, Inc., v. Minnesota*, 370 N.W. 2d 844 (Minn. 1985) (state law prohibiting religious discrimination in employment did not violate First Amendment rights of health club operated by “born-again” Christians), appeal dismissed, 478 U.S. 1015 (1986).

<sup>51</sup> See note \*\* supra.

<sup>52</sup> Douglas Laycock, “Afterword,” in *Same-Sex Marriage and Religious Liberty*, supra note \_\_, at 194-201; Robin Fretwell Wilson, “Matters of Conscience: Lessons for Same-Sex Marriage from the Health-Care Context,” in *Same-Sex Marriage and Religious Liberty*, supra note \_\_, at 77-102; see also Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 *Nexus* 101 (2009); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 *B.Y.U. J. Pub. L.* 475 (2008).

marriages, except where such a refusal imposes significant hardship on the same-sex couple.”<sup>53</sup>

Now that state legislatures have gotten into the same-sex marriage business, these arguments have begun to appear in the political arena.<sup>54</sup> In the process leading up to Connecticut’s recent legislation on same-sex marriage, a group of legal academics (including Wilson and Laycock) proposed a broad exemption for all individuals and religious entities from laws that would impose on them, in violation of their sincerely held religious beliefs, a duty to provide goods and services related to the solemnization of any marriage.<sup>55</sup> Unlike the scholarly works of Wilson and Laycock, this proposal made no exception for serious hardship to same-sex couples. The Connecticut legislature soon thereafter enacted a provision that protected religious organizations from any such duty to provide such goods or services,<sup>56</sup> but omitted the proposed exemption for individuals and

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<sup>53</sup> Douglas Laycock, “Afterword,” in *Same-Sex Marriage and Religious Liberty*, supra note \_\_, at 198.

<sup>54</sup> See Jacqueline L. Salmon, Religious Exemptions in Same-Sex Laws Under Scrutiny, WASH. POST, May 14 2009, available at [http://newsweek.washingtonpost.com/onfaith/godingovernment/2009/05/by\\_jacqueline\\_l\\_salmon\\_as.html](http://newsweek.washingtonpost.com/onfaith/godingovernment/2009/05/by_jacqueline_l_salmon_as.html).

<sup>55</sup> Letter of April 20, 2009, from Thomas C. Berg, Carl H. Esbeck, Robin Fretwell Wilson, and Richard W. Garnett to the Honorable Christopher G. Donovan, Speaker of the Connecticut House, re: Religious Liberty Implications of Raised Bill 899, available at <http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Berg.etal.pdf>. Professor Laycock also submitted a letter, dated April 21, 2009, to Speaker Donovan, available at <http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Laycock.pdf>, endorsing the recommendations made in the April 20 letter and expanding on the arguments in support of such exemptions.

<sup>56</sup> Connecticut Public Act No. 09-13, “An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples,” Sec. 17



businesses.

The question of such an exemption for individuals and firms is largely a matter of legislative discretion, because neither same-sex couples nor providers of commercial goods enjoy significant constitutional protection in the areas affected by this dispute.<sup>57</sup> Same-sex couples have no federal constitutional right to be free from discrimination, based on sexual orientation, in the non-governmental provision of goods and services.<sup>58</sup> Although roughly half the states prohibit discrimination based on sexual orientation,<sup>59</sup> the contours of that protection can be modified by legislation.<sup>60</sup> Likewise, the federal

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(exempting all religiously affiliated organizations from any obligation “to provide services, accommodations, advantage[s], facilities, goods or privileges to an individual if the request for such services is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of [the organization’s] religious beliefs and faith”).

<sup>57</sup> See *North Coast Women’s Care Medical Group, Inc. v. Benitez*, 44 Cal. 4<sup>th</sup> 1145, 2008 Cal. LEXIS 10093 (Sup. Ct. Cal., Aug. 18, 2008) (neither state nor federal constitutions support exemption of physicians group from state law prohibition on discrimination, based on sexual orientation, against lesbian patient seeking fertility treatment). *Stormans, Inc. v. Selecky*, 2009 U.S.App. LEXIS \_\_\_\_ (9<sup>th</sup> Cir. 2009) (Free Exercise Clause does not exempt pharmacists from regulation requiring them to fill all prescriptions).

<sup>58</sup> To the extent that the exemptions would apply to conduct by private actors, the conduct at issue would not constitute state action. On this point, we disagree with Professor Feldblum, who suggests that states are under an affirmative constitutional duty to protect same-sex couples from private discrimination. Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, note xx supra, at 152-154. Same-sex couples, however, may have state and federal constitutional protections with respect to the conduct of public officials. See *infra* text at notes XX-XX.

<sup>59</sup> See, e.g., Nancy K. Ota, *Queer Recount*, 64 ALB. L. REV. 889 (2001)

<sup>60</sup> *Romer v. Evans*, 517 U.S. 620 (1996), suggests a constitutional limit on the power to modify such legislation on a wholesale basis at the expense of minorities

Constitution's Free Exercise Clause does not require the accommodation of commercial or public actors who have religious objections to serving same-sex couples. After *Employment Division v. Smith*, such actors would need to show that anti-discrimination rules from which they seek exemption are not "neutral, generally applicable regulatory law[s]." <sup>61</sup> Because protections for same-sex couples do not specifically target religious conduct or motives, the Free Exercise Clause offers no support for exemption claims.

For exemption proponents, the same-sex marriage controversy involves a collision between irreconcilable moral commitments, each of which deserves respect. On one side, many people view same-sex intimate relationships as morally good and deserving of public support and protection equal to that enjoyed by opposite-sex relationships. On the other side, many people hold religious beliefs that regard same-sex intimacy as sinful, and some believe that they have a religious obligation not to encourage or assist that sinful conduct. The collision of these two views has the potential to cause great suffering, either to the religious integrity of those forced to facilitate what they believe to be sinful conduct, or to the dignity of same-sex couples if they are denied access to publicly available benefits.

The proposed regime of exemptions attempts to minimize the suffering caused by this collision, and to maximize the opportunity for all people to participate fully in public – including commercial – life. <sup>62</sup> Under such a regime, religious objectors would be

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defined by sexual orientation, but the circumstances of modification in *Romer* were quite extreme.

<sup>61</sup> *Employment Div. v. Smith*, 494 U.S. 872, 880 (1990).

<sup>62</sup> Wilson, *Matters of Conscience*, note xx supra at 97-102; Laycock, *Afterword*, note xx supra at 197-201. Koppelman also proposes a regime of exemptions, but is less

exempted from a duty to serve same-sex couples, unless a specific refusal of service would impose a “significant hardship” on those seeking the service.<sup>63</sup> Proponents contend that same-sex couples would rarely be refused services even under a broad exemption; few merchants would be willing to pay the economic cost of rejecting a whole class of consumers, and same-sex couples would be able to quickly find substitute providers if confronted with a seller unwilling to assist them.<sup>64</sup> Thus, proponents argue, there is no reason to believe that same-sex couples would be systematically denied access to publicly available goods and services.

For those who are sensitive to both sides of this conflict, the proposed exemption has significant appeal. Such an exemption seems especially effective in addressing the criticism, made by religious conservatives, that official recognition of same-sex intimacy would require all people to support the practice. Nonetheless, the proposed exemption invites skepticism and careful scrutiny because it is legally anomalous. In no other respects are individuals and for-profit entities excused, on religious grounds, from compliance with non-discrimination laws.<sup>65</sup>

Exemption proponents have pointed to what they assert are two analogous regimes of religious exemptions -- the obligation of employers to make reasonable accommodations for the religious beliefs and practices of employees, and the right of

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explicit about the details. Koppelman, *You Can't Hurry Love*, note xx supra at 146.

<sup>63</sup> Wilson, *Matters of Conscience*, note xx supra at 101; Laycock, *Afterword*, note xx supra at 198.

<sup>64</sup> Koppelman, *You Can't Hurry Love*, note xx, supra at 132-35.

<sup>65</sup> Non-profit religious entities are generally exempt from prohibitions on religion-based discrimination in employment decisions. 42 U.S.C. Sec. 2000e-1 (Title VII, Sec. 702 of the Civil Rights Act of 1964).

healthcare providers and institutions not to provide abortion-related services. We think those two schemes are quite different in character from the proposed exemption for those who refuse service to same-sex couples. The differences suggest reasons for legislators to be reluctant to grant the proposed exemption.

### 1. Religious accommodations in the workplace

In developing their arguments for religious objections to facilitating same-sex marriage, Professors Laycock and Wilson point to the model of religious accommodation in the workplace.<sup>66</sup> At first glance, the parallel seems very strong. Under Title VII of the 1964 Civil Rights Act and analogous state employment discrimination laws, employers have an affirmative obligation to accommodate the religious needs of their employees.<sup>67</sup> This obligation is designed to ensure that religious adherents are not arbitrarily or invidiously excluded from the workplace, but are instead given a reasonable opportunity to take up any occupation.<sup>68</sup> Thus, Title VII protects individuals from employment discrimination based on religious belief and religious conduct.<sup>69</sup>

If an employee shows that compliance with a workplace obligation would require the employee to violate a religious obligation, then the burden shifts to the employer to

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<sup>66</sup> See Wilson, *The Limits of Conscience*, note xx supra at 51-52; Laycock, *Afterword*, note xx supra, at 199.

<sup>67</sup> The leading decisions on the duty and its scope are *TWA v. Hardison*, 432 U.S. 63 (1977), and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

<sup>68</sup> See Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 784 (1996).

<sup>69</sup> Title VII 42 USC 2000e(j). See also MASS. GEN. LAWS. ANN. 151B (2006), §4; N.J. STAT. ANN. 10:5-12(q) (2008); N.Y. LAWS ANN. § 296 Unlawful Discriminatory Practices (2009).

show that the employee’s religious need cannot be accommodated without imposing an “undue hardship” on the employer.<sup>70</sup> The balancing of religious commitment and secular hardship is thus a significant feature of the law of the workplace.

The analogy to workplace accommodations, however, is deeply strained when applied to the proposed exemption for those who do not want to serve same-sex couples. For purposes of providing religious accommodations to others, customers and employers are not comparable. At the most basic level, employers have power in the relationship and access to information that customers do not ordinarily possess. Take, for example, a bakery in which an employee seeks a religious exemption from baking, decorating, or delivering cakes for same-sex couples. The owner of the bakery would be able to assess the effect of an accommodation on the distribution of responsibilities within the bakery, propose alternative measures for avoiding or mitigating the conflict with the employee’s religious obligations, and ultimately decide whether or not to make an accommodation.

If, however, the bakery owner believes that the bakery itself should not serve same-sex couples, those couples have neither the information nor the authority to assess the relative significance of the bakery’s claim, the availability of measures less burdensome than complete denial of service, or even the extent of the burden that the refusal imposes on same-sex couples generally. Instead, the couple knows only that they must seek out a different bakery, and must hope that the next one is willing to serve them.

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<sup>70</sup> *Webb v. City of Philadelphia*, 562 F.3d 256, 259 (3rd Cir. 2009) (applying the burden shifting scheme to religious accommodation claims under Title VII in the Third Circuit); *E.E.O.C. v. Firestone Fibers & Textiles, Co.*, 515 F.3d 307 (4th Cir. 2008) (applying the scheme in the Fourth Circuit); *Morrisette-Brown v. Mobile Infirmary Medical Center*, 506 F.3d 1317, 1321 (11th Cir. 2007) (applying the scheme in the Eleventh Circuit).

Even if the bakery has the burden of showing, in a legal action for discrimination, the sincerity of its religious objection and the lack of significant hardship on the same-sex couple, the power and information imbalance remain.

Wilson and Laycock contend that the problem of information asymmetry can be alleviated by a public notice requirement,<sup>71</sup> through which religious objectors must inform customers of the unavailability of service to same-sex couples. But such a requirement, as Laycock acknowledges, may impose even greater burdens on same-sex couples. In some areas at least, public pronouncements of exclusion might make such refusals even more common.<sup>72</sup> More importantly, however, that information does nothing to address the real imbalance between merchant and customer. Advance knowledge that a particular store does not serve same-sex couples may help avoid some measure of dignitary harm, but does nothing to assist those couples in locating providers that are willing to serve them. A more appropriate informational requirement would demand that, as a condition of the exemption, religious objectors provide customers with a list of ready and willing providers.

The analogy between accommodation of employees and exemption of service providers is also questionable because of the different character of the burdens imposed by the respective exemptions. In the employer-employee relationship, as in almost every other setting in which religious exemptions are claimed, the costs of the burden can be

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<sup>71</sup> See Wilson, *Matters of Conscience*, note xx supra, at 98; Laycock, *Afterword*, note xx supra, at 198-99 (envisioning “a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.”)

<sup>72</sup> See Laycock, *Afterword*, note xx supra, at 199.

broadly distributed. For example, the military service exemption for conscientious objectors imposes a direct burden on government, which must seek a broader pool of potential draftees. Individual potential draftees also experience an increased, though widely diffused, burden in the form of a marginally greater risk of being conscripted. Likewise, a statute that exempts religious users of particular drugs from controlled substances laws imposes a direct burden on government, which must implement and administer a scheme for ensuring that such use is limited to the exempted religious group and purposes. The exemption also imposes an indirect, though likely insubstantial, burden on other citizens, who could be exposed to risks from those who use the controlled substance. In the employer-employee relationship, the employer bears the direct burden of a religious accommodation, but any economic cost can be spread among all customers.<sup>73</sup>

The proposed religious exemptions to public accommodation laws, however, impose their direct costs on a discrete set of customers. When a same-sex couple is denied service, the couple must absorb the full burden of such a denial – measured in the time and other expense incurred in locating a willing provider, along with the dignitary harm of being refused access to services that are otherwise available to the public.<sup>74</sup>

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<sup>73</sup> Seen in this light, the burden of religious accommodation does not materially differ from other burdens imposed on employers, such as the duty to make reasonable accommodations for disabled employees. The employer has the information to assess the reasonableness of potential accommodations, and the ability to spread among all customers the costs required to make such an accommodation.

<sup>74</sup> As such, the harm to same-sex couples from the Wilson-Laycock proposals is qualitatively distinct from the burden imposed by any other religious accommodation. See generally, Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589 (2000). The closest analogies to this burden can be found

This direct burden would also be unique to same-sex couples, because religious objectors have no general right to refuse service to other groups of people.<sup>75</sup>

## 2. Conscientious objection to participation in abortions

Professor Wilson's argument for exemptions invokes parallels with rights of

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in statutes that accommodate the practice of faith healing. Parents who refuse traditional medical care for their children, and instead seek spiritual healing, are often granted partial exemptions from laws regulating child abuse and neglect – up to the point at which the child's health is placed in serious danger by the refusal of medical care. See Jennifer L. Rosato, *Putting Square Pegs in a Round Hole, Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, n.41 (1994) (listing statutory exemptions for faith-healing parents). The burden of such an accommodation quite obviously falls on the ill child, who is denied conventional medical care out of deference to the parents' religious beliefs. But the parent-child relationship is distinguishable from the merchant-customer relationship. Most importantly, the Constitution recognizes a zone of deference to parental judgments, in which the state does not ordinarily intrude. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise clause and parental rights to control upbringing of children supports exemption from duty of parents to send children to accredited school until the age of 16). See also *Troxel v. Granville*, 530 U.S. 57 (2000) (Mother's fundamental liberty interests under the federal Constitution were violated by state law that gave visitation rights to child's paternal grandparents). This zone can be explained by the (controversial) presumption of parents' special care and concern for the child, knowledge of the child's particular needs, and interest in forming the child's religious identity. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"). Merchants have no such bond with or authority over their customers, so imposition of burdens in the context of arms'-length commercial dealings cannot be similarly justified.

<sup>75</sup> The question of third-party burdens is constitutionally significant. The Supreme Court has repeatedly recognized Establishment Clause limits on the state's power to burden third parties as a means for accommodating the religious concerns of others. See *TWA, Inc. v. Hardison*, 423 U.S. 63 (1977); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); and *Cutter v. Wilkinson*, 544 U.S. 709 (2005). For general discussion, see Ira C. Lupu and Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. Va. L. Rev. 89, 107-112 (2007). The proposed exemption avoids constitutional problems only if it is limited to circumstances in which a refusal of services does not cause substantial harm to those refused.



conscientious objection in the context of abortion.<sup>76</sup> Before conscience clauses, she contends, those who sought abortion attempted to force doctors and hospitals to provide such services.<sup>77</sup> Conscience clauses limit the overreaching claims of patients; such clauses specify that health care providers and facilities are not required to perform certain acts to which they are morally opposed.<sup>78</sup> Religious believers, she contends, should have a similar right not to facilitate same-sex relationships.

The widespread acceptance of a right to conscientious objection rests on a shared recognition that abortion has a moral character that is categorically distinct from other practices, medical or otherwise. Exemptions from mandatory provision of abortion services, like those from conscription in times of war, focus specifically on those who might be forced to terminate human life.<sup>79</sup> In other words, the exemption reflects the specific moral character of the act, rather than a more general deference to the subjective demands of conscience. Thus, proponents of exemptions have been much less successful in enacting broader measures that would exempt healthcare professionals and facilities from any obligation to provide services they might deem objectionable.<sup>80</sup>

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<sup>76</sup> Wilson, *Matters of Conscience*, note xx supra at 81-85, 93.

<sup>77</sup> *Id.* at 79.

<sup>78</sup> *Id.* (referring to the “primogenitor of healthcare conscience clauses, the Church Amendment”). See, e.g., MASS. GEN. LAWS ANN. title XVI, ch. 112, § 121; TENN. CODE ANN. § 68-34-104; COLO. REV. STAT. ANN. § 25-6-102; ARK. CODE ANN. § 20-16-304.

<sup>79</sup> In addition, healthcare professionals and institutions are frequently exempted from obligations to perform sterilization procedures; this exemption is based on the close connection, within some religious traditions, between interference with conception and the taking of human life.

<sup>80</sup> For example, the Obama administration<sup>92</sup> has now proposed to rescind the

By contrast, the proposed religious exemption in the context of same-sex marriage is not focused on any specific act, much less an act that involves the taking of human life. A provider of goods or services is covered if he or she has a sincere religious objection to performing acts that facilitate same-sex relationships.<sup>81</sup> Neither the “religious” character of the objection nor the concept of “facilitation” offer meaningful external constraints on the provider’s claimed exemption.

The exemption applies to any action that would facilitate a same-sex marriage, with “facilitation” defined in purely subjective terms. As Laycock points out, cooperation in wrongdoing is a well-established legal, moral, and theological category, with a rich history of sophisticated analysis.<sup>82</sup> But that analysis is beside the point in this context because only one person’s opinion determines whether particular conduct would facilitate same-sex marriage – that of the one who seeks an exemption. Citing *Thomas v. Review Board*,<sup>83</sup> in which the Supreme Court held that a member of the Jehovah’s Witnesses should be excused from working in a munitions factory, Wilson asserts that “objectors get to decide how offensive a task is, not the rest of the world.”<sup>84</sup>

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regulations, promulgated in the waning days of the Administration of George W. Bush, designed to widen the scope of conscientious exemptions for health care workers in the U.S. See Rescission of the Regulation Entitled “Ensuring that {HHS} Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 Fed. Reg., No. 45, March 10, 2009, available at <http://edocket.access.gpo.gov/2009/pdf/E9-5067.pdf>.

<sup>81</sup> Wilson, *Matters of Conscience*, note xx supra at 100; Laycock, *Afterword*, note xx supra at 195; Koppelman, *Can’t Hurry Love*, note xx supra at 135.

<sup>82</sup> Laycock, *Afterword*, note xx supra, at 195-196.

<sup>83</sup> 450 U.S. 707 (1981).

<sup>84</sup> Wilson, *The Limits of Conscience*, note xx supra at 92.

Moreover, the exemption could be claimed by anyone who believes that his or her conduct would facilitate a same-sex marriage – that is, the ongoing relationship between a same-sex couple, and not just the wedding ceremony itself. Although proponents emphasize services provided in connection with the act of getting married, the exemption extends to all services sought by same-sex couples during the entire course of a relationship, from food and shelter to healthcare and legal representation. Seen in that light, this exemption is starkly different from conscientious objection in the abortion context. In the healthcare setting, medical professionals have a general duty to treat patients, but are relieved of the duty to provide a specific service – regardless of the identity of the patient seeking that service. In the proposed exemption at issue here, service providers are free to refuse assistance to an entire group of people – those in same-sex relationships – no matter how remote the assistance sought is from any specific action, such as a wedding or adoption of a child.

This concern would be alleviated if exemption proponents restricted their claim to acts directly connected with the solemnization of same-sex marriage, such as celebration of or other direct participation in the wedding ceremony. Framed in that way, the exemption would be narrowly tailored to a specific act about which the public has significant moral ambivalence – the state endorsement of same-sex intimacy. Such an exemption would allow individuals to distance themselves from that endorsement, without permitting a categorical refusal of goods and services to same-sex couples. With the exemption so narrowed, the analogy to the abortion regime is considerably stronger.

When applied to goods and services provided by the government, however, the

analogy to conscientious objection in the abortion context is especially inappropriate. The right to abortion is a negative liberty,<sup>85</sup> and thus the state has a duty not to interfere with the exercise of that right.<sup>86</sup> But the state has no constitutional obligation to facilitate access to abortion, and indeed the state has a legitimate interest in protecting nascent life, so long as the state does not impose an “undue burden” on the right to abortion.<sup>87</sup> Seen in this light, the balancing of burdens between providers and patients is entirely appropriate; patients only have a right to object when the state places significant obstacles in the way of access.

Same-sex marriage, however, is not a negative liberty, at least with respect to the state. The state creates and maintains a monopoly over the legal institution of marriage. Anyone who wishes to marry must obtain a license from the state – even if the marriage is later celebrated by a religious official.<sup>88</sup> Because the state creates this benefit, denial

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<sup>85</sup> *Id.*; see also *Webster v. Reproductive Health Services*, 492 U.S. 490, 510 (1989) (“Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor... do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions”).

<sup>86</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1994) (finding that “a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends”).

<sup>87</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 8xx (1992) (state may adopt measures to encourage choice of carrying pregnancy to term instead of terminating it by abortion) (plurality opinion); see also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (state may open public hospitals to childbirth while closing them to abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (government may fund medical expenses of childbirth but not abortion).

<sup>88</sup> *Wilson, Matters of Conscience*, note xx *supra* at 97 (officials authorized by the state to issue marriage licenses “stand as an entryway into legal marriage”).

of access to marriage has a very different character from the state's denial of funding for, or other restrictions on, abortion services. With respect to abortions, the state satisfies its obligation simply by refraining from coercively restricting access.<sup>89</sup> The right to marry, however, is the affirmative right of access to the state's administrative process for granting that benefit. It rests on a claim of equality, not a claim of fundamental liberty.

This distinction between abortion and same-sex marriage is important for assessing Wilson's argument that public employees should be exempt from duties involving same-sex marriage. She suggests several measures for accommodating religious objections of those responsible for processing marriage applications.<sup>90</sup> The marriage clerk's office could identify clerks willing to process applications from same-sex couples; if no one in that office was willing to process the applications, Wilson suggests that the office could direct the couple to a different office or arrange to have the couple's paperwork processed elsewhere.<sup>91</sup> This might require same-sex couples to drive longer distances or wait a longer period of time in order to obtain a marriage license, Wilson concedes, but "it does not frustrate a couple's ability to marry."<sup>92</sup>

This comparison ignores the couple's interest in equal treatment under law. The extension of rights of conscience to such equality interests has no analogy or support in existing law. Under Article VI of the U.S. Constitution, all executive and judicial

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<sup>89</sup> See, e.g., *Planned Parenthood*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it").

<sup>90</sup> Wilson, *Matters of Conscience*, note xx supra, at 98-99.

<sup>91</sup> *Id.*

<sup>92</sup> Wilson, *Matters of Conscience*, note xx supra, at 99.

officers of the states must swear or affirm their duty to support the Constitution,<sup>93</sup> and many state constitutions require executive and judicial officers to make a similar oath or affirmation.<sup>94</sup> Thus, under both the equal protection clause of the 14<sup>th</sup> Amendment, and related equality provisions of state constitutions,<sup>95</sup> such state officers have duties of equal respect to all persons within the state. It's very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals.<sup>96</sup>

In this regard, the provisions in the Maine and New Hampshire statutes that

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<sup>93</sup> U.S. Const. Art. VI, cl. 3.

<sup>94</sup> See, e.g., Ala. Const. Art XVI, § 279; Calif. Const. Art 20, § 3; Conn. Const. Art. II, § 1; Del. Const. Art. XIV, § 1; Maryland Const., Art. I, § 9; Mont. Const. Art. III, § 3; Neb. Const. Art. XV, § 1; N.Y. Const. Art. XVIII, § 1; Ohio Const. Art. XV, § 7; Pa. Const. Art. VI, § 3; Vt. Const. Ch. II, § 56; Wis. Const. Art. IV, § 28.

<sup>95</sup> In Massachusetts, Iowa, and Connecticut, state supreme court opinions place the right to same-sex marriage explicitly on state constitutional guarantees of equality. A similar situation obtained in California in the time between The Marriage Cases and the enactment of Prop 8.

<sup>96</sup> These concepts of the general duty of public officials and employees inform the leading appellate decision on the subject of religion-based exemptions from the duty to serve all impartially. See *Rodriguez v. City of Chicago*, 156 F.3d 771 (7<sup>th</sup> Cir. 1998) (rejecting police officer's request for religious accommodation that would excuse him from having to guard an abortion clinic). Concurring in *Rodriguez*, Judge Posner argued that government officials should never be free to refuse to serve a particular class. "The objection to recusal . . . is not the inconvenience to the police department, the armed forces, or the fire department, as the case may be, though that might be considerable in some instances. The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect." *Id.* at 778-79. See also *Parrott v. District of Columbia*, 1991 WL 126020 (D.D.C. 1991) (police department is not under a legal duty to make a reasonable accommodation of officer's religious attitudes about abortion and relieve him of duty to protect abortion clinic.); *Ryan v. Department of Justice*, 950 F.2d 458 (7<sup>th</sup> Cir. 1991) (upholding discharge of FBI agent who refused on religious grounds to investigate anti-war activists).

relieve all persons, authorized by law to officiate at a marriage, from the obligation to solemnize any particular marriage deserve special attention.<sup>97</sup> We have discovered no law on the question whether a Justice of the Peace or other official authorized to officiate is under a statutory duty to perform marriages when requested, and we expect no such specific duty exists.<sup>98</sup> The task – involving a face-to-face pronouncement in words that others are married – might well be understood as deeply personal as well as professional, and therefore subject to the exercise of unfettered discretion.<sup>99</sup> Consistent with this theory of the role, the Maine and New Hampshire schemes confer exactly this sort of broad-based discretion; neither enactment singles out same-sex marriages as the only kind that would trigger relief from an otherwise applicable duty to marry all. Despite

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<sup>97</sup> Maine, “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom,” Section 5: “19-A MRSA §655, sub-§3, available at [http://www.mainelegislature.org/legis/bills/bills\\_124th/chappdfs/PUBLIC82.pdf](http://www.mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC82.pdf), is enacted to read: “3. Affirmation of Religious Freedom. . . . A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.” New Hampshire, An Act Affirming Religious Freedom Protections with Regard to Marriage, Sec. IV, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html>: “Members of the clergy as described in RSA 457:31 or other persons otherwise authorized under law to solemnize a marriage shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment to the United States Constitution or by part I, article 5 of the New Hampshire constitution.”

<sup>98</sup> Indeed, it would be quite surprising if high-level judges, both state and federal, were under any such legal duty. We could imagine Supreme Court Justices, and other prominent jurists, being quite busy with weddings if they were obliged to officiate on request.

<sup>99</sup> In this respect, the act of marrying a couple is readily distinguishable from an administrator’s processing of marriage paperwork. The former involves a public declaration of the couple’s marriage, while the latter does not require the administrator to express any public approval of the act.

these provisions, the state as a whole has a constitutional duty to supply public officials for the task of performing same-sex marriages. If no public officials were willing to do so, same-sex couples could quite literally and legitimately complain that they were not being afforded equal protection of the laws.<sup>100</sup>

The absence of legal precedent or analogy for a broad exemption to a duty to serve same-sex couples raises two concerns. First, because the exemption is potentially much broader in scope than other religious exemptions, and lacks the practical constraints present in the employment context, we question whether proponents are correct in predicting that the exemption would have little effect on same-sex couples. Indeed, in states that now include sexual orientation under public accommodations and other anti-discrimination laws, the exemption would effectively withdraw existing protections from same-sex couples. Second, the proposed exemption would offer a precedent that could be invoked to support even broader claims of religious exemption from public accommodations laws. The general principle advanced by exemption proponents is that individuals should not be required to assist conduct they believe to be sinful. Why would not the same solicitude extend to a merchant who does not want to serve an unwed mother, or to serve someone who has religious beliefs that the merchant finds objectionable?

Of course, exemptions of the type discussed in this part can serve as a bargaining

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<sup>100</sup> *Romer v. Evans*, 517 U.S. 620 (1973) (state may not put an entire “class of persons [outside] the right to seek specific protection from the law.”). Because we cannot imagine such a widespread and total refusal of official participation in a state that has been legislatively willing to recognize same-sex marriage, we do not speculate on the remedy that would follow from a violation. An order that all public officials stop performing opposite-sex marriages until the problem had been solved would probably do the trick.



chip in the legislative negotiations that are on the horizon in a number of states. If acceding to them will get a same-sex marriage deal done, the temptation to go along would be quite understandable. But if we were representing the campaign for same-sex marriage, we would be extremely unlikely to concede to these exemptions without very widespread and substantial policy benefits in return. Given the state-by-state character of these legislative negotiations, it is hard to see how and where any such bargain could be struck.<sup>101</sup>

*C. Religious Organizations and the Status Incidents of Family Life*

The third, and most difficult, category of potential conflicts relates to a broad array of religiously affiliated organizations, and the extent of their freedom to refuse to recognize the equal status of same-sex families. These cases may concern the celebration of weddings, but they more typically involve whether such organizations will treat same-sex married couples as equal to opposite-sex couples for purposes of eligibility for other goods, services, or benefits. Cases in this category have given rise to some of the highest profile conflicts in the field – for example, the case of Ocean Grove Meeting Association, discussed above; the decision by Catholic Charities of Boston to surrender its license as an adoption agency rather than place children with same-sex couples, as state law

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<sup>101</sup> Gay rights groups might be attracted to a bargain that involved repeal of federal DOMA in exchange for some guarantee of religious exemptions from state non-discrimination laws. See Blankenhorn & Rauch, Op-Ed, A Reconciliation on Gay Marriage, N.Y. TIMES, Feb. 21, 2009, at WK11, available at <http://www.nytimes.com/2009/02/22/opinion/22rauch.html>. But the coordination problems in putting together such a deal seem very formidable, and any federal statutory protection for religious freedom against state law would raise constitutional questions about the scope of congressional power to protect religion. *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997).

requires;<sup>102</sup> and the refusal by Yeshiva University to make its married student housing available to a same-sex couple.<sup>103</sup> Also included in this category of cases are those involving benefits for the spouses of employees of religiously affiliated organizations, and benefits provided by religiously affiliated fraternal benefit associations.

In this third category, patterns of convergence and divergence have appeared among the states that have thus far legislated on same-sex marriage. Connecticut, New Hampshire, and Vermont all exempt religiously affiliated organizations from any obligation to “celebrate” a marriage, and all three exempt religiously affiliated fraternal benefit associations from any obligation to accept as members, or pay insurance benefits to, parties to same-sex unions.<sup>104</sup> Connecticut alone, however, has a special exception for social services, including adoption, delivered by religious organizations, so long as those services are funded exclusively from private sources.<sup>105</sup> And only New Hampshire has a

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<sup>102</sup> See Father Robert Carr, Boston’s Catholic Charities to Stop Adoption Services over Same-Sex Law, Catholic Online News, 3/10/06, available at [http://www.catholic.org/national/national\\_story.php?id=19017](http://www.catholic.org/national/national_story.php?id=19017)

<sup>103</sup> See *Levin v. Yeshiva University*, 754 N.E. 2d 1099 (Court of Appeals of NY, 2001) (reinstating complaint by lesbian couple alleging that university’s policy of refusing them access to married student housing violated state law prohibition on discrimination based on sexual orientation). The University did not raise a defense of religious freedom in the case.

<sup>104</sup> Connecticut Public Act No. 09-13, “An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples,” available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>; Vermont, “An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage,” sections 10(b), 11, available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>; New Hampshire, An Act Affirming Religious Freedom Protections with Regard to Marriage, secs. III-IV, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html>.

<sup>105</sup> Connecticut Public Act No. 09-13, ~~Sec.~~ 19: “Nothing in this act shall be

provision that exempts religious organizations from any obligation to provide goods or services “if such request for such [goods or] services . . . is related to . . . *the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals*, and such . . . promotion of marriage is in violation of their religious belief and faith.”<sup>106</sup> None of the legislating states enacted a provision explicitly relating to spousal benefits for employees of religiously affiliated organizations.

In this third category, only the cases involving celebration of same-sex weddings present any plausible claim of constitutionally mandated exemptions. But many of these disputes, in which conflicting intuitions, policies, and principles are manifest, present plausible cases for permissive legislative accommodation, and the divergences among the states suggest that this third category presents the most fruitful arena for legislative compromise. In this section of the paper, we sketch some overarching policy concerns which we hope may guide legislative deliberation about such accommodations. In Part

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deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose,” available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

<sup>106</sup> New Hampshire, An Act Affirming Religious Freedom Protections with Regard to Marriage, sec. III, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html>(emphasis added). Maine is the outlier; its rather different statutory formula specifies that the same-sex marriage law “. . . does not authorize any court or other state or local governmental body . . .to compel, prevent or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition.” The relative vagueness of the language in the Maine scheme makes it difficult to predict how the Act will be applied to cases outside the solemnization and celebration of marriage.

III.C.2, below, we apply these principles to some of the particular cases within the category.

1. *Guiding principles and policies.*

a. *The continuum of religious exclusivity.* Among the most substantively important yet administratively difficult considerations is that of religious exclusivity of the contested service or benefit. The most powerful reason for recognizing the constitutional right of houses of worship to exclude same-sex couples (or any others) is this customary pattern of exclusivity. In their normal operation of conferring sacraments and religious recognition, communities of faith are the very antithesis of the concept of “public accommodations.” Even if their houses of worship are open to the general public for purposes of prayer, virtually all faiths that administer sacraments operate on theological norms of exclusivity. Be it baptism, Bar or Bat Mitzvah, marriage, blessings at the time of death, or other rites of inclusion in the religious community, many houses of worship will confer sacraments only on those who, by ancestry, deed, or explicit commitment, have become (and remain) members of the faith. If, for example, participation in a same-sex union, or divorce, or unrepented sins, disqualify someone from good standing in a faith community, principles of both free exercise and associational freedom buttress the private right of that community to exclude those whose conduct does not satisfy the relevant religious criteria.

Not all religiously affiliated organizations, however, exclude non-adherents from participation in the benefits or activities of the organization. For reasons of altruism or needed financial support, some organizations have voluntarily opened their services and

facilities without regard to membership status in the faith. This pattern obtains quite frequently in religiously affiliated organizations, such as Catholic Charities, Lutheran Social Services, or the Young Men's Hebrew Association, which provide social services or recreational opportunities regardless of faith affiliation.

Organizations that are generally open to all without regard to religion are less sympathetic candidates for exemption from obligations to serve members of same-sex couples. For example, OGCMA's decision to exclude only same-sex couples from using the Boardwalk Pavilion is quite different from a similar organization's decision to permit only those of a particular religious group to use its facility. Nevertheless, as the examples in Part II.C.2 below illustrate, the service context may matter considerably in state policy decisions about whether to accommodate such particularized exclusionary impulses.

*b. Problems of administration.*

Recognizing exemptions for public employees and private vendors involves the difficult enterprise of measuring conflicting hardships and perhaps testing the religious sincerity of exemption claimants. Exempting religiously affiliated organizations on these questions can be done in ways that entail no such problems of administration. First, as the legislation has emerged, no balancing of hardships is involved in applying institutional exemptions – in all of the legislating states, religious entities may exclude same-sex couples from goods related to solemnization and celebration of marriage without regard to the availability of alternative providers.

Moreover, unlike the situation of individuals, whose religious sincerity in this context may come into legitimate question, no test of sincerity can ever be sensibly

applied to a faith community's determinations on issues of sexuality. Whatever the theological origins of the community's norms, they will not seem to be the idiosyncratic result of any particular individual's response to same-sex intimacy. Rather, such norms will have been the product of institutional judgment over time, and thus are not readily subject to meaningful probes of sincerity.

*c. The potential withdrawal of valuable social resources.*

If some individual objectors to same-sex marriage withdraw from their current vocation because of the unavailability of exemptions from laws mandating non-discrimination, social costs are likely to be rather small. Others, willing to serve all, will take their place as marriage license clerks or providers in the wedding industry. One cannot, however, make the same confident prediction about religious organizations as non-profit providers of social services, including adoption, foster care, or education. If religious organizations withdraw as providers of such services – as was the case with the decision by Catholic Charities of Boston to surrender its license as an adoption agency in Massachusetts – the deadweight social loss might be considerable. In non-profit markets for social services, we have little confidence that other providers will expand, or new providers will enter, to pick up the slack.

*d. The presence of state subsidy and support.*

By force of the Constitution, states may have to tolerate conduct that they do not want to actively support. Even beyond constitutional duty, states may choose to respect the private right to engage in such conduct, but nevertheless decide not to affirmatively support it. In various post-*Dale* cases involving the Boy Scouts, for example, courts have

upheld state or local decisions, driven by concern over anti-gay discrimination, to withdraw public subsidy or support from the Scouts.<sup>107</sup> As exemplified by Connecticut's same-sex marriage legislation, a state may thus decide to exempt from non-discrimination principles some service activity of religious institutions that exclude same-sex families, but only so long as those activities are privately funded.<sup>108</sup>

A long line of decisions in the Supreme Court teaches that government may withhold subsidies, from religious entities as well as others, from institutions that do not comply with subsidy conditions designed to advance reasonable government policies.<sup>109</sup> There is thus little doubt concerning the constitutional validity of governmental decisions to tolerate certain conduct by religiously affiliated institutions while refusing to subsidize the same behavior.<sup>110</sup>

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<sup>107</sup> *Boy Scouts v. Wyman*, 335 F.3d 80, 98 (2<sup>nd</sup> Cir. 2003); *Evans v. City of Berkeley* 129 P.3d 394, 404-05 (Calif. 2006).

<sup>108</sup> Connecticut Public Act No. 09-13, "An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples," Sec. 19: "Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose," available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

<sup>109</sup> *NEA v. Finley*, 524 U.S. 569 (1998); *United States v. American Library Association*, 539 U.S. 194 (2003). Indeed, most recently, the Supreme Court reaffirmed this principle in a case in which the gay rights movement was on the other side. *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006). See also *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>110</sup> A useful analogy can be found in federal policies with respect to religious selectivity in hiring by religious organizations. The Supreme Court has upheld the validity of the provision in Title VII of the 1964 Civil Rights Act that permits such selectivity, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), but there is considerable controversy over permitting such selectivity in government-funded social

2. *Three subsets of conflict.*

The four general themes sketched above – degree of exclusivity, problems of administration, risk of withdrawal of service, and availability of affirmative support – will operate in varying patterns and degrees with respect to the particular sub-categories of cases within this final class of conflicts.

a. *Goods and services incident to wedding ceremonies.*

As noted in Part II.A. above, the same-sex marriage legislation in Vermont, Connecticut, and New Hampshire all exempt religious organizations – not just houses of worship – from any obligation to provide goods or services related to the solemnization or celebration of any marriage. Here, for example, is the relevant Connecticut provision:<sup>111</sup>

Notwithstanding any other provision of law, a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantage[s], facilities, goods or privileges to an individual if the request for such services is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith.

For reasons sketched in Part II.A., above, the core of this provision is required by the Constitution. Communities of faith cannot be legally compelled to solemnize any class of marriages, and the state should not be in the business of deciding which religiously affiliated organizations have a sufficient nexus to communities of faith, and

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services. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 *DePaul L. Rev.* 1, 51-57, 102-105 (2005).

<sup>111</sup> Connecticut Public Act No. 09-13, “An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples,” Sec. 17 (signed into law on April 23, 2009), available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.



their houses of worship, to be entitled to the same freedom of choice. If, for example, a particular chapel at DePaul University is reserved for Roman Catholic worship and ceremonies, the state should have no greater power to compel availability of that space for a same-sex wedding than the state would have for Holy Name Cathedral.

Moreover, the extension of this provision's coverage to *all* "services, accommodations, advantage[s], facilities, goods or privileges . . . if the request for such services is related to the solemnization of a marriage or celebration of a marriage" seems constitutionally salutary, even if not constitutionally required. The availability of goods and services like reception halls for a wedding celebration, a church-supplied musician for a wedding or wedding reception, or pre-marital counseling for couples within the faith tradition all seem part of an indivisible enterprise – the determination by authorized representatives of a religious community as to which unions it will bless.

Notably, the exemption is only relevant for religious institutions that fall within the definition of "public accommodation" with respect to particular goods, services, or facilities. Thus, if New Jersey had adopted the laws enacted in Connecticut, Vermont, and New Hampshire, OGCMA would be free to exclude same-sex couples from using the Boardwalk Pavilion for marriage ceremonies, even though the facility was otherwise open to the public. A for-profit enterprise, however, even if closely connected with a religious entity, would not be covered by this exemption.

Moreover, the existing statutory exemptions are limited to goods and services used to celebrate or solemnize a marriage. Again returning to the example of OGCMA, if the Boardwalk Pavilion remained a public accommodation, the Association could

prohibit its use for purposes of same-sex weddings, but would not receive a general privilege to discriminate based on sexual orientation. Thus, in such a regime of exemptions, OGCMA would be required to allow same-sex couples to use the Pavilion, on equal terms with other couples, for any activities but same-sex weddings. Seen in this light, the exemption balances the Association's desire not to have its religious message compromised or distorted by a same-sex wedding in its Pavilion, with same-sex couples' interest in having access to the set of goods and services generally available to the public.

In terms of affirmative state support, it is worth noting that the Connecticut statute goes still further in connection with institutional religious freedom to decide which marriages to solemnize or celebrate. The statute limits the remedial consequences of invoking the substantive exemption:<sup>112</sup>

Any refusal to provide services, accommodations, advantages, facilities, goods or privileges in accordance with this section shall not create any civil claim or cause of action, or result in any state action to penalize or withhold benefits from such religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society.

This section protects religious organizations that refuse to solemnize or celebrate particular weddings from loss of state-created benefits, as well as insulating these organizations from private civil actions or state-imposed punishments. This protection against loss of state benefits is constitutionally gratuitous, but – in the narrow and specific context of solemnization or celebration of a marriage – nevertheless seems sound.

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<sup>112</sup> Id. In the absence of such exemptions, the remedial consequences for prohibited denials of service might include civil damages, fines, injunctions against provision of such goods or services without full compliance with the relevant law, and loss of state-created benefits.

## 2. *Services provided to married couples.*

The relevant arguments of constitutionality and policy become more balanced, nuanced, and complex when the context shifts from celebration of a wedding to recognition of marital status. Others who have contended for religious exemptions have tended not to identify or emphasize this distinction,<sup>113</sup> but it is of great conceptual significance. Solemnization and celebration of a wedding are one-time events in the life of a particular couple, and represent a religious organization's highest level of engagement and imprimatur. By contrast, the availability of goods and services may represent significant material opportunities over a lengthy period of time for a same-sex couple, and, in at least some circumstances, represent considerably less significant symbols of approval from a religious organization.

With respect to the availability of such services, important differences appear among the recent legislative enactments on the subject of same-sex marriage. The most prominent divergence is that displayed in the New Hampshire law, which goes beyond the otherwise parallel provisions in Vermont and Connecticut by exempting religious organizations from any obligation to provide goods or services “if such request for such [goods or] services . . . is related to . . . . *the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals,* and such . . . promotion of marriage is in violation of their religious belief and faith.”<sup>114</sup>

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<sup>113</sup> E.g., Stern, *supra* note XX, at 1-56 (discussing the rights of same-sex couples without distinguishing issues related to wedding ceremonies from those related to marital status).

<sup>114</sup> New Hampshire, An Act Affirming Religious Freedom Protections with Regard to Marriage, secs. III, available at <http://www.gencourt.state.nh.us/legislation/2009/0000HB0073.html>. In more general and

The New Hampshire law authorizes religious entities to apply their own definition of marriage to questions of the distribution of particular goods and services based on marital status. This recognition of authority is not limited to same-sex couples, and religious communities may choose to exercise it in other ways. For example, a church may exclude from its services for married couples those divorced and remarried individuals whose status is inconsistent with the church's strict limits on the availability of divorce.

For a variety of reasons, the calculus of accommodation is more evenly balanced between same-sex couples and religious institutions in the context of the particular benefits covered by the New Hampshire scheme.<sup>115</sup> With respect to most or all of the items on the list of exempt services – those aimed at the “promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals” – there is good reason to expect that the religious organization is consistently applying religious norms for the determination of eligibility, and that the services involve activities with explicitly religious content. That is, such services are likely to be delivered in a religiously exclusive way. When religious marriage rests on norms that diverge from those of civil marriage, religious entities should be free to carry them

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unfortunately ambiguous terms is Maine's rather different statutory formula, which specifies that the same-sex marriage law “. . . does not authorize any court or other state or local governmental body . . . to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith's tradition.” It is quite difficult to say just how far beyond “solemnization” of marriage the Maine statute extends.

<sup>115</sup> Note that the scheme does not cover all goods and services that might be designated for married couples – e.g., visitation rights for a same-sex spouse in a religiously affiliated hospital are not included in the exemption.

forward through a variety of contexts in which marital status is relevant. Thus, state exemption policy with respect to religious organizations' treatment of same-sex couples might appropriately be tailored to those areas of service in which the likelihood of consistent expression and application of religious norms seems highest.

This insight sheds important light on a range of problems involving the provision of social service or other benefits to married couples. For example, some religiously affiliated universities prefer members of their own faith for admission as students, and federal law does not restrict such a preference.<sup>116</sup> With respect to such schools, legislatures should consider accommodating the school's desire to prefer students of its own faith for married student housing. Because a same-sex marriage would effectively (or formally) disqualify a participant from good standing in some faiths, those faiths should be free to treat same-sex couples like all those who do not measure up to the faith community's standards.

The likelihood of consistent religious inclusion and exclusion is not the only relevant consideration in the calculus of accommodation. As noted above, the risk of withdrawal of valuable and not easily replaced social services is also a significant policy consideration. This variable illuminates the now-famous withdrawal of adoption services by Catholic Charities of Boston,<sup>117</sup> a case which sadly illustrates the social costs that may

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<sup>116</sup> Title VI of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000d et seq., forbids discrimination based on race, color, or national origin by recipients of federal financial assistance, but does not forbid religious selectivity by such recipients. To the best of our knowledge, no state forbids religious preference in admission by religiously affiliated universities.

<sup>117</sup> See Father Robert Carr, Boston's Catholic Charities to Stop Adoption Services over Same-Sex Law, Catholic Online News, 3/10/06, available at [http://www.catholic.org/national/national\\_story.php?id=19017](http://www.catholic.org/national/national_story.php?id=19017)

be incurred when religious charities are faced with nondiscrimination requirements in tension with faith principles. Catholic Charities of Boston surrendered its license as an adoption agency rather than facilitate placements with same-sex couples. State law required all adoption agencies, secular or religious, to follow broad nondiscrimination guidelines, and the state legislature was unwilling to provide an exemption for religiously affiliated agencies that did not want to make such placements.

Such a requirement, though permitted by the federal constitution, generates obvious trade-offs if it drives from the market large and well-respected providers of a particular social service. Nothing in the relevant market conditions makes it likely that other providers, new or pre-existing, will fill the void left in Massachusetts by the withdrawal of Catholic Charities as a provider of adoption services. A policy of permissive accommodation would have allowed Catholic Charities and other religiously affiliated adoption agencies to single out same-sex couples – including those legally married in Massachusetts – as ineligible for adoption services, but would have maintained the pre-existing provision of service to couples and children in need.<sup>118</sup> Perhaps in response to the Massachusetts tale, Connecticut has exempted religious organizations, offering social services such as adoption, from any obligation to serve same-sex couples, so long as the service is not funded by government.<sup>119</sup>

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<sup>118</sup> For a related critique of developments in Massachusetts, see Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash between Gay Rights and Religious Freedom*, 15 *Duke J. Gender L. & Pol’y* 297 (2008); see also Minow, *Religious Groups*, supra note xx, at 831-843.

<sup>119</sup> Connecticut Public Act No. 09-13, “An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples,” Sec. 19: “Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such

### 3. *Employee benefits to spouses*

This final sub-set of cases is materially significant to same-sex married couples, and symbolically significant to religious organizations opposed to same-sex marriage. If one member of a same-sex couple is employed by a religious organization that provides spousal benefits to employees, should legislatures permit the religious organization to exclude same-sex spouses from such benefits?

On one, very important level, the conflict suggested by this question is less stark than it may seem. Religious organizations already have the statutory right, under federal law and the law of most states, to limit employment to those who belong to and maintain the employers' faith.<sup>120</sup> If religious employers are opposed to same-sex intimacy, they thus have the prerogative to exclude from employment all who engage in intimate same-

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religious organization does not receive state or federal funds for that specific program or purpose," available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

<sup>120</sup> The federal statutory exemption for religious organizations from Title VII's prohibition on religious discrimination in employment is codified at 42 U.S.C. sec. 2000e-1(a) (2000). Most states have similar exemptions. For a survey of state provisions, see Ira C. Lupu & Robert W. Tuttle, *Government Partnerships with Faith-Based Service Providers: The State of the Law*, "The Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government, SUNY (December, 2002), at 131-169 (Appendix B). The current version of the proposed Employment Nondiscrimination Act (ENDA), H.R. 3017, 111th Cong., 1st sess., which would extend Title VII of the 1964 Civil Rights Act to discrimination based on a person's "actual or perceived sexual orientation or gender identity," *id.* sec. 4, includes an exemption for all religious organizations that are exempt from Title VII's prohibition on religious discrimination. *Id.* at sec. 6. H.R. 3017 is available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3017>. If ENDA, as enacted, retains this exemption for religious employers, they would remain free under federal law to exclude openly gay employees, whether or not the employer explicitly invoked religious reasons for doing so.

sex conduct.<sup>121</sup> Participation in a same-sex marriage would be an admission that an employee was engaged in such conduct, and therefore not acting consistently with the faith. Accordingly, religiously affiliated organizations could refuse to hire, or could dismiss, employees who made requests for benefits for a same-sex intimate partner.

Many religiously affiliated employers, however, may not want to maintain a general policy of religious selectivity, or even a narrower but explicit policy of excluding sexually active gay employees. A religiously affiliated university, for example, may want to hire the best faculty it can without regard to religion, especially in fields of study unrelated to religious concerns. Moreover, such an employer will rarely want to invade the sexual privacy of its employees. Accordingly, a school with traditional religious connections may effectively have a policy of “don’t ask, don’t tell” with respect to gay employees. If the school’s benefits for partners of employees are limited to spouses, and the state in which the school is located does not recognize same-sex marriage or legal equivalents such as civil unions, this arrangement can readily survive.

Once the state recognizes same-sex unions, however, and employees enter them and apply for benefits, the religiously affiliated school is in a bind. The marriage is a “tell,” and if the school pays the benefits, it will be subsidizing a relationship its faith tradition condemns. Alternatively, the school will be openly engaged in discrimination based on sexual orientation if it refuses to pay the benefits.

Perhaps the existence of a legal escape from the obligation to pay such benefits to same-sex spouses is sufficient to solve the problem presented by this class of conflicts. There is no obvious policy reason to permit religiously affiliated employers, educational

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<sup>121</sup> See, e.g., *Little v. Wuerl*, 929 F.2d 944 (3<sup>rd</sup> Cir. 1991).



or otherwise, to gain the benefits of the work done by gay employees without incurring the detriment of paying benefits to their spouses to the precise same extent as those paid to opposite sex spouses. Under the current regime of employment law, such employers effectively have three lawful paths open to them – refuse on religious grounds to hire openly gay employees; end the payment of spousal benefits to all employees; or include the same-sex spouses (or, civil union partners, in states where that relationship is a functional equivalent of marriage) in whatever benefits are paid to opposite-sex spouses. An exemption of religiously affiliated employers from the obligation to cover same-sex spouses to the same extent as opposite-sex spouses would add a fourth choice to that list, and reduce legal pressure (though not other, informal pressure) to maintain a regime of equality.

The issue of spousal benefits for employees thus seems sufficiently complex under current law, and sufficiently in social and economic flux, that we do not advance any particular recommendations to legislatures over how to approach these issues. It is noteworthy that none of the states that legislated on same-sex marriage in the spring of 2009 saw fit to address the problem of spousal benefits paid by religious organizations.

The closest that any of them came to this problem was in the provisions related to the rather different context of fraternal benefit societies. Vermont, Connecticut, and New Hampshire each has a provision that exempts such societies from any obligation “to provide insurance benefits to any person if to do so would violate the fraternal benefit society’s free exercise of religion . . .”<sup>122</sup> Such protections of fraternal benefit societies,

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<sup>122</sup>, See, e.g., in Vermont, see “An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage,” section 10, available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>; in New Hampshire, see An

such as the Knights of Columbus and others which may have religious criteria for membership, arise in the more compelling constitutional context of associational relationships rather than employment relationships. Accordingly, these societies presented a more constitutionally appealing and relatively cost-free case for accommodation than do religiously affiliated employers not generally engaged in making religious distinctions among employees.

### CONCLUSION

In the first few years after *Goodridge*, the spread of Defense of Marriage Acts had religious forces on the offensive against the recognition and spread of same-sex marriage. California's Proposition 8 had appeared to confirm that trend. But more recent events, including the dramatic and uncoerced recognition by the New Hampshire, Vermont, and Maine legislatures of such marriages, indicate that the forces of social and political gravity have begun to pull the tides in a different direction. Moreover, the demographics associated with this issue suggest that, in the medium to long run, the forces that support same-sex marriage are destined to prevail.<sup>123</sup> In the future, religious coalitions opposed to such marriage may well have to adjust to a political world in which legislative compromises will be important to the future of religious freedom on the question of marriage.

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Act Affirming Religious Freedom Protections with Regard to Marriage, sec. III, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html>.

<sup>123</sup> See Adam Nagourney, Same-Sex Marriage Holds Peril for GOP, NY Times, April 28, 2009, available at [http://www.nytimes.com/2009/04/29/us/politics/29memo.html?\\_r=1&scp=10&sq=demographics%20of%20gay%20rights%20issues&st=cse](http://www.nytimes.com/2009/04/29/us/politics/29memo.html?_r=1&scp=10&sq=demographics%20of%20gay%20rights%20issues&st=cse) (reporting polls showing that 57 percent of respondents under 40 supported same-sex marriage, compared to 31 percent of respondents over 40).

Some elements of that freedom are well-protected by the Constitution, but others are not. As in all political dramas, the timing of action will matter greatly. If the groups supporting religious freedom on these issues hold out for complete victory over same-sex marriage, and choose not to make some of the necessary compromises, those groups are likely to get from legislatures no more protection of religious liberty than the Constitution requires. If, however, the religion-based opposition can find ground of agreement with the same-sex marriage movement – for instance, on the propositions that healthy, loving, respected families of all kinds produce social benefits, and that a proper respect for freedom to define, for religious purposes, the content of a virtuous life is essential to a free society – a more expansive and stable *modus vivendi* seems entirely within the sweep of politics' art.