



6-1-1999

Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom

Richard F. Duncan

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994).

Available at: <http://scholarship.law.nd.edu/ndlr/vol69/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ARTICLES

Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom

*Richard F. Duncan**

I. INTRODUCTION

It has become almost a cliché to observe that contemporary America is in the middle of a *kulturkampf*. We have divided into camps and are locked in what James D. Hunter calls a “struggle to define America” and its culture.¹ A chasm separates us over issues like prayer in public schools, abortion, the National Endowment for the Arts, sex education, and homosexuality.²

The culture war is a battle over symbols and social institutions and, perhaps, rages most intensely when advocates of the sexual revolution lock horns with the forces of orthodox Christianity.³ The conflict between sexual revolutionists and the Church typically is a philosophical and theological dispute.⁴ However, when legisla-

* Sherman S. Welpton, Jr., Professor of Law, University of Nebraska, College of Law.

1 JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

2 Professor Hunter describes the primary areas of conflict more generally:

The contemporary culture war rages on a variety of institutional fronts. But five areas in which it rages most intensely are in the realms of the family, education, the popular media, law, and electoral politics.

Id. at 173.

3 *See id.* at 43-48, 173.

4 Richard John Neuhaus describes the debate within the Church over homosexuality this way:

What is now being demanded is not personal acceptance but agreement that Christian doctrine and morality are fundamentally in error. What is demanded is the formal blessing of libidinal liberation from communal restraints.

Richard John Neuhaus, *Homosexuality and the Churches*, *FIRST THINGS*, May 1990, at 64, 70. For a good example of radical homosexual theology, see REV. ROBERT WILLIAMS, *JUST AS I AM: A PRACTICAL GUIDE TO BEING OUT, PROUD, AND CHRISTIAN* (1992). Two advocates of gay rights, Marshall Kirk and Erastus Pill, have called for an attack on “the moral authority of homophobic churches by portraying them as antiquated backwaters, badly

tion codifying the values of the sexual revolution is enacted in the form of laws prohibiting discrimination on the basis of sexual orientation or practice, the dispute becomes a legal one. Should government enact antidiscrimination laws protecting sexual behavior? Should such laws then be enforced against religious institutions and individuals who hold conflicting religious beliefs?

To give context and texture to this problem, consider some of the conflicts that may arise when legislation prohibiting employment and housing discrimination on the basis of sexual preference or practice is proposed or enacted.

CASE ONE

Holy Savior School is a small interdenominational Christian elementary school. The school's charter states that it was founded to provide students with an education from an orthodox Christian perspective⁵ and to employ teachers and staff members to serve as role models of the Christian life for students and others in the community.

Bob Smith and Frank Jones are both employees of the school. Smith teaches fifth and sixth grade social studies classes and Jones serves as the school's janitor. When school officials learn that Smith and Jones are living together in a homosexual relationship, they decide to terminate their employment because Smith and Jones "are unrepentant sinners whose influence is harmful to our students and our community."

out of step with the times and with the latest findings of psychology." Marshall K. Kirk & Erastus Pill, *Waging Peace*, CHRISTOPHER STREET, No. 95, at 33, 38.

5 I use the term "orthodox Christian" or something similar to describe people who are often labeled "Fundamentalists" by law review writers and the popular media. I consider this latter term, which conjures up images of ayatollahs and irrational fervor, offensive and a not very subtle means of marginalizing a significant segment of mainstream American society. For example, the popular media "regularly refer to the Rev. Don Wildmon, of the anti-pornography American Family Association, as a 'fundamentalist,' notwithstanding that he's an ordained minister in the mainline United Methodist Church." Don Feder, *Focusing On Media's Selective Sensitivity*, CONSERVATIVE CHRONICLE, June 17, 1992, at 31. The obvious purpose of this tactic is to make Rev. Wildmon out as an extremist without having to demonstrate that his views on pornography are outside the mainstream. Sadly, this attempt to use extreme language to marginalize ideological opposition has even made its way into prestigious law reviews. See Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993) (referring to "right-wing, fundamentalist Christian groups" who oppose special rights for homosexuals). In a recent letter to *The New York Times*, Alexander Harper, a minister in the mainline United Church of Christ, compared media use of the word "fundamentalist" to "ugly racial slurs" which cast "no light but only heat." He went on to call for a moratorium on the use of the word. N.Y. TIMES, May 30, 1993, § 4 (Magazine) at 10.

CASE TWO

Mike Strong is the sole proprietor of Word Christian Books, a small business which employs ten workers. Strong is a "born again" Christian who has accepted Jesus as his Savior and the Lord of his life. Strong believes that all of his activities are governed by Biblical principles and has dedicated every aspect of his life to the glory of God. He considers his business a ministry and seeks to use it as a witness to the community of Biblical business ethics. Although Strong hires employees without regard to race, gender, or religion, he seeks to hire only men and women of integrity and good character.

Strong sincerely believes that homosexual behavior is sinful and that he is commanded to "fear the Lord and shun evil."⁶ Therefore, when he learns that one of his employees, Mary Doe, is involved in an ongoing lesbian relationship, he terminates her employment with his business.

CASE THREE

Margaret McCabe is a seventy-five-year old woman who was recently widowed and is supporting herself on Social Security and a little income generated by a five-plex apartment building she owns and manages. As a devout Roman Catholic, Mrs. McCabe believes that fornication and homosexual behavior are serious sins and that it is sinful for her to facilitate others who wish to commit these sins. She also wishes to maintain a "family atmosphere" for her tenants. Therefore, although Mrs. McCabe is willing to rent to married heterosexual couples and to single men or women, she is unwilling to rent to unmarried homosexual or heterosexual cohabiting couples.⁷

Each of these hypotheticals presents a clash of inconsistent lifestyles.⁸ And each also presents a classic confrontation between

6 *Proverbs* 3:7. Strong interprets the Bible as teaching that homosexuality is an abominable sin. For example, Strong interprets *Leviticus* 18:22 as providing a clear command: "Do not lie with a man as one lies with a woman: that is detestable." See also *Leviticus* 20:13; *Romans* 1:24-27; *I Corinthians* 6:9-10.

Notice that for purposes of Strong's claim to religious freedom, it does not make a difference whether his interpretation of the Bible is the "correct" one or even a widely-held one. All that matters is that Strong sincerely believes that homosexuality is detestable in the eyes of God. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *United States v. Ballard*, 322 U.S. 78 (1944).

7 This hypothetical is similar to the facts of a recent California case. See *Donahue v. Fair Employment & Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. App. 2d Dist. 1991), review granted, 825 P.2d 766 (Cal. 1992); review dismissed and cause remanded, 859 P.2d 671 (Cal. 1993). See also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 136-45 (1993).

8 For example, Mrs. McCabe's desire to live her life in accordance with her reli-

big government and individual freedom.⁹ As a matter of public policy, should government legislate a particular view of sexual morality¹⁰ and impose it on religious institutions and individuals who wish merely to be left alone to govern their ministries, businesses, and property in accordance with their most profound and deeply held principles and beliefs? If this regulatory scheme is enacted, are religious objectors entitled to a free exercise exemption?

The purpose of this Article is to discuss and analyze the impact on religious freedom brought about by the expansion of antidiscrimination laws to protect sexual practices occurring outside of marriage.¹¹ The primary focus of this inquiry is to deter-

religious beliefs clashes with her would-be tenants' desire to cohabit on McCabe's property. Under the proposed legislation, the tenants' sexual practices are protected activities and Mrs. McCabe's religious lifestyle is declared unlawful.

9 There is an interesting role reversal on this issue. Progressive sexual revolutionists are on the side of big government and the legislation of morality; religious traditionalists line up with individual freedom and the right to be left alone.

10 Antidiscrimination laws protecting sexual practices are based on the moral claim that a person's sexual orientation, like a person's race and sex . . . tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth

Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 32 (D.C. 1987) (describing the moral posture of the District of Columbia law prohibiting discrimination on the basis of sexual orientation). See also RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 4 (1992) (noting that "defenders of the antidiscrimination principle often treat that principle as though it were a self-evident truth that certain grounds for decision should be banned for moral reasons"). Of course, many individuals in our society disagree, and believe that it is both rational and appropriate to make character distinctions at least in part based upon a person's sexual behavior. For example, in the first hypothetical above, the religious school's officials obviously believe deeply that distinctions in terms of "individual worth" can be made between persons committed to sexual fulfillment within marriage and those engaged in sexual relations outside of marriage. Under antidiscrimination laws, a particular view of sexual morality, the sexual relativism of social liberals, is codified and imposed on everyone else. For a discussion of whether homosexual inclinations and practices are "like" race or gender, see *infra* notes 30-65 and accompanying text.

11 Antidiscrimination laws may protect sexual practices either expressly or impliedly. For example, the District of Columbia Human Rights Act, which prohibits employment, housing, and educational discrimination on the basis of "sexual orientation," defines the term as "male or female homosexuality, heterosexuality and bisexuality, by preference or practice." D.C. CODE ANN. § 1-2502(28) (1993). Laws in other jurisdictions, although not covering sexual practices expressly, may do so indirectly by barring discrimination on the basis of marital status. For example, in *Donahue v. Fair Employment & Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. App. 2d Dist. 1991), *review granted*, 825 P.2d 766 (Cal. 1992); *review dismissed and cause remanded*, 859 P.2d 671 (Cal. 1993), the court interpreted a law prohibiting housing discrimination on account of marital status to protect unmarried cohabiting couples. However, in *State By Cooper v. French*, 460 N.W.2d 2, 7 (Minn. 1990), the Minnesota Supreme Court construed a similar provision and concluded "[i]t is

mine whether religious institutions and individuals, who choose to make distinctions based upon their sincerely held religious beliefs regarding sexual morality, are (or should be) entitled to a free exercise exemption from these laws.

II. SEXUAL ORIENTATION LAWS AND PUBLIC POLICY

The homosexual rights movement has become "a political force to be reckoned with"¹² in recent years and "gay rights" legislation¹³ seems to be on top of the homosexual agenda. Interestingly, advocates of the homosexual cause seem more concerned about the symbolic consequences of these laws than the practical gains in terms of employment and housing opportunities.¹⁴ One proponent of homosexual rights, writing in a national homosexual newsmagazine, clearly and forcefully stated that "cultural acceptability" is the real goal of the homosexual movement:

[P]romoting homosexuality is exactly what the gay movement is all about. This doesn't mean promoting homosexuality in the Anita Bryant sense of recruiting young children at playgrounds. It means promoting homosexuality as an acceptable and viable means of expression, on a par with and equal to heterosexuality. Achieving this cultural acceptability is why a gay movement exists¹⁵

Viewed through this prism, gay rights legislation is the vehicle for enlisting the state and its monopoly of force on one side of the struggle for cultural legitimacy.¹⁶ When a legislature acts to

obvious that the legislature did not intend to extend . . . protection . . . to include unmarried, cohabiting couples in housing cases." The Minnesota Court was influenced by the fact that Minnesota's antifornication law had not been repealed. *Id.*

12 RICHARD A. POSNER, *SEX AND REASON* 292 (1992). For a history of the development of the homosexual rights movement in America, see JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* (1983).

13 As used herein, the term "gay rights legislation" or "homosexual rights legislation" refers to antidiscrimination laws which include sexual orientation and practices among the protected categories.

14 A recent student Comment describes this approach to homosexual rights legislation as the "dignity view." Under this view, homosexual rights legislation is seen "as primarily a legislative affirmation of the goodness of gay and lesbian people and their lifestyle." Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 610 (1991).

15 Randy Shilts, *The Queering of America*, THE ADVOCATE, Jan. 2, 1991, at 33. See also RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 32 (1987) (the gay political agenda is "essentially a battle for social legitimacy").

16 For example, a recent student Comment observed that "[t]he most significant

protect homosexual behavior under antidiscrimination laws, it elevates homosexual practices to the status of protected activities while at the same time branding many mainstream religious institutions and individuals as outlaws engaged in antisocial and immoral behavior. Symbolically, gay rights legislation declares homosexual behavior good (i.e., protected) and religiously motivated discrimination evil (i.e., prohibited). These are stakes worth fighting for,¹⁷ and this issue may be the one which forces the Supreme Court to rethink its unwise decision, in *Employment Division v. Smith*,¹⁸ to drastically reduce the scope of the Free Exercise Clause.

Dennis Altman, in his book on the "homosexualization" of America, makes an important point that is critical to understanding the political dynamics of gay rights legislation: "The greatest single victory of the gay movement over the past decade has been to shift the debate from behavior to identity, thus forcing opponents into a position where they can be seen as attacking the civil rights of homosexual citizens rather than attacking specific . . . antisocial behavior."¹⁹ Thus, homosexual activists have attempted to define themselves as a legitimate minority group "comparable to other minorities and deserving of the same rights, legal and civil."²⁰

Essentially, the argument goes something like this: "Being a homosexual is analogous to being a racial or ethnic minority. Racial and ethnic minorities are protected by anti-discrimination laws. Therefore, homosexuals should have the same civil rights as racial and ethnic minorities."²¹ The problem with this logic, of

impact of the [Massachusetts homosexual rights] law . . . was its effect on public consciousness: the role it would play in bringing about a change in cultural acceptance of same-sex relations." Comment, *supra* note 14, at 610.

17 Dr. James Dobson, a nationally-known psychologist and defender of the institution of the family, recently observed: "We are in a civil war of values and the prize to the victor is the next generation—our children and grandchildren." HUNTER, *supra* note 1, at 64 (1991).

18 494 U.S. 872 (1990). Indeed, in the Court's most recent free exercise case, Justice Souter called for the Court to re-examine *Smith* should a proper case present the issue. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring).

19 DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 9 (1982).

20 *Id.* at 2.

21 As Dennis Altman observes: "In a country where people identify themselves by reference to ethnicity and religion, it is not surprising that homosexuals have increasingly come to see themselves as another ethnic group and to claim recognition on the basis of this analogy." *Id.* at viii.

course, is the major premise. Are homosexual inclinations and practices really analogous to being a member of a particular race or ethnic group? Is discrimination against persons engaged in morally controversial behavior the same as discrimination on the basis of race or ethnicity? If so, then the argument has force. If not, then the case for homosexual rights needs to be made apart from the case for racial and ethnic civil rights.

A. *Antidiscrimination Laws: General Rule or Exception*

We live in a free society, and the general principle is one of free choice. Under this view, entrepreneurs who must meet the payroll and bear the risks of the market are free to manage their businesses and properties without governmental interference. Similarly, each individual, as the exclusive owner of his or her person and labor, has a right to decide where to live and for whom to work.²²

The traditional rule in employment law mirrors these fundamental principles and establishes a baseline of free choice and autonomy for both employer and employee. Employers are free to hire or fire "at any time and for any reason," and employees are equally free to accept employment or to quit as it may please them.²³ Historically, the law of landlord and tenant was also governed by the principles of choice and autonomy—landlords and tenants were free to enter into leases (or not) with whomever they chose and on any basis they chose.²⁴

In the second half of the Twentieth Century, however, a consensus developed in America against certain types of private discrimination. This consensus held that discrimination on the basis

22 The idea of self-ownership is critical to Locke's theory of property: "[E]very man has a property in his own person; this nobody has any right to but himself." JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, ch. 5, ¶ 27 (John Wiedhofft Gough ed., 1966). See also EPSTEIN, *supra* note 10, at 21-24.

23 See Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733 (1986). Of course, the parties are free to enter into an employment contract providing for job security, and even in the absence of an express contract an employer may be bound by policies and practices contained in its employee manuals or handbooks. See *id.* at 743-51. See also *SEXUAL ORIENTATION AND THE LAW* 66 (HARV. L. REV. ed., 1990). As Professor Larry Alexander recently observed, "in a just society there will be an area of liberty in which private people are permitted to express their preferences with respect to their intimate companions, their associates, their employees and employers . . ." Larry Alexander, *What Makes Wrongful Discrimination Wrong: Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 154 (1992).

24 See ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* 692 (1980).

of race, religion or gender was wrong and therefore should be prohibited.²⁵

It is important to recognize, however, that civil rights laws codifying this principle are nothing more than exceptions to the general rule of free choice. Although employers and landlords are prohibited from taking race, gender and religion into account when selecting employees or tenants, they remain free to make choices on the basis of other, non-protected factors. For example, it is permissible to discriminate in employment against members of the Ku Klux Klan and similar hate groups, even if the prospective employees are otherwise well-qualified for the job.²⁶ Landlords likewise are free to refuse to rent to Klansmen, pornographers, and other persons of undesirable character, even though these prospective tenants have the means to pay rent and good references from previous landlords.²⁷

Therefore, when proponents of homosexual rights legislation argue that they are seeking nothing more than the same civil rights everyone else has, they are wrong for two reasons. First, they already have the same rights everyone else has, i.e., the right to be protected against discrimination on the basis of their race, gender, religion, and other protected categories. Second, since the general rule continues to be one of free choice in employment and housing matters,²⁸ homosexual behavior is merely one of countless activities left unprotected by antidiscrimination laws. As we have seen, even a person's political associations, such as his or her membership in the Ku Klux Klan or other unpopular groups, are not protected activities under typical employment discrimination and fair housing laws.²⁹ Since political expression and association, activities recognized as fundamental rights by the First Amendment, typically are not protected against private discrimina-

25 See generally EPSTEIN, *supra* note 10, at 1-4. Although the antidiscrimination principle did not originally cover discrimination on the basis of age or disability, the principle has expanded to cover these forms of discrimination. *Id.* at 2.

26 See *id.* at 5. For example, when a minority-owned business recently learned that one of its computer operators was the Grand Dragon of the New York Ku Klux Klan, the firm decided to terminate his employment. Apparently, no federal or New York law protects employees from being discharged on the basis of their political associations. See Donatella Lorch, *Jewish Group Aims at the Klan; Its Weapon: The Answering Machine*, N.Y. TIMES, June 1, 1992, at B5.

27 See generally SCHOSHINSKI, *supra* note 24, at 692-715.

28 See *supra* notes 22-27 and accompanying text.

29 See *supra* note 26 and accompanying text.

tion, the argument for "equal treatment" for homosexual behavior would appear to cut the other way.

B. Is Homosexual Behavior the Same as Race and Ethnicity?

Although homosexual behavior is just one of many activities that are not covered by employment discrimination and fair housing laws, proponents of homosexual rights argue that persons who engage in same-gender sexual activity are similarly situated to racial and ethnic groups protected by these laws and are therefore equally deserving of protection.³⁰ A student Comment describes this view as follows:

This argument . . . begins by analogizing sexual orientation to race, gender or religion. It goes beyond . . . by arguing that a person's identity as gay or lesbian is as good (or morally neutral) as the religious or racial categories with which people self-identify.³¹

Is homosexuality analogous to race and ethnicity for purposes of antidiscrimination law and policy? Why has our society chosen to prohibit private discrimination on the basis of race?

Some argue that racial discrimination has been outlawed because race is an immutable, unchosen characteristic "determined solely by the accident of birth."³² Seizing on this theme, some proponents of gay rights argue that sexual orientation is not a chosen lifestyle, but rather an immutable, biologically determined trait.³³ Perhaps.³⁴ But even accepting the dubious claim that sex-

30 See Comment, *supra* note 14, at 613.

31 *Id.*

32 Cf. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

33 Several recent studies have focused on differences in the basic structure of the hypothalamus and the anterior commissure of the human brain. Other studies have involved monozygotic (identical) or dizygotic (fraternal) twins. See, e.g., Laura S. Allen & Roger A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, 89 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, August 1992, at 7199-7202; Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, March 1993, at 47-65. Psychologists such as Dr. Evelyn Hooker have argued it is a "mistake to hope that we will be able to modify or change homosexuality." *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 53. For a general discussion of biological and other theories advanced to explain the origins of homosexuality, see WARREN J. BLUMENFELD & DIANE RAYMOND, *LOOKING 'AT GAY AND LESBIAN LIFE* (1988).

34 Several researchers criticize the findings and conclusions of recent studies on the biological origins of homosexuality as "inconclusive." See David L. Wheeler, *Studies Linking Homosexuality to Genes Draw Criticism From Researchers*, THE CHRONICLE OF HIGHER EDUCATION, Feb. 5, 1992, at A8. In fact, some researchers doubt whether these studies have "any relevance to an issue as complex as human sexuality." They noted that "so little is

ual orientation is both inherent and unchangeable, is this a reason to designate homosexuals as members of a protected class under civil rights laws?³⁵ How important a factor is immutability in the formulation of civil rights policy?

Suppose, for example, that a drug were invented that would enable human beings to change their race. In other words, blacks could take a safe, inexpensive pill and become Caucasian. Would anyone argue seriously that civil rights laws should not cover blacks who declined the drug and thereby chose to remain black?³⁶

I think not. And I don't believe the immutability of race is the reason that racial discrimination is anathema in our society and under our laws. As was so often true, Dr. Martin Luther King had a seminal insight when he taught us that racial discrimination is anathema because people should be judged by the content of their character, not by the color of their skin.³⁷ Racial discrimina-

known about how the brains of higher animals work that to assign function or meaning to slight discrepancies in anatomical features is a gross oversimplification." Natalie Angier, *Researchers Find a Second Anatomical Idiosyncrasy in Brains of Homosexual Men*, N.Y. TIMES, Aug. 1, 1992, at 7. E.L. Pattullo, who until his retirement in 1987 was director of the Center for the Behavioral Sciences and associate chairman of the department of psychology at Harvard University, distinguishes homosexuality from race as follows: "It is indubitable, however, that skin color and gender are genetically determined, whereas it is certain that—often, if not always—the postnatal environment influences sexual orientation." E.L. Pattullo, *Straight Talk About Gays*, COMMENTARY, December 1992, at 23. Finally, at least two federal circuit Courts of Appeals have concluded that homosexuality is not an immutable characteristic. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) *reh'g denied*, 909 F.2d 375; *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Circuit Judge Brunetti's opinion, in the former case, was particularly straightforward: "Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage . . ." 895 F.2d at 573.

35 As Dennis Prager has observed, whether "homosexuals choose homosexuality is entirely unrelated to the question of whether society ought to regard it as an equally valid way of life." Dennis Prager, *Homosexuality, the Bible, and Us—a Jewish Perspective*, THE PUBLIC INTEREST, Summer 1993, at 73. Moreover, even if biology determines the inclination, as human beings capable of moral reasoning homosexuals remain free to choose whether to act on the inclinations.

36 See Note, *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285, 1303 (1985); *Janz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) ("Discrimination on the basis of race would not become permissible merely because a future scientific advance permits the change in skin pigmentation.") The hypothetical in the text was suggested by my colleague, Prof. David Moshman. Although he generally supports gay rights legislation, he is not persuaded by the immutability argument.

37 "I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." Martin Luther King, Jr., *I Have a Dream*, reprinted in, A TESTAMENT OF HOPE: THE ESSEN-

tion is wrong not because race is immutable and inherent, but rather because it is a morally neutral characteristic. Race tells us nothing about a person's character.³⁸

Sexual behavior and orientation, however, tell us much about a person's character because they tell us what a person does (or what he is inclined to do).³⁹ Sexual conduct and preferences are

TIAL WRITINGS OF MARTIN LUTHER KING, JR. 219 (James Melvin Washington ed., 1991). Dr. King delivered this historic address at the Lincoln Memorial on August 28, 1963. *Id.* at 217. In other words, Dr. King's insight suggests that people should be judged on the basis of what they do, and not on the basis of their race or color. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 154 (1980) (distinguishing laws which burden burglars from those which disadvantage blacks).

38 See *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (Homosexuality is unlike race, gender, and other suspect classes under the Equal Protection Clause because "homosexuality is primarily behavioral in nature" and the "conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir.), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) (same). Although there may be some racists in our society who would argue otherwise, I know of no serious scholar who contends that race is a morally significant characteristic. See Alexander, *supra* note 23, at 159.

39 Gen. Colin Powell, former chairman of the Joint Chiefs of Staff, was criticized recently by Rep. Patricia Schroeder for his support of the military's ban on homosexuals. Rep. Schroeder complained that his views were similar to those once used against desegregating the military. General Powell, who is black, informed Rep. Schroeder that he needed "no reminders concerning the history of African-Americans" in the military and went on to remind her of the difference between race and sexuality:

Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.

Elmo Zumwalt, Jr., *Guidance From Gen. Powell*, WASH. TIMES, June 4, 1992, at G3. Some commentators argue that discrimination on the basis of sexual orientation (as opposed to sexual conduct) is "often founded on the simple-minded assumption that 'a homosexual' is someone who engages in homosexual conduct. The overgeneralization in this assumption should be plain to anyone who can understand the concept of celibacy." Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U. C. DAVIS L. REV. 677, 728 n.174 (1991). Although chastity among self-identified homosexuals apparently is, to say the least, atypical, I certainly agree that it should not be discouraged. See John Cary Sims, *Moving Toward Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543, 1568 (1992) ("While it is possible that a few individuals might choose [celibacy], they would certainly not be large enough in number to justify analyzing the rights of homosexuals as if celibacy were typical or even common"); ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 85 (1978) ("Almost one-half of the white homosexual males . . . and one-third of the black homosexual males . . . said that they had had at least five hundred different sexual partners during the course of their homosexual careers."). Certainly, the distinction between status and behavior would be critical should a state act to criminalize homosexuality as a status offense. See *Robinson v. California*, 370 U.S. 660 (1962). However, homosexual rights laws operate to protect (not punish) homosexuals as a class, so *Robinson* is inapplicable. Moreover, I have been unable to find any empirical evidence demonstrating that celibate ho-

fraught with moral and religious significance.⁴⁰ To be sure, not

mosexuals are often victimized by discrimination in employment or housing. As Professor Sims has argued, homosexual rights laws are intended primarily to protect homosexuals who are sexually active. Sims, *supra*, at 1568. In fact, the homosexual rights movement is concerned primarily with protecting the interests of practicing homosexuals to be openly gay. See *id.*; Rhonda R. Rivera, *Queer Law: Sexual Orientation Law In The Mid-Eighties Part I*, 10 U. DAYTON L. REV. 459, 515-16 (1985). See also *supra* notes 192-97 and accompanying text.

40 In his concurring opinion in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), Chief Justice Burger summarized what he referred to as "millennia of moral teaching" about homosexuality:

[T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 WILLIAM BLACKSTONE, *COMMENTARIES* *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Our society's three major religions—Judaism, Christianity, and Islam—historically have viewed homosexuality as immoral. See, e.g., The Jewish Torah (*Leviticus* 18:22, 20:13), the New Testament (*Romans* 1:26-28, I *Timothy* 1:9-10, I *Corinthians* 6:9-10) and the Koran (*The Heights* 7:80). See also BLUMENFELD & RAYMOND, *supra* note 33, at 152. Finally, the natural law tradition, a "resilient pillar of Western thought," condemns homosexual practices such as anal intercourse as an unnatural perversion of reproductive and digestive organs. See Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 25. It is precisely this unnatural merging of the reproductive organ of one man with the anus of another that is the primary means of transmission of AIDS in our society. See Warren Winkelstein, Jr., et al., *Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus: The San Francisco Men's Health Study*, 257 JAMA 321 (1987). Dr. Winkelstein's findings "support the inference that sexual transmission of HIV infection in homosexual/bisexual men in San Francisco, during the current AIDS epidemic, has been largely a function of the numbers of sexual contacts and the practice of receptive anal/genital contact among them." *Id.* at 325. See also Lawrence A. Kingsley, et al., *Sexual Transmission Efficiency of Hepatitis B Virus and Human Immunodeficiency Virus Among Homosexual Men*, 264 JAMA 230 (1990). Another scientific study of homosexual men published in a leading medical journal found that "oral-anal sex with multiple male partners carries an extremely high risk of intestinal infection." Thomas C. Quinn, et al., *The Polymicrobial Origin of Intestinal Infections In Homosexual Men*, 309 NEW ENG. J. MED 576, 582 (1983). David Richards' 1979 statement denying the immorality of homosexuality because "[t]here is no convincing evidence that homosexuality is either harmful to the homosexual or correlated with any form of mental or physical disease" seems completely inoperative in the era of AIDS. David Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 989

everyone agrees that homosexual behaviors and inclinations are immoral.⁴¹ But the point is that, unlike race, sexuality is morally controversial. When an employer or landlord makes a distinction based upon a person's sexuality, he is making a judgment about the content of that individual's character.

It is important to recognize that the argument against gay rights legislation does not require proof that homosexuality is immoral, harmful, or unnatural, as it might if one were defending laws prohibiting sodomy or otherwise employing the state's monopoly of force to punish or discourage homosexuality.⁴² Here the shoe is on the other foot—proponents of gay rights legislation are seeking minority status for homosexuals and wish to use governmental power to punish and discourage employers and landlords for making decisions about their own businesses and properties based upon sincerely held religious or moral beliefs concerning homosexuality. The burden should be on the proponents of the pro-gay agenda to establish that the beliefs of these employers and landlords are unreasonable, and that homosexuality, like race and ethnicity, is in fact morally neutral.

Gay rights advocates have not carried either part of this burden. By their own admission, there is no consensus in our society that homosexuality is morally acceptable.⁴³ Moreover, the view

(1979).

41 For example, a 1992 Gallup Poll found that 57% of Americans deemed homosexuality an unacceptable lifestyle, with 38% believing it to be acceptable. ARIZONA REPUBLIC, Apr. 25, 1993, at A19. A major survey conducted by the Kinsey Institute in 1970 confirms that a majority of Americans believe that homosexual behavior is wrong. ALBERT D. KLASSEN ET. AL., SEX AND MORALITY IN THE U.S.: AN EMPIRICAL ENQUIRY UNDER THE AUSPICES OF THE KINSEY INSTITUTE 26-27 (Hubert J. O'Gorman ed., 1989). One commentator, a proponent of expansive legal protection for homosexuals, agrees that even a brief survey of the caselaw and legal literature "will reveal an utter lack of consensus both with respect to the morality of homosexuality and with respect to society's view of the morality of homosexuality." Mark Strasser, *Suspect Classes And Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 960-61 (1991). See REV. ROBERT WILLIAMS, *supra* note 4. See also ROBIN SCROGGINS, THE NEW TESTAMENT AND HOMOSEXUALITY (1983).

42 See Strasser, *supra* note 41, at 960. I believe this case could be made in support of sodomy laws. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (Burger, C.J., concurring). However, since it is beyond the scope of this Article, I will not attempt to make the argument here. Suffice it to say that I agree with Prof. Harry Jaffa's wise observation that "[c]onfining sexual friendship to its proper sphere—between man and wife—is the very core of that morality by which civilization is constituted." HARRY V. JAFFA, HOMOSEXUALITY AND THE NATURAL LAW 35 (1990).

43 See Strasser, *supra* note 41, at 960-61 (acknowledging "an utter lack of consensus both with respect to the morality of homosexuality and with respect to society's view of the morality of homosexuality"). According to a recent U.S. News & World Report poll,

that it is not morally acceptable—one seemingly held by a majority today⁴⁴ and which has withstood the test of time—certainly is, at the very least, both reasonable and supportable.⁴⁵ At least so far, the argument that homosexuality and race are analogous has failed because race is a morally neutral characteristic and homosexuality is morally controversial.

The primary purpose of our Nation's civil rights laws prohibiting racial discrimination was to remedy the severe economic deprivation caused by pervasive discrimination against blacks and other racial minorities.⁴⁶ Civil rights laws were enacted against a background of devastating and widespread discrimination that relegated blacks in particular to only the most menial occupations and

73% of respondents oppose same-sex marriages, 70% oppose allowing homosexuals to adopt children, and 60% oppose "legal partnerships" for homosexual couples. Importantly, very high proportions of those who hold these views say they hold them "very strongly." Joseph P. Shapiro et. al., *Straight Talk About Gays*, U.S. NEWS & WORLD REPORT, July 5, 1993, at 47. Moreover, 52% oppose teaching about homosexual orientation in sex education classes in public schools with the strongest opposition coming from those with school age children. *Id.* at 46. Finally, although 65% say they support equal rights for homosexuals, 50% oppose extending civil rights laws to cover homosexuals. *Id.* at 48.

44 See *supra* note 41.

45 See *supra* note 40. Those who argue that homosexual behavior is immoral stand on the shoulders of giants such as Blackstone, Augustine, Martin Luther, and John Calvin. See 4 WILLIAM BLACKSTONE, Commentaries *215; Augustine, *Sermon on I Corinthians 6:9, 10, 11, 19*, reprinted in, SELECTED SERMONS OF ST. AUGUSTINE 19-20 (Q. Howe, Jr. ed., 1966); MARTIN LUTHER, COMMENTARY ON THE EPISTLE TO THE ROMANS 31 (J. Theodore Mueller trans., 1954); JOHN CALVIN, CALVIN'S COMMENTARIES: THE EPISTLES OF PAUL THE APOSTLE TO THE ROMANS AND TO THE THESSALONIANS 34-37 (Ross MacKenzie trans.) (David W. Torrance & Thomas F. Torrance eds., 1960). Many reputable modern scholars also conclude that homosexuality is immoral. See, e.g., JAFFA, *supra* note 42; PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); John Finnis, *Legal Enforcement of "Duties To Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 445-46 (1987). The former director of the Center for the Behavioral Sciences and associate chairman of the department of psychology at Harvard University, E.L. Pattullo, who admits to being ambivalent about the role of homosexuals in society, nevertheless believes that there are good reasons to resist legal and social acceptance of the gay lifestyle:

Hence to the extent that society has an interest both in reproducing itself and in strengthening the institution of the family—and to the extent that parents have an interest in reducing the risk that their children will become homosexual—there is warrant for resisting the movement to abolish all societal distinctions between homosexual and heterosexual.

Pattullo, *supra* note 34, at 23.

46 According to the legislative history of the Civil Rights Act of 1964, the evidence demonstrating this widespread employment discrimination was "overwhelming." H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 26 (1963) [hereinafter H.R. REP. NO. 914] (additional views of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias, and Bromwell). See David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1130 (1989).

the least attractive housing opportunities. One commentator recently described the pervasiveness and severity of racial discrimination in employment existing just prior to passage of the Civil Rights Act of 1964:

Despite the expressed policies of the executive branch . . . employment in the federal government remained largely segregated in the 1950s and the early 1960s, with sharply defined jobs for whites and blacks. Segregation and discrimination also continued with little change in the private sector and in most state and local governments

Blacks were excluded from traditionally "white" jobs and were limited to lower paying, less desirable jobs throughout the South. While discriminatory practices of employers and unions in other regions were frequently less explicit and less rigid, custom, inertia, seniority and referral systems, union pressure, and informal practices accomplished much the same result throughout the rest of the country.⁴⁷

The economic devastation of blacks and other nonwhites resulting from these discriminatory practices is objectively demonstrable. For example, in 1960 nonwhite males earned only 59.9 percent of the income of white males, and nonwhite females earned only 50.3 percent as much as white females.⁴⁸

Have gay rights proponents proven their case that homosexuals have been economically impoverished by discrimination in employment, housing, and public accommodations and are therefore in desperate need of the protection of antidiscrimination laws in these areas? No. Not only have they failed to prove that homosexuals have been impoverished by discrimination, but the data

47 Rose, *supra* note 46, at 1125-26. The Supreme Court has recognized that severe discrimination against blacks in particular was the basis of the Civil Rights Act of 1964. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252 (1964). For example, the Court noted that discrimination against blacks in public accommodations was so severe that black travellers were "often unable to obtain accommodations and have had to call upon friends to put them up overnight." *Id.* at 253.

48 H.R. REP. NO. 914, at 28 table 3. See Rose, *supra* note 46, at 1127. Rep. William M. McCulloch and his Republican colleagues concluded that this data revealed "the economic straitjacket in which the Negro has been confined." H.R. REP. NO. 914, at 28. Admittedly, these statistics do not prove that the disparity in income was caused solely by discrimination. But when coupled with the overwhelming evidence of pervasive discrimination discussed above, the argument that much of the income disparity between whites and nonwhites was caused by employment discrimination is very persuasive and certainly sufficient to support civil rights legislation.

support the opposite conclusion—homosexuals are an economically advantaged group in our society.

According to Jeffrey J. Vitale, president of a marketing and consulting firm that specializes in market research on homosexuals, “[a]ffluence is the rule for gay households.”⁴⁹ Another marketing expert, Michael Kaminer, calls homosexuals “the market of the decade.”⁵⁰

According to the 1990 U.S. Census, male homosexual households ranked at the top in terms of average annual household income.⁵¹ The average household income for male homosexual couples (\$56,863) significantly exceeds that for married heterosexual households (\$47,012).⁵² Market surveys support these findings. For example, a 1991 study conducted by Overlooked Opinions, a marketing and consulting firm that specializes in the homosexual market, reported the following findings:⁵³

	<i>Gay Men</i>	<i>Lesbians</i>	<i>Nat'l Average</i>
Average Household Income	\$51,325	\$45,927	\$36,520

49 The quotation in the text comes from a letter Mr. Vitale recently published. AMERICAN DEMOGRAPHICS, September 1991, at 54. One national newspaper examined data from the 1990 Census and concluded: “Gay male couples have higher incomes than any other group, including married couples, traditionally the nation’s most affluent family type.” Margaret L. Usdansky, *Gay Couples By the Numbers: Data Suggest They’re Fewer Than Believed, But Affluent*, U.S.A. TODAY, Apr. 12, 1993, at 8A.

50 Jane Applegate, *From Videos to Greeting Cards, Gay Clout Abounds*, WASH. POST, May 3, 1993, at F10. Mr. Kaminer noted that since many homosexual households have two incomes and no children, disposable income “dramatically increases.” *Id.*

51 Usdansky, *supra* note 49, at 8A.

52 *Id.*

53 Ramon G. McLeod, *Gay Market A Potential Gold Mine*, SAN FRANCISCO CHRON., Aug. 27, 1991, at A1. A 1992 survey of people who voted in the presidential election contradicts this disparity between gay and straight household income. However, the gay respondents were much younger, on average, than others in this survey and this “could have driven down education and income figures.” In any event, even this study confirms that homosexuals are not an economically impoverished class. Fifty-six percent of gay men and 47% of lesbians reported annual family income in excess of \$30,000. Anne Cronin, *Two Viewfinders, Two Pictures of Gay America*, N.Y. TIMES, June 27, 1993, § 4, at 16. As one supporter of gay rights observed after acknowledging evidence of gay affluence, “to call homosexuals an impoverished class would be silly.” Jonathan Rauch, *Beyond Oppression*, NEW REPUBLIC, May 10, 1993, at 20. See also Sullivan, *supra* note 40, at 34 (“Unlike blacks three decades ago, gay men and lesbians suffer no discernible communal economic deprivation and already operate at the highest levels of society . . .”).

The same study revealed that fifteen percent of male homosexual households have incomes exceeding \$100,000 (compared to only four percent of all households), and that homosexuals are more likely to have a college degree and a professional or managerial career than heterosexuals.⁵⁴

None of this is meant to imply that discrimination against homosexuals does not occur in our society. It clearly does. However, the available evidence indicates that it is neither pervasive⁵⁵ nor economically devastating.

Not only are homosexuals an affluent and a highly educated class, they are also politically powerful. Homosexuals are far more likely than average to vote,⁵⁶ and one of the fastest-growing political action organizations in Washington is the Human Rights Cam-

54 McLeod, *supra* note 53, at A1. Approximately 60% of adult homosexuals have college degrees, compared to only about 20% of the overall population. More than 40% of homosexuals have professional or managerial jobs, compared to about 30% of the overall population. *Id.* The average years of education for homosexuals is 15.7, compared to a national average of only 12.7. Rauch, *supra* note 53, at 20.

55 As California Governor Pete Wilson said when explaining his decision to veto a 1991 gay rights bill, the test of fairness for homosexual rights laws is "whether there is evidence of discrimination so pervasive as to warrant state government imposing so widely a burden so oppressive to potentially numerous innocent employers." Veto message of Governor Pete Wilson concerning ASSEMBLY BILL 101, CAL. ASSEMBLY JOURNAL, Oct. 17, 1991, at 4872. See Sims, *supra* note 39, at 1547 n.11. Proponents of homosexual rights laws have not met this burden. According to a recent large scale survey of gays and lesbians, only 15% reported they had experienced job discrimination. Martha Groves, *Frequent Job Bias Leaves Little Recourse, Gays Say*, LOS ANGELES TIMES, Oct. 5, 1991, at A1. See also SEXUAL ORIENTATION AND THE LAW, *supra* note 23, at 65 (17% of gay men "report having lost or having been denied employment because they were gay"); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 166 (1991) (16% of homosexuals responding to a national telephone survey reported employment discrimination and 15% reported housing discrimination). Notice that all of those numbers should be discounted somewhat, because they refer only to reports of perceived discrimination as opposed to proven cases of discrimination. See also Lorena Dumas, Comment, *The Sexual Orientation Clause of the District of Columbia's Human Rights Act*, 1 LAW & SEXUALITY 267, 274 (1991) (only three cases alleging discrimination on the basis of sexual orientation were adjudicated by the D.C. Human Rights Commission since 1973). In comparison, a 1984 survey found that 10% of white males reported they had lost a promotion because of affirmative action preferences. Peter Brimelow & Leslie Spencer, *When Quotas Replace Merit, Everybody Suffers*, FORBES, Feb. 15, 1993, at 82. Although Professor Rivera asserts that it is "generally acknowledged that discrimination against homosexual persons is quite common," she neither explains what "quite common" means nor cites any empirical evidence supporting her assertion. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons In The United States*, 30 HASTINGS L.J. 799, 805-06 (1979).

56 According to a recent broadly based demographic survey of homosexuals, more than 80% of gays and lesbians voted in the 1988 presidential election, compared to less than 60% of all citizens. McLeod, *supra* note 53, at A1.

paign, a pro-gay group that raised \$4.5 million in 1992.⁵⁷ During the Democratic primaries in the last election, all five of the leading Democratic candidates for president "actively courted the gay vote."⁵⁸ And, of course, President Clinton is a strong supporter of the gay political agenda.⁵⁹ As one commentator has observed, "it is clear that homosexuals have crossed a threshold [and have become] an integral part of American political life."⁶⁰

The other protected categories under typical antidiscrimination laws—gender, religion, and disability—also are unlike sexual orientation and behavior. Like racial minorities and in contrast to homosexuals, women have a proven history of economic disadvantage.⁶¹ People with disabilities likewise have a proven and compelling need for governmental assistance in employment and housing.⁶² Also, like race and unlike sexual orientation and behavior, both gender and disability are morally neutral char-

57 Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 11, 1992, § 6 (Magazine), at 20.

58 *Id.*

59 *Id.*

60 *Id.* at 21. See also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir.), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) (noting that "homosexuals are not without political power"); POSNER, *supra* note 12, at 292 (homosexuals "have become a political force to be reckoned with"). The political power of homosexuals is not surprising, because small, special interest groups "are exactly the groups that are likely to obtain disproportionately large benefits from the political process." Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 428.

61

There is a significant wage disparity between the earnings of women as a group and the earnings of men as a group. The average working women [sic] earns about 60 percent of what the average working man earns. The disparity displays a stubborn persistency over time and within age groups

In 1981, a working woman earned 59.2 percent of what a working man earned. The median income of women who worked full time in year-round jobs was \$12,001. The median income of men who worked full time in year-round jobs was \$20,260. As one would expect, women were overrepresented among workers whose earnings were low and underrepresented among workers whose earnings were high. Sixty-four percent of all workers who earned \$7,000 to \$10,000 were women, while only 3 percent of all workers who earned over \$75,000 were women.

STEVEN L. WILLBORN, *A COMPARABLE WORTH PRIMER* 7 (1986). Professor Willborn provides numerous additional data supporting his conclusion that "the earnings disparity between men and women has remained relatively constant for at least the last thirty years." *Id.*

62 For example, in 1990 Congress reported that "[i]ndividuals with disabilities experience staggering levels of unemployment and poverty." H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 32 (1990). The report, which accompanied the Americans With Disabilities Act of 1990, fully documented this conclusion. *Id.* at 28-50.

acteristics.⁶³ Finally, prohibition of religious discrimination is justified because unlike homosexual behavior, religious freedom is a fundamental constitutional right,⁶⁴ and from the beginning of the American Republic religion has been viewed as "being necessary to good government and the happiness of mankind."⁶⁵

It seems clear that homosexuals are not impoverished and disempowered as were racial minorities in the early 1960s. Nor are they similar to other classes protected by civil rights laws. Therefore, the argument that they are analogous to racial minorities and other protected groups for purposes of civil rights legislation is unpersuasive. If antidiscrimination laws are to be amended to include sexual orientation as a protected category, it must be because homosexuality is deserving of protected status in its own right, not derivatively through the experiences of other, dissimilar groups.

C. *The (Not So) Hidden Agenda: Gay Rights and Social Legitimacy*

Antidiscrimination laws impose heavy costs on markets, individuals and society.⁶⁶ Although the economic costs of civil rights laws are substantial,⁶⁷ so too are the costs in terms of political

63 See *supra* notes 38-45 and accompanying text.

64 Of course, religious freedom is expressly protected by the Bill of Rights. U.S. CONST. amend. I. In contrast, the Supreme Court clearly has held that there is no constitutional right under the Due Process Clause to engage in homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1985). The Supreme Court has never recognized homosexuals as a suspect or quasi-suspect class protected by strict or intermediate scrutiny under the Equal Protection Clause. See Strasser, *supra* note 41, at 937. Although it seems unlikely that *Bowers* would have been decided differently under the Equal Protection Clause (*id.* at 949), as Professor Sunstein has observed, nothing in *Bowers* expressly forecloses an equal protection claim by homosexuals harmed by governmental discrimination. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI L. REV. 1161, 1168 (1988).

65 The language quoted in the text was adopted by the First Congress in 1789 when it reenacted the Northwest Ordinance. 1 Stat. 50, 52. See also *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141, 2151 (1993) (Scalia, J., concurring) ("those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good"). In contrast, "millennia of moral teaching" throughout the course of Western civilization has condemned homosexual behavior as immoral and unacceptable. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

66 See generally EPSTEIN, *supra* note 10.

67 Two commentators recently estimated the costs of civil rights laws at 4% of GNP (or more than \$225 billion). Brimelow & Spencer, *supra* note 55, at 81-99. Prof. Epstein's extensive research on modern employment discrimination laws led him to conclude that they produce "a dangerous form of government coercion that in the end threatens to . . . strangle the operation of labor and employment markets." EPSTEIN, *supra* note 10, at 505.

liberty and intellectual freedom.⁶⁸ However, regarding race, religion, and gender, our society has developed a consensus that these costs "should be cheerfully borne because they are more than offset by the substantial social and symbolic gains to the larger society."⁶⁹ Our society has not reached a similar consensus about the cost-benefit ratio of extending antidiscrimination laws to protect sexual inclinations and behavior.

We have already seen that homosexuality is not analogous to race and gender for purposes of civil rights policy, because homosexuality remains morally controversial and homosexuals are not an economically disadvantaged class.⁷⁰ What, then, is the goal of proponents of homosexual rights legislation? If not economic equality, exactly what end is being pursued by gay activists?

As gay journalist and activist Randy Shilts observed recently, the gay political agenda is "essentially a battle for social legitimacy."⁷¹ Frank Kameny, an early leader of the homosexual rights

68 See EPSTEIN, *supra* note 10, at 500-05. Professor Epstein believes that "modern civil rights laws are a new form of imperialism that threatens the political liberty and intellectual freedom of us all." *Id.* at 505. Consider also Epstein's attempt to explain this conclusion:

The antidiscrimination laws thus play havoc with the use of any standard insurance principles, whether they deal with longevity or health, or any other aspect of human behavior. In a similar vein the antidiscrimination laws lead to a systematic Orwellian campaign of disinformation. One is not allowed to ask about age, about prior disability or handicap, about marital status, about individual abilities. Tests that have modest predictive value are rejected in favor of universal generalizations that have no predictive value at all. And this systematic campaign to discredit accurate statistical generalizations is punctuated by the self-congratulatory pronouncement that we have done all this not for our benefit but for yours. The current legislative view is that perfect information may be used (precisely because it can never be acquired), but nothing less will do.

Id. at 503-04. Andrew Sullivan, a well-known journalist who supports an expansive gay rights agenda, acknowledges that antidiscrimination laws protecting homosexuals infringe upon the autonomy and liberty of employers and landlords covered by the legislation. Sullivan, *supra* note 40, at 35-36.

69 EPSTEIN, *supra* note 10, at 497.

70 See *supra* notes 30-65 and accompanying text.

71 SHILTS, *supra* note 15, at 32. See also *supra* note 15 and accompanying text. Professor Marc Fajer, in his thought-provoking article on storytelling and gay rights, complains that society's non-recognition of homosexual marriages "denies gay relationships public legitimacy." Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 577 (1992). Professor Fajer believes the law should recognize the right of homosexuals "to carry on our lives in public." *Id.* at 605. By way of example, he is critical of a Roman Catholic parish that recently expelled a priest who admitted "that he was gay and had AIDS." *Id.* at 573.

movement, made the point forcefully in a 1964 speech to the New York Mattachine Society:

I take the stand that not only is homosexuality . . . not immoral, but that homosexual acts engaged in by consenting adults are moral, in a positive and real sense, and are right, good, and desirable, both for the individual participants and for the society in which they live.⁷²

According to Marshall Kirk and Hunter Madsen, authors of a widely read book that bills itself as a "gay manifesto for the 1990's," the gay political agenda involves a large scale campaign designed to gain social acceptance for the homosexual lifestyle. In what has become the principal textbook for homosexual activism, Kirk and Madsen frankly admit that the strategy they recommend amounts to a very sophisticated "propaganda" campaign designed to "transform society's antigay attitudes"⁷³ and to vilify and even silence those who oppose their agenda.⁷⁴

Since homosexuals have already achieved economic equality with the general population, the primary purpose served by extending antidiscrimination laws to protect sexual inclinations and behavior is symbolic. When government passes homosexual rights legislation it sends a message to society that the homosexual lifestyle is legitimate, perhaps on a par with marriage and family life, and that the government is so committed to this value that it will bring force to bear against those who wish to manage their busi-

⁷² Frank Kameny, Speech to the New York Mattachine Society (July 1964), in D'EMILIO, *supra* note 12, at 153. As Dennis Prager has observed, to advocate homosexuality as a legitimate lifestyle, equal to marital relationships, constitutes an "assault on the extremely hard-won, millenia-old battle for a family-based, sexually monogamous society." Prager, *supra* note 35, at 72.

⁷³ MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90S* 161 (1989). See also *id.* at 162-63, 172-73. The authors state that "antigay discrimination begins, like war, in the minds of men, and must be stopped there with the help of propaganda." *Id.* at 163.

⁷⁴ *Id.* at 189:

The objective is to make homohating beliefs and actions look so nasty that average Americans will want to dissociate themselves from them We also intend, by this tactic, to make the very expression of homohatred so discreditable that even Intransigents will eventually be silenced in public

This objective is to be accomplished by packaging homosexuals as victims of prejudice while portraying those who disagree with their agenda as fanatics. For example, Kirk and Madsen suggest that their opponents could be shown as "[k]lansmen demanding that gays be slaughtered or castrated" or as "[h]ysterical backwoods preachers, drooling with hate to a degree that looks both comical and deranged." *Id.* The goal is to marginalize, discredit, and ultimately silence opposition. *Id.*

nesses in accordance with a different code of ethics. Persons who believe the homosexual lifestyle is sinful, immoral, or destructive of traditional family values are given a Hobson's choice under homosexual rights laws—either reject these deep personal beliefs as a code of business ethics, or get out of business.⁷⁵

Viewed from this perspective, homosexual rights legislation constitutes one prong of a large scale campaign designed to transform the way society views homosexuality.⁷⁶ Other prongs in this sophisticated campaign include manipulation of the media⁷⁷ and of public school curricula⁷⁸ to promote a positive view of the ho-

75 As Kenneth Karst has stated in a different context, living one's life in accordance with one's profoundly held beliefs about religion and personal holiness has "a great deal to do with the formation and shaping of an individual's sense of his own identity." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635 (1980). Moreover, a person's religious self-definition is important not only in terms of "what it says to him but also by what it says (or what he thinks it says) to others." *Id.* at 636. Homosexual rights laws thus employ the power of the state to restrict the religious self-definition and expression of employers and landlords in order to facilitate the homosexuality and bisexuality of others.

76 KIRK & MADSEN, *supra* note 73, at 161-91. Many proponents of gay rights laws, including a law professor who is drafting proposed federal legislation, argue "that laws are often the first step toward changing hearts and minds." Shapiro et al., *supra* note 43, at 48.

77 Kirk and Madsen have devised a sophisticated media campaign for achieving the homosexual agenda. KIRK & MADSEN, *supra* note 73, at 173. They state that the "most effective propaganda" tactics include gaining "access to the kinds of public media that would automatically confer legitimacy upon these messages and, therefore, upon their gay sponsors. To be accepted by the most prestigious media, such as network TV, our messages themselves will have to be—at least initially—both subtle in purpose and crafty in construction." *Id.* at 173.

78 Consider, for example, the multicultural curriculum developed for use in public schools in New York City. The teacher's manual for first grade exhorts teachers to foster "positive attitudes toward sexuality" and explains what this means regarding homosexuality:

Teachers of first graders have an opportunity to give children a healthy sense of identity at an early age. Classes should include references to lesbians/gay people in all curricular areas and should avoid exclusionary practices by presuming a person's sexual orientation, reinforcing stereotypes, or speaking of lesbians/gays as "they" or "other."

If teachers do not discuss lesbian/gay issues, they are not likely to come up. Children need actual experiences via creative play, books, visitors, etc. in order for them to view lesbians/gays as real people to be respected and appreciated. Educators have the potential to help increase the tolerance and acceptance of the lesbian/gay community

BOARD OF EDUCATION OF THE CITY OF NEW YORK, CHILDREN OF THE RAINBOW: FIRST GRADE 372 (1991). Similar schemes of indoctrination also exist in higher education. For example, the Social Work Department at St. Cloud State University in Minnesota issued a policy statement that warned prospective students that "[i]t is simply not acceptable for social workers to view homosexual people as perverse or as sinners It is not OK in

mosexual lifestyle and a negative view of "homophobia" and "religious intolerance."

Of course, proponents of the homosexual agenda have every right to wage a propaganda campaign to promote social acceptance of the gay lifestyle and even to vilify traditional religion. However, policy makers should be aware of this campaign and should recognize that they stand at a crossroads when they consider extending antidiscrimination laws to human sexuality. They need to understand that the issue is not similar to race and gender, nor is it about eliminating economic disparity and injustice.

We all are sinners. But we all do not demand that our sins be recognized as civil rights. The issue our society faces is one of bedrock principle—we must choose between inconsistent value systems, between the values of moral relativism and the sexual revolution on the one hand, and the traditional values of family and religious freedom on the other. And in making this decision we must never forget the high stakes involved. Although the issue may be primarily a symbolic one, it is nevertheless symbolism of crucial importance. As Professor James Hunter has observed, the path we take at this crossroads is critical to the task of defining the very essence of American culture.⁷⁹ It is about who we are and what we value. And it is about whether traditional religion is still legitimate in modern America. The decision whether to turn our backs on millennia of moral teaching should be the product of careful and thoughtful judgment and not of a subtle and manipulative campaign of propaganda.

this case to "love the sinner and hate the sin." Maura Lerner, *St. Cloud State's Department Statement on Gays Causes Backlash*, MINNEAPOLIS STAR TRIBUNE, June 1, 1993, at 9A. Although the position statement was modified following public criticism of its apparent religious bigotry, it continues to state that students "who could not envision themselves taking an active part in eliminating discrimination against gays and lesbians should consider if they are appropriate candidates for the social work profession." *Id.*

79 HUNTER, *supra* note 1, at 177. Indeed, homosexual advocates agree with this assessment. Andrew Sullivan calls equal access to marriage "the critical measure for full gay equality." Sullivan, *supra* note 40, at 37. Societal acceptance of homosexual marriages, he says, "is the highest public recognition of our personal integrity." *Id.* For a self-described "counterhistory" of same-sex marriage, which concludes that homosexual unions "have been valuable and productive across times and cultures," see William N. Eskridge, Jr., *A History of Same-sex Marriage*, 79 VA. L. REV. 1419, 1511 (1993). See also Note, *supra* note 5, at 1906-07 (listing one example of discrimination caused by the "persistence of ignorance and misinformation" society's refusal to recognize homosexual attachments "as families").

III. SEXUAL ORIENTATION LAWS AND RELIGIOUS FREEDOM

Although the laws of at least twenty-three states continue to classify homosexual sodomy as a criminal offense,⁸⁰ a small but increasing number of states recently have begun to move in the opposite direction by enacting homosexual rights legislation. When Minnesota enacted what has been called America's "most comprehensive gay rights law"⁸¹ in early 1993, it became the eighth state to pass antidiscrimination laws protecting sexual inclinations and behavior.⁸² A number of cities and counties also have passed similar restrictions on private employers and landlords.⁸³

However, a libertarian countertrend may be developing. Congress has consistently rejected efforts to amend title VII of the 1964 Civil Rights Act to cover sexual orientation as a protected characteristic.⁸⁴ Moreover, in a statewide initiative in Colorado and a number of local initiatives in Oregon, the people have acted to protect themselves against gay rights restrictions.⁸⁵

80 Sodomy remains a crime in twenty-three states as of the spring of 1993. See ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. §§ 13-1411 to 13-1412 (Supp. 1988); ARK. CODE ANN. § 5-14-122 (Michie 1987); FLA. STAT. ch. 800.02 (1987); GA. CODE ANN. § 16-6-2 (Michie 1988); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (Supp. 1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. ANN. CODE art. 27, §§ 553-54 (1987); MICH. COMP. LAWS §§ 750.158, 750.338-750.338(b) (1979); MINN. STAT. § 609.293 (1988); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1986); MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1987); NEV. REV. STAT. § 201.190 (1987); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. tit. 21, § 886 (1981); R.I. GEN. LAWS § 11-10-1 (1986); S.C. CODE ANN. § 16-15-120 (Law. Co-op 1985); TENN. CODE ANN. § 39-13-509 (1991); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (Vernon 1989); UTAH CODE ANN. § 76-5-403 (Supp. 1988); VA. CODE ANN. § 18-2-361 (Michie 1988). The Kentucky statute criminalizing sodomy, see KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1985), was declared unconstitutional in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). The Massachusetts statute prohibiting "the abominable and detestable crime against nature," see MASS. GEN. L. ch. 272, § 34 (1986), was arguably invalidated as applied to private consensual conduct by *Commonwealth v. Balthazar*, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974). See SEXUAL ORIENTATION AND THE LAW, *supra* note 23, at 9-10 n.2.

81 THE ECONOMIST, Apr. 24, 1993, at 26.

82 See CAL. CIV. CODE § 51.7 (West 1982); CAL. LABOR CODE § 1102.1 (West 1989); CONN. GEN. STAT. ANN. § 46a-81a to 46a-81r (West 1986); HAW. REV. STAT. §§ 378-1, 378-3 (1992 Supp.); MASS. GEN. L. ch. 151B §§ 3, 4 (1982); Act of April 2, 1993, 1993 MINN. SESS. LAW SERV. 81 (West) (amending MINN. STAT. § 363 (1992)); N.J. STAT. ANN. §§ 10:5-5, 10:5-12 (West 1993); VT. STAT. ANN. tit. 1, § 143 (1985), tit. 9, §§ 4503-4504 (1984), tit. 21, § 495 (1987); WIS. STAT. ANN. §§ 101.22, 111.32 (West 1988). See also D.C. CODE ANN. §§ 1-2502, 1-2503 (1991).

83 A recent student Note reports that at least 139 jurisdictions have adopted some form of homosexual rights legislation. Note, *supra* note 5, at 1906. For a list of these jurisdictions, see *id.* at 1923-25.

84 See SEXUAL ORIENTATION AND THE LAW, *supra* note 23, at 68-69.

85 Timothy Egan, *Voters in Oregon Back Local Anti-Gay Rules*, N.Y. TIMES, July 1, 1993,

Regardless of the trendline, homosexual rights legislation is likely to remain in force in a number of states and localities for at least the immediately foreseeable future, and in those jurisdictions collisions of constitutional dimension will occur when government seeks to enforce these restrictions against religiously-motivated institutions and individuals. The remainder of this Article is devoted to an analysis of this difficult issue.

A. *The Impact of Smith on Free Exercise Exemptions From Homosexual Rights Restrictions*

In 1990, the Supreme Court cast aside almost three decades of free exercise jurisprudence when it decided *Employment Division v. Smith*.⁸⁶ Under the traditional test applied by the Court in free exercise cases, a governmental restriction that burdened the free exercise of religion was valid only if the state justified it by establishing that it was the least restrictive means of achieving a compelling or overriding government interest.⁸⁷

The compelling interest test had been applied by a long line of cases dating back almost thirty years to the Court's landmark decision in *Sherbert v. Verner*.⁸⁸ In *Sherbert*, the Supreme Court held unconstitutional a state's decision to withhold unemployment benefits from a Seventh Day Adventist who refused to work on Saturdays based upon her sincerely held religious beliefs. The Court clearly stated that this burden on the practice of religion could be upheld only if the state established a "compelling" justification for the regulation.⁸⁹ Moreover, even if the state had made the required showing of a compelling interest, it also was required "to demonstrate that no alternative forms of regulation [would suffice

at A6. Similar grassroots campaigns to protect traditional family values are also being waged in Arizona, California, Florida, Idaho, Michigan, Ohio, and Washington. See Note, *supra* note 5, at 1906.

86 494 U.S. 872 (1990).

87 See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990). As Professor McConnell observes, although free exercise doctrine was very protective of religious liberty during the pre-Smith period, in practice "the Supreme Court only rarely sided with the free exercise claimant." *Id.*

88 374 U.S. 398 (1963). As a student commentator has observed, "[a]lmost a dozen Supreme Court cases in the last twenty-five years have applied the test articulated in *Sherbert v. Verner* . . ." Note, *Leading Cases*, 104 HARV. L. REV. 129, 200 (1990). See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 835 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

89 *Sherbert*, 374 U.S. at 406.

to accomplish this overriding purpose] without infringing First Amendment rights."⁹⁰ Since the state was unable to meet this difficult test, the Court held that the denial of unemployment benefits violated Sherbert's rights under the Free Exercise Clause.

However, the Court completely rewrote the law of free exercise in 1990 when it decided *Smith*. The facts of *Smith*, sometimes referred to as the "peyote case," are simple. Two members of the Native American Church, Alfred Smith and Galen Black, were denied unemployment benefits after being fired from their jobs as drug counselors. The benefits were denied because Smith and Black had been discharged for work-related misconduct—their illegal use of the hallucinogenic drug peyote for sacramental purposes at a ceremony of their church.⁹¹

Smith and Black claimed that the denial of the benefits was an unconstitutional burden on their free exercise of religion, because it penalized them for taking part in what to them was a religious sacrament.⁹² Although the Oregon Supreme Court held that the state may neither, consistent with the First Amendment, prohibit good faith use of peyote in a religious ceremony nor deny unemployment compensation to persons whose unemployment results from their exercise of religious freedom,⁹³ the United States Supreme Court reversed the Oregon decision, upheld the denial of benefits and, at least for the present, rejected the compelling interest test for most (but, significantly, not all) free exercise challenges.

Since the use of peyote was a crime under Oregon law, the question before the Court was whether "that prohibition is permissible under the Free Exercise Clause."⁹⁴ Justice Scalia, writing for a five-judge majority, stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁹⁵ In other words, so long as its laws are neutral

90 *Id.* at 407.

91 *Employment Division v. Smith*, 494 U.S. 872, 874 (1990). The use of peyote was illegal under Oregon's criminal code. *See id.* at 875-76.

92 *Id.* at 876.

93 *See Smith v. Employment Division*, 763 P.2d 146 (Or. 1988); McConnell, *supra* note 87, at 1111.

94 *Smith*, 494 U.S. at 876.

95 *Id.* at 879, quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

and generally applicable, government may prohibit that which religion requires, or require that which religion prohibits. There is no need to satisfy the compelling interest test.⁹⁶ Accommodation of religious conscience is left to the wisdom (or the whim) of state legislatures and political majorities. In effect, the Supreme Court has closed its doors to religious claimants seeking exemptions from neutral laws of general application that incidentally burden the free exercise of religion.⁹⁷

Although *Smith* has a few scholarly defenders,⁹⁸ the general view among the commentators is that the decision is seriously flawed as a matter of textual interpretation,⁹⁹ historical analysis,¹⁰⁰ and in its understanding of free exercise precedents.¹⁰¹

96 See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993).

97 See *id.*

98 See, e.g., William P. Marshall, *In Defense of Smith and Free Exercise Revisionism* 58 U. CHI. L. REV. 308 (1991). See also William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. L. REV. 357 (1989-90). Even Professor Marshall, while applauding *Smith's* results, acknowledges that the opinion of the Court "is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction." Marshall, *supra*, 58 U. CHI. L. REV. at 308-09.

99 Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 3 (footnotes omitted):

The early published reactions to *Smith* also make the point that the decision is inconsistent with the apparent meaning of the constitutional text. The Court concedes that religious conduct is the exercise of religion, and it accurately describes the law at issue as a "criminal prohibition" of this religious exercise. On its face, such a law would seem to be a "law prohibiting the free exercise thereof." The Court does not really dispute the point; it says only that this is not the only "permissible" meaning of the text.

See also McConnell, *supra* note 87, at 114-16; Note, *supra* note 88, at 202.

100 Justice Souter questioned *Smith's* fidelity to the history of free exercise in his concurring opinion last term in *Hialeah*:

There appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. of Abington v. Schempp*, 374 U.S., at 223 . . . , then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith*.

Even more troubling than the opinion's analytical shortcomings is its impact on the quality of religious freedom. As Professor Douglas Laycock has observed, "[i]f the Court intends to defer to any formally neutral law restricting religion, then it has created a legal framework for persecution, and persecutions will result."¹⁰²

If the general rule coming from *Smith* is that free exercise has been banished from the Bill of Rights, it is critically important that we pay attention to the exceptions recognized by the Court to this general rule of non-protection. For purposes of the protection of religiously-motivated conduct,¹⁰³ these exceptions are two in number.

First, as the Court stated most recently in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁰⁴ "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."¹⁰⁵ Second, the *Smith* Court stated that the First Amendment bars application of even a neutral and generally applicable law "to religiously motivated action" in cases involving what the Court referred to as "hybrid" claims—i.e., claims under which free exercise is "reinforced" by another constitutional interest such as free speech, association, or the right of parents to direct the education of their children.¹⁰⁶ Since these two exceptions now constitute the primary source of

113 S. Ct. at 2249 (Souter, J., concurring). See also McConnell, *supra* note 87, at 1116-19; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); W. Cole Durham, Jr., *Religious Liberty And The Call Of Conscience*, 42 DEPAUL L. REV. 71, 79-85 (1992). But see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

101 See McConnell, *supra* note 87, at 1124-27. The Court relied most heavily on *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), a case which allowed public schools to require religious dissenters to participate in a daily flag-salute ceremony. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). Justice Scalia's majority opinion somehow failed to notice that *Gobitis* had been overruled, only three years after it was decided, in the landmark case of *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). As Professor McConnell observed, "[r]elying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*." McConnell, *supra* note 87, at 1124.

102 Laycock, *supra* note 99, at 4.

103 *Smith* recognizes that the Free Exercise Clause continues to protect the right of religious belief as distinct from religiously-motivated conduct. *Smith*, 494 U.S. at 877.

104 113 S. Ct. 2217 (1993). *Hialeah* is the first post-*Smith* free exercise decision of the Court.

105 *Id.* at 2233.

106 *Smith*, 494 U.S. at 881-82.

religious freedom under the Free Exercise Clause, the remainder of this Article will analyze their application in cases involving restrictions on religious conscience¹⁰⁷ created by enforcement of homosexual rights legislation.

B. Are Homosexual Rights Laws "Neutral" and "Generally Applicable"?

Smith holds that the government's power "to enforce [neutral and] generally applicable prohibitions of socially harmful conduct" does not require a compelling justification under the Free Exercise Clause even if the law has the incidental effect of burdening religiously-motivated practices.¹⁰⁸ But when government restricts religious freedom by a law which fails to satisfy the requirements of neutrality and general applicability, the Court has stated forcefully that a rigorous and undiluted standard of strict scrutiny will be applied.¹⁰⁹ Since these requirements are now the principal constitutional protection for the freedom of religious conscience, it is particularly important that the Court give them meaningful content.¹¹⁰

107 James Madison believed that the "unalienable right" of freedom of conscience is "precedent both in order of time and degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments*, THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 7 (Marvin Meyers ed., rev. ed. 1981). Madison's argument in *Memorial and Remonstrance Against Religious Assessments* is regarded by the Supreme Court and numerous commentators "as the single most authoritative source for understanding the meaning of the religion clauses of the First Amendment." Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination Of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 192 n.7 (1992). Professor Durham recently discussed the significance of Madison's views:

Madison's picture portrays religious liberty as a matter of interacting sovereigns—the Creator as the ultimate source of conscientious obligation, the individual as the vessel of conscience, and civil society as an artificial construct whose very existence is conditioned and bounded by preexisting obligations set up by the other two sources of sovereignty. Significantly, liberty of conscience is in no sense derivative from the state. Exemptions for conscientious conduct are not bestowed as a matter of grace by the state, nor are they the functional equivalent of aid, subsidization, or preferred treatment. They are simply reserved spheres of free conduct built into the original structure of the social compact.

Durham, *supra* note 100, at 82.

108 *Smith*, 494 U.S. at 885; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993).

109 *Hialeah*, 113 S. Ct. at 2233 ("The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'").

110 See Brief for Petitioners at 9, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (No. 91-948).

1. Are Homosexual Rights Laws Religiously Neutral?

Although the Court did not precisely define what it meant by "neutral" laws in *Smith*, it did provide some guidance in *Smith* and even more in *Hialeah*. We know, for example, that a law that is specifically directed at a religious practice, such as a law that bans the casting of "statues that are to be used for worship purposes," is not neutral.¹¹¹ On the other hand, if prohibiting the exercise of religion is not the object of a law "but merely the incidental effect of a generally applicable and otherwise valid provision," the neutrality requirement apparently will be met.¹¹² The Court appears to be saying that "formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause."¹¹³

Formal neutrality is probably satisfied if a legal restriction neither singles out religious practices for special burdens nor adopts classifications which discriminate among classes of religious believers. For example, an across-the-board prohibition of possession and consumption of alcoholic beverages is formally neutral even though it incidentally criminalizes the sacramental use of wine.¹¹⁴ For purposes of *Smith*, it makes no difference that the law is aimed at alcoholic beverages rather than at peyote.¹¹⁵

Suppose a law targets religion by forbidding only the sacramental use of alcoholic beverages. Again this is an easy case under *Smith* and *Hialeah*—such a law is neither religiously neutral nor generally applicable.¹¹⁶

Now consider Prohibition with an exception that allows organized religious groups (but not individuals) to possess sacramental

111 See *Smith*, 494 U.S. at 877-78.

112 *Id.* at 878.

113 *Hialeah*, 113 S. Ct. at 2242 (Souter, J., concurring). The term "formal neutrality" basically adopts a "standard of no religious classifications." See Douglas Laycock, *Formal, Substantive, And Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990). Substantive neutrality on the other hand goes beyond the face of a law and examines its effects. It asks whether government action "encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." *Id.* at 1001. Substantive neutrality is satisfied "when government encouragement and discouragement [of religious belief or practice] is minimized." *Id.* at 1002. An across-the-board prohibition of the use of peyote thus satisfies the requirements of formal neutrality, but probably fails the test of substantive neutrality as applied to the sacramental use of peyote by members of the Native American Church. *Id.* at 1003.

114 *Smith*, 494 U.S. at 884. See also Laycock, *supra* note 113, at 1000.

115 See *Smith*, 494 U.S. at 877, 885.

116 *Id.* at 877-78; *Hialeah*, 113 S. Ct. at 2226-27.

wine for use in religious rites.¹¹⁷ Also suppose this law is being enforced against an individual who wishes to use sacramental wine at home for weekly communion with his family. When the individual asserts a free exercise claim against this governmental burden on his religious worship, does the compelling interest test apply or should his claim be rejected because the burden on his religious exercise is only an incidental effect of a neutral law of general applicability?

The starting point is the Court's statement in *Hialeah* that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"¹¹⁸ Clearly, Prohibition with an exemption for Catholics (but not for other denominations) would fail this test of neutrality and would therefore require a compelling justification.¹¹⁹ At least arguably, the example of Prohibition with an exemption only for organized religious groups is similarly lacking neutrality—sacramental wine is permitted to members of organized religions who wish to celebrate communion in the sanctuary but is forbidden to those who sincerely wish to worship God by celebrating communion at home with members of their family. Since this law is not neutral, its application against individual believers must "undergo the most rigorous of scrutiny."¹²⁰ Further supporting this argument is the Court's reliance, in both *Smith* and *Hialeah*, on *McDaniel v. Paty*¹²¹ as an example of a law that fails neutrality because it imposes "special disabilities on the basis of religious views or religious status."¹²² Just as it undermines neutrality for

117 For example, the National Prohibition Act contained an exemption for sacramental use of alcoholic beverages but expressly prohibited the sale of sacramental alcohol "to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation" National Prohibition Act, ch. 85, § 6, 41 Stat. 305, 311 (1919) (repealed 1933).

118 113 S. Ct. at 2226.

119 *Id.* The Court cited *Fowler v. Rhode Island*, 345 U.S. 67 (1961) as an example of governmental action that failed the test of neutrality. In *Fowler*, the Court held that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching by other denominations.

120 *Hialeah*, 113 S. Ct. at 2233.

121 435 U.S. 618 (1978) (invalidating a Tennessee law that disqualified members of the clergy from serving as legislators).

122 *Smith*, 494 U.S. at 877; *Hialeah*, 113 S. Ct. at 2226. It is important to note that the problem in *McDaniel* was not denominational non-neutrality because the law expressly applied to clergy "of any denomination whatever." *McDaniel*, 435 U.S. at 620. It was discrimination based upon religious status (e.g., member of the clergy) that destroyed the

the state to discriminate against members of the clergy because of their status as such, arguably it also destroys neutrality when the state exempts the religiously motivated behavior of religious institutions (but not that of religious individuals) from restrictive legislation like the hypothetical Prohibition law.¹²³

Now, how does this analysis relate to the question whether typical homosexual rights laws are religiously neutral? An across-the-board prohibition of all employment and housing discrimination by all classes of employers and landlords, like the hypothetical Prohibition law with no exceptions, should pass the test of formal neutrality. Such a law neither targets religious conduct for special disabilities, nor creates religious classifications which discriminate among classes of religious believers.¹²⁴

But now consider a statute, like that of Vermont,¹²⁵ which prohibits employment discrimination on the basis of sexual orientation and provides an exemption for "any religious or denominational institution or organization" to make employment decisions which are "calculated by the organization to promote the religious principles for which it is established or maintained."¹²⁶ Is such a law religiously neutral when enforced against Mike Strong, the hypothetical owner of a Christian book store, who wishes to run his business in accordance with his sincerely held religious beliefs?¹²⁷ Remember, Mr. Strong considers his business a ministry and seeks to use it as a witness to the community of Biblical business ethics. Therefore, he has dismissed an employee because he

neutrality of the Tennessee statute.

123 See *Frazer v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989). *Frazer* held that free exercise protects the religiously motivated conduct of *individual believers* and specifically rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834.

124 See *supra* notes 114-15 and accompanying text.

125 VT. STAT. ANN. tit. 21, § 495 (Supp. 1992).

126 The exception reads in full as follows:

The provisions of this section prohibiting discrimination on the basis of sexual orientation shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained.

VT. STAT. ANN. tit. 21, § 495(e) (Supp. 1992).

127 See *supra* note 6 and accompanying text.

believes her homosexual lifestyle is inconsistent with the personal integrity and character that he expects his employees to model for his customers and the community.¹²⁸

This case is similar in all material respects to our hypothetical case of Prohibition with an exemption only for religious institutions.¹²⁹ And like that case, the Vermont employment statute appears to fail the test of religious neutrality, because its exemption provision creates a religious classification—religiously-motivated employment decisions based upon sexual orientation are allowed when made by religious institutions but prohibited when made by religious individuals. The State of Vermont's attempt to enforce its restrictive law against Strong's religious conscience should be denied unless the state is able to establish a compelling justification for its statutory scheme.¹³⁰

If this argument about the concept of religious neutrality under the *Smith* doctrine is correct, it means that religious exemptions from otherwise general government burdens must be "non-discriminatory"¹³¹—i.e., they must be all or nothing. Partial religious exemptions for some classes of believers destroy neutrality and entitle believers left unprotected by the exemption to strict scrutiny. This result seems consistent with the reasoning of *Smith* and its emphasis on equal protection of religious exercise.¹³² It also ensures that a political consensus for homosexual rights laws and other restrictive legislation cannot be built by trading exemptions to powerful religious institutions in exchange for their support or silence.¹³³

128 *Id.*

129 See *supra* notes 117-23 and accompanying text.

130 *Id.* For an analysis of the compelling interest test in the context of homosexual rights legislation that burdens free exercise, see *infra* notes 172-204 and accompanying text.

131 Although *Smith* holds that the Free Exercise Clause does not require legislatures to enact exemptions for religiously-motivated conduct, the Court expressly stated that "a nondiscriminatory religious-practice exemption is permitted." *Smith*, 494 U.S. at 890 (emphasis added).

132 See Laycock, *supra* note 99, at 11 (*Smith* adopts "an equal protection rule" for free exercise).

133 Powerful religious institutions might oppose homosexual rights legislation if it applied to them, but might withdraw their opposition in exchange for an exemption for religious institutions. Religious neutrality and general applicability forbid these attempts to piece together a political consensus by buying off opposition with partial exemptions. This protection for religious minorities against partial exemption is necessary whether the exemptions discriminate along denominational lines or between institutional and individual believers. See *Hialeah*, 113 S. Ct. at 2226.

Smith seems to be based on the notion that religious freedom is sufficiently protected by laws that treat religiously-motivated persons no better (and no worse) than anyone else. Although I believe free exercise properly understood requires more,¹³⁴ I most certainly believe it requires no less than a kind of most-favored-nation status for religious minorities "caught in conflict with our secular political culture."¹³⁵ If government chooses to exempt only some religious believers from restrictive laws, religiously motivated persons left unprotected by the limited exemption are entitled to rigorous protection under the Free Exercise Clause.

2. Are Homosexual Rights Laws Generally Applicable?

Neutrality and general applicability are interrelated and "failure to satisfy one requirement is a likely indication that the other has not been satisfied."¹³⁶ However, the Court has treated them as two separate requirements, each serving a different purpose.¹³⁷ The purpose of the neutrality requirement is to trigger strict scrutiny whenever governmental restrictions target religion or discriminate among classes of religiously-motivated actors.¹³⁸ The requirement that laws burdening religious practice must be of general applicability, however, is aimed primarily at governmental restrictions that discriminate between religious and secular behavior—a law is generally applicable if it treats religiously-motivated conduct no worse than its secular counterparts.¹³⁹ General applicability becomes an issue whenever a regulatory scheme provides exemptions for some reasons but not for religious reasons.

Returning to our hypothetical Prohibition law, assume that Prohibition is enacted and exemptions are provided only for home consumption and for small, private clubs with less than forty mem-

134 I support pre-*Smith* law which required all governmental burdens on religiously-motivated conduct to undergo a compelling interest test. See *supra* notes 88-90 and accompanying text.

135 See McConnell, *supra* note 87, at 1152. As Professor McConnell points out, although non-mainstream believers are most at risk to be caught in the net of the modern regulatory state, on occasion any person with religious convictions may need the protection of the Free Exercise Clause. *Id.*

136 *Hialeah*, 113 S. Ct. at 2226.

137 *Id.* at 2226-33.

138 See *supra* notes 111-35 and accompanying text.

139 *Hialeah*, 113 S. Ct. at 2232 (stating that free exercise protects religious observers against unequal treatment).

bers. Are religious congregations entitled to strict scrutiny when they raise a free exercise claim against Prohibition's application to them and their desire to use wine for sacramental purposes?

Clearly, if a law is so riddled with secular exemptions that it restricts *only* conduct with a religious motivation, the law is neither neutral nor generally applicable.¹⁴⁰ But what of a law, like the hypothetical one we are discussing, that provides exemptions for only a few secular classes? Does the existence of any exemption scheme that discriminates against religiously-motivated behavior take the case out of *Smith* and trigger strict scrutiny?

Neither *Smith* nor *Hialeah* resolve the issue with certainty, but both cases can be read as supporting the argument that "the allowance of any exemption is substantial evidence that religious exemptions would not threaten the statutory scheme."¹⁴¹ *Smith*, for example, cites *Sherbert* and the other unemployment cases as standing for the proposition "that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."¹⁴² Although part of the Court's concern was with the danger of excessive administrative discretion in schemes involving "individualized governmental assessment" of exemptions,¹⁴³ abuse of discretion is not the only (nor even the primary) concern of the requirement of general applicability. As Justice Kennedy stated in his opinion for the Court in *Hialeah*, protecting religious observers against unequal treatment is the central goal of the requirement and, therefore, "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."¹⁴⁴ *Smith* may have reduced free exercise to a

140 *Id.*

141 *Laycock, supra* note 99, at 50. "The state may conceivably have a compelling reason for denying some claims to religious exemption even though it grants other exemptions, but such cases should be quite rare." *Id.*

142 *Smith*, 494 U.S. at 884.

143 *Id.* In *American Friends Serv. Comm. v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1991), the court held that the Immigration Reform and Control Act was generally applicable even though it contains exceptions for large classes of persons. The court concluded that because "those exceptions exclude entire, objectively-defined categories of employees from the scope of the statute" they are not "individualized exemptions" within the meaning of *Smith* and the doctrine of general application. *Id.* at 1408. *See also* *Intercommunity Ctr. for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990). The conclusions in both of these cases were reached, as Justice Stevens might say, with hardly a whisper of analysis regarding the principle of general applicability and its relationship to equal protection of free exercise of religion. *See infra* note 144 and accompanying text.

144 *Hialeah*, 113 S. Ct. at 2232. Restrictions that are underinclusive—by failing to pro-

rule of equal treatment for religious observers, but when equality is lacking the Free Exercise Clause still has teeth and requires that religious observers be treated no worse than other classes recognized by the regulatory scheme.

If this analysis is correct, the Prohibition law under discussion requires a compelling justification, because the scheme of exemptions discriminates against religious congregations seeking access to wine for sacramental purposes. This is the correct result because if free exercise means anything after *Smith*, it should not permit a state to prefer social and in-the-home use of alcoholic beverages over sacramental use by church congregations. Properly understood, *Smith* means that religious observers must live by the same rules as everyone else in society. But when legislative majorities begin handing out exemptions to various classes of persons, religious observers are entitled to equal exemptions.

Now let's apply this analysis to homosexual rights laws. Typically, these laws prohibit discrimination on the basis of sexual orientation in employment and housing, but also contain a number of exemptions for various classes of persons. Although these statutes usually contain an exemption for religious institutions, they do not provide a general exemption for religiously-motivated behavior by non-institutional believers.¹⁴⁵ Are these laws "generally applicable" under the Free Exercise Clause and the *Smith* doctrine?

For example, Connecticut forbids landlords from making distinctions on the basis of sexual orientation, but exempts owner occupied dwellings "containing not more than four units."¹⁴⁶ Similarly, California prohibits employers from discriminating on the basis of sexual orientation but defines "employer" to exempt those who regularly employ fewer than five persons,¹⁴⁷ and Minnesota's statute contains an exemption for the employment of domestic servants.¹⁴⁸ None of these regulatory restrictions contain exemptions for religious individuals who wish to manage their businesses

hibit non-religious conduct that endangers governmental interests "in a similar or greater degree" than the restricted religiously-motivated conduct—do not satisfy the requirement of general applicability. *See id.*

145 *See supra* statutes cited at note 82. For a discussion analyzing exemptions which discriminate between institutional and individual religious actors, see *supra* notes 111-35 and accompanying text.

146 CONN. GEN. STAT. ANN. § 46a-81e(b) (West Supp. 1993).

147 CAL. LAB. CODE § 1102.1(b)(1) (West Supp. 1994).

148 1993 Minn. Sess. Law. Serv. 82 (West) (amending MINN. STAT. 1992 § 363.02(1) (1992)).

and properties in accordance with deeply-held religious beliefs concerning the morality of homosexual behavior. Are these laws generally applicable?

If *Smith* is serious about protecting religious freedom against unequal governmental burdens, the answer must be that none of these laws is generally applicable because all of them create unequal exemptions. Consider our earlier hypothetical involving Mrs. McCabe, the elderly widow who owns and manages a five-plex apartment building.¹⁴⁹ As a devout Roman Catholic, she believes that it is sinful for her to rent an apartment in her building to unmarried homosexual or heterosexual cohabiting couples. Under the Connecticut statute discussed above, she is guilty of a crime if she follows her religious beliefs and refuses to rent an apartment to homosexual cohabitants. However, the owner of a neighboring four-unit apartment building is entitled to a statutory exemption so long as he resides in the building. Although this exemption may be reasonable in its attempt to protect the autonomy and associational interests of small landlords, the Free Exercise Clause demands that Mrs. McCabe's religiously-motivated behavior be given the same treatment unless the state has a compelling justification for its scheme of unequal exemptions.

Likewise, the California and Minnesota statutes are not generally applicable as applied to Mike Strong, the owner of the Christian book store. Since Strong's book store employs ten workers, if it were located in California Strong would not be covered by the exemption for employers of fewer than five persons. And if his business were located in Minnesota, Strong's book store would not qualify for the domestic servants exemption. The result in both states is the same—religious exercise is restricted while some other interests are not. Although there may be good reasons for California to protect small businesses and for Minnesota to protect the autonomy of employers of domestic servants, the decision to give these interests protection denied to religious observers ought to trigger rigorous scrutiny under what remains of the Free Exercise Clause in the wake of *Smith*.

C. *Do Homosexual Rights Restrict Smith "Hybrid" Claims?*

In *Smith*, the Court recognized one class of free exercise claims that continues to require even neutral and generally appli-

149 See *supra* note 7 and accompanying text.

cable laws to pass the compelling interest test—so-called “hybrid” claims in which the Free Exercise Clause is reinforced by another constitutional interest such as free speech, association, or the right of parents to control the education of their children.¹⁵⁰ As a student commentator has observed, the free exercise hybrid doctrine appears to have been created to distinguish away cases, such as *Wisconsin v. Yoder*,¹⁵¹ which were seemingly inconsistent with the general rule of *Smith*.¹⁵² *Yoder*, of course, is the 1972 decision in which the Court held that Wisconsin’s compulsory attendance laws could not be enforced against Old Order Amish parents who, for religious reasons, declined to send their children to public or private school beyond the eighth grade.¹⁵³ Although *Yoder* had always been regarded as one of the Court’s landmark free exercise cases, Justice Scalia practiced alchemy on it in *Smith* and it emerged not as a free exercise case but as a “hybrid” linking free exercise to the right of parents “to direct the education of their children.”¹⁵⁴

Exactly what is this new invention of Justice Scalia and the majority in *Smith*? What is a hybrid case? If a party already has a constitutional claim under the Free Speech or Due Process Clause, what is the significance of linking that claim with a free exercise claim? What does the free exercise clause add to the equation?

Clearly, what the Court must have meant is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the

150 *Smith*, 494 U.S. at 881-82. See generally Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the “Hybrid Situation” in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993).

151 406 U.S. 205 (1972).

152 See Fry, *supra* note 150, at 835. See also McConnell, *supra* note 87, at 1121 (“One suspects that the notion of ‘hybrid’ claims was created for the sole purpose of distinguishing *Yoder*.”) The hybrid concept may not be an entirely new idea in constitutional law. It might, for example, explain how the Court, in *Stanley v. Georgia*, 394 U.S. 557 (1969), found a right to possess obscene publications in the home. Although *Stanley* involved a lawful search under the Fourth Amendment and obscene materials which generally are not protected by the First Amendment, the Court held that possession of obscene material in the privacy of one’s home could not constitutionally be made a crime. *Id.* at 559, 568. The Court expressly indicated that the case had an “added dimension” because a privacy interest was linked to a free speech interest. *Id.* at 564. The arithmetic of *Stanley* goes something like this: “First amendment satisfied plus fourth amendment satisfied equals Constitution unsatisfied.” See Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the Bowers v. Hardwick Dissent*, 25 WAKE FOREST L. REV. 501, 512 (1990).

153 *Yoder*, 406 U.S. at 213-15, 234-35.

154 *Smith*, 494 U.S. at 881.

compelling interest test. In other words, the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim. Professor Mark Tushnet agrees with this analysis and explains the hybrid process this way:

It is important to understand that this model makes sense only on the assumption that the second claim standing alone would also not trigger the [compelling interest test], for otherwise it is the second claim alone, and without any contribution from the Free Exercise claim, that does the work

The idea underlying this . . . distinction, then, must be that there are "interests" related to values protected by the Constitution which are not themselves rights protected by the Constitution, and that sometimes these interests can be added together to yield the equivalent of a constitutional right.¹⁵⁵

A good example of a hybrid claim at work is contained in the recent decision of a federal district court in *Alabama and Coushatta Tribes of Texas v. Big Sandy School District*.¹⁵⁶ *Big Sandy* involved a free exercise challenge by Native American students to a generally applicable school hair code that required boys to grow their hair "no longer than the top of a standard dress collar."¹⁵⁷ The court avoided the general rule of *Smith* by noting that the plaintiffs' claim was a *Smith*-hybrid, because their free exercise claim¹⁵⁸ was reinforced both by a free speech claim and by a parental rights claim.¹⁵⁹ The court concluded that since the Native American students had established a substantial likelihood of success on the merits, they were entitled to a preliminary injunction against enforcement of the hair regulation.¹⁶⁰

In *Smith*, the Court said hybrid claims will be recognized in at least three circumstances: (1) when a free exercise claim is linked to a free speech or free press claim; (2) when a free exercise claim is linked to a claim of freedom of association; and (3) when

155 Mark Tushnet, *Public and Private Education: Is there a Constitutional Difference*, 1991 U. CHI. LEGAL FORUM 43, 71-72. *But see* Fry, *supra* note 150, at 847: "Subsequent lower court case law has interpreted Justice Scalia's hybrid situation to require free exercise claimants to assert free speech rights that are strong enough that, were they standing alone, they would be sufficient claims." The same author recognizes, quite correctly, that this narrow interpretation of the hybrid exception "may not be mandated by *Smith*." *Id.*

156 817 F. Supp. 1319 (E.D. Tex. 1993).

157 *Id.* at 1323.

158 Plaintiffs alleged that they had sincerely held religious beliefs regarding the spiritual significance of wearing long hair. *Id.* at 1324-26.

159 *Id.* at 1332-36.

160 *Id.* at 1336.

a free exercise claim is linked to a claim based upon the right of parents to direct the education of their children as recognized in *Pierce v. Society of Sisters*¹⁶¹ and *Yoder*.¹⁶² Although litigants should always attempt to hybridize their free exercise claims by linking them to another constitutional interest, the hybrid doctrine probably will not provide much protection to most religious observers challenging homosexual rights laws.

For example, in our hypothetical cases,¹⁶³ neither Mr. Strong nor Mrs. McCabe appears to have a hybrid claim—their free exercise claims appear unrelated to either free speech or parental rights concerns, and any attempt to link free exercise with freedom of association is likely to be unpersuasive in cases involving commercial enterprises.¹⁶⁴ Moreover, it is unlikely that the Court will recognize a hybrid claim if Strong and McCabe attempt to link free exercise to unenumerated property rights.¹⁶⁵

However, one class of our hypothetical litigants, Holy Savior School and the parents of children attending the school, appears

161 268 U.S. 510 (1925). In *Pierce*, the Court struck down an Oregon law that required most children between the ages of eight and sixteen to attend public school. *Id.* at 530-31. The Court held that the Oregon legislation unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. The unanimous opinion of the Court recognized this parental right regarding education as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 535. See also *Meyer v. Nebraska*, 262 U.S. 390 (1923). The leading modern case recognizing this parental right is *Wisconsin v. Yoder*, in which the Court noted that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. 205, 232 (1992). Although *Pierce* grounded parental rights in substantive due process, in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the Court declared that this liberty is also rooted in free speech.

162 *Smith*, 494 U.S. at 881. For a recent decision finding a free-exercise/parental-rights hybrid in the context of a home school case, see *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993).

163 See *supra* notes 5-7 and accompanying text.

164 The Supreme Court has recognized a constitutional right of association in two distinct senses, neither of which seems applicable to Strong and McCabe's commercial activities. First, "the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Second, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618. Neither Strong's desire to choose his employees, nor McCabe's wish to select her tenants, implicates the freedom of association as defined by the Court. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.41, at 1063 (4th ed. 1991).

165 See *American Friends Serv. Comm. v. Thornburgh*, 961 F.2d 1405, 1408 (9th Cir. 1992) (no hybrid claim stated when free exercise linked to substantive due process "right to employ").

to have a classic hybrid claim under *Smith*. Their free exercise claim is reinforced by all three of the interests mentioned in *Smith*—by the right of parental choice in education,¹⁶⁶ by the free speech principle that the state may not “contract the spectrum of available knowledge” by restricting educational alternatives such as an authentically religious education,¹⁶⁷ and by the freedom of expressive association.¹⁶⁸

Finally, one other situation in which a hybrid claim may be available to an employer or landlord challenging a homosexual rights ordinance could involve a statute which attempts to regulate not only conduct, but also speech. For example, the Hawaii employment discrimination law provides that it is an unlawful discriminatory practice for any employer “to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication . . . which expresses, directly or indirectly, any . . . discrimination.”¹⁶⁹ Obviously, a religious employer charged with violating this provision for making statements about the immorality of homosexuality would have a strong free speech claim.¹⁷⁰ But he would also have a textbook hybrid claim in which free exercise is reinforced by free speech.¹⁷¹

D. *Do Homosexual Rights Laws Pass Strict Scrutiny?*

A law restricting religious exercise that falls outside *Smith*'s general rule of judicial deference because it fails the test of neutrality and general applicability—or, presumably, because it bur-

166 See *supra* note 161.

167 *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

168 See *supra* note 164. Holy Savior School is a pervasively religious school founded to provide students with an education from an orthodox Christian perspective and to employ teachers and staff members to serve as role models of the Christian life. See *supra* text accompanying note 5. Therefore, it is exactly the kind of “collective effort on behalf of shared goals” envisioned by the Court as protected by the freedom of association. *Roberts*, 468 U.S. at 622. See also *NAACP v. Alabama*, 357 U.S. 449 (1958). Obviously, the primary purpose of the collective effort at Holy Savior School is an expressive one, the teaching and learning of knowledge about God's world from God's perspective. As the Court noted in *Roberts*, protection of these expressive communities “is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Roberts*, 468 U.S. at 622.

169 HAW. REV. STAT. § 378-2(C) (1992 Supp.)

170 See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). See also Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harrassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harrassment*, 68 NOTRE DAME L. REV. 1003 (1993).

171 See *supra* notes 156-62 and accompanying text.

dens a hybrid interest—"must undergo the most rigorous of scrutiny."¹⁷² The Court went out of its way in *Hialeah* to emphasize that "[t]he compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'"¹⁷³ Thus, homosexual rights laws that trigger strict scrutiny upon impact with a qualified free exercise claim will be upheld only if they further a governmental interest of the highest order and are "narrowly tailored in pursuit of those interests."¹⁷⁴ The Court went so far as to suggest that such laws "will survive strict scrutiny only in rare cases."¹⁷⁵ If my analysis is correct in its conclusion that most homosexual rights laws will trigger strict scrutiny under *Smith* when challenged by religiously-motivated employers and landlords,¹⁷⁶ then there is every reason to believe that these restrictions are unconstitutional.

Are homosexual rights laws capable of passing through the gauntlet of superlatives required by an undiluted test of strict scrutiny? Are these laws really the least restrictive means of effectuating a truly compelling governmental interest?

In *Bob Jones University v. United States*,¹⁷⁷ the University, a nondenominational school with what the Court called a "fundamentalist Christian" world view,¹⁷⁸ was denied tax exempt status due to its policy forbidding interracial dating. Although the Court determined that the denial of tax benefits available to other educational institutions had a "substantial impact" on the University's free exercise of religion,¹⁷⁹ this burden was justified by the government's "fundamental, overriding interest in eradicating racial discrimination in education."¹⁸⁰ The Court suggested that the

172 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993).

173 *Id.* (quoting *Smith*, 494 U.S. at 888). Thus, although *Smith* constricted the reach of the Free Exercise Clause, the Court has made clear that "within this narrowed field, the degree of protection has been intensified." Brief Amicus Curiae of Americans United for Separation of Church and State at 15, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (No. 91-948).

174 *Hialeah*, 113 S. Ct. at 2233.

175 *Id.*

176 Most such laws trigger strict scrutiny because they are either not neutral or not generally applicable. See *supra* notes 108-49 and accompanying text. Moreover, at least a few applications of these laws will burden *Smith*-hybrid claims. See *supra* notes 150-71 and accompanying text.

177 461 U.S. 574 (1983).

178 *Id.* at 580.

179 *Id.* at 603-04.

180 *Id.* at 604.

government's interest in eliminating racial discrimination was truly extraordinary, because "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education."¹⁸¹ As one commentator recently observed, the decisive factor in *Bob Jones* was that a religious community challenged the correctness of a public policy "to which the legal and political system is deeply committed, and on which the prestige of the modern Supreme Court is largely based."¹⁸² Indeed, the Court in *Bob Jones* cited an unbroken line of its past decisions that "establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy."¹⁸³

In *Roberts v. United States Jaycees*,¹⁸⁴ the Court provided an even clearer picture of its view of the compelling interest test in the context of antidiscrimination laws. *Roberts* concerned a conflict between the State of Minnesota's "efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization."¹⁸⁵ The Court held that the state's "compelling interest in eradicating discrimination against its female citizens" justified its law requiring the Jaycees to admit women as full voting members.¹⁸⁶

The Court noted that discrimination on the basis of gender is "invidious" and produces "special harms"¹⁸⁷ because it is based upon "archaic and overbroad assumptions about the relative needs and capacities of the sexes" and therefore "forces individuals to labor under stereotypical notions that often bear no relationship

181 *Id.* at 595.

182 McConnell, *supra* note 107, at 203.

183 *Bob Jones*, 461 U.S. at 593. In his concurring opinion in a similar case involving racial discrimination by a private religious school, Circuit Judge Goldberg explained the compelling justification for laws prohibiting racial discrimination:

The constitutional imperative to eliminate the badges of slavery has not dimmed in the 114 years since President Lincoln issued the Emancipation Proclamation. The compelling governmental interest in moving nearer that noble goal overrides appellant's interest in preserving a "very minor" religious practice.

Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977) (Goldberg, J., concurring), *cert. denied*, 434 U.S. 1063 (1978).

184 468 U.S. 609 (1984).

185 *Id.* at 612.

186 *Id.* at 623.

187 *Id.* at 628.

to their actual abilities."¹⁸⁸ In other words, gender—like race—tells us nothing about a person's character or abilities. People should be judged on the "content of their character" not on their gender or on the color of their skin.¹⁸⁹ The Minnesota law prohibited the Jaycees from relying on "unsupported generalizations" about gender,¹⁹⁰ but left them free "to exclude individuals with ideologies or philosophies different from those of its existing members."¹⁹¹

Under *Roberts* then, there is a crucial difference between discrimination based upon racial and gender stereotypes, and discrimination on the basis of more reliable evidence of character and aptitude. For example, discrimination against members of a particular race or gender based on the unsupported generalization that the particular group is "shiftless and lazy" is invidious discrimination which the state has a compelling interest to eradicate. However, discrimination against individuals who identify themselves as being shiftless and lazy, perhaps by marching in a parade under the banner "shiftless, lazy, and proud," is not invidious and the state has no compelling reason to intervene.

In the only decision of an appellate court to reach the issue whether there is a compelling justification for homosexual rights laws, *Gay Rights Coalition v. Georgetown University*,¹⁹² the District of Columbia Court of Appeals held that the District of Columbia ordinance was justified because "[a] homosexual orientation tells nothing reliable about abilities or commitments in work, religion, politics, personal and social relationships, or social activities . . ."¹⁹³ Unfortunately, the court did not explain this highly controversial conclusion. Did the court mean that homosexual conduct of various sorts is irrelevant to character? If homosexual conduct is morally neutral then it would seem to follow that homosexual inclinations are morally neutral. But if it is reasonable to believe that homosexual behavior is morally significant and reflects on a person's character, then why isn't it also reasonable to believe that homosexual orientation is a good proxy for homosexual behavior (and, thus, at least a reasonably reliable predictor of character).

188 *Id.* at 625.

189 *See supra* notes 37-38 and accompanying text.

190 *Roberts*, 468 U.S. at 628.

191 *Id.* at 627.

192 536 A.2d 1 (D.C. 1987).

193 *Id.* at 35.

Suppose, for example, that an applicant for employment informs the employer that he is gay. Or suppose an employer sees an employee marching in a gay pride parade while carrying a sign which states "I'm gay and I'm proud." Or suppose two male applicants for an apartment are seen kissing in the hallway by the manager of the complex. Although in none of these examples did anyone witness same-gender genital contact, in each of them the decision maker is relying on much more than "unsupported generalizations" or "stereotypical notions" to quote the Court in *Roberts*.¹⁹⁴

Recently, the issue before the Seventh Circuit, in a case involving the military's ban of homosexuals, was the significance of a person's admission that she is a lesbian.¹⁹⁵ The court concluded that this admission of sexual orientation

if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.¹⁹⁶

The Seventh Circuit's reasoning is more persuasive than that of the D.C. court in the *Georgetown* case. Discrimination on the basis of homosexual orientation is not invidious—it is a rational and reasonable attempt to take into account the character of a person who has a propensity to engage in morally controversial behavior.¹⁹⁷

194 See *supra* notes 187-90 and accompanying text.

195 *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom.*, *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990).

196 *Ben-Shalom*, 881 F.2d at 464.

197 A recent statement of "observations" issued by the Vatican as a background resource for bishops concurs:

"Sexual orientation" does not constitute a quality comparable to race, ethnic background, etc., in respect to non-discrimination. Unlike these, homosexual orientation is an objective disorder . . . and evokes moral concern.

Vatican Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons*, reprinted in 22 ORIGINS: CNS DOCUMENTARY SERVICE, Aug. 6, 1992, at 176.

Moreover, it is not discrimination against an economically impoverished class of citizens. As previously discussed, the available data indicates that homosexual rights legislation is not necessary to provide economic equality for homosexuals—as a class, homosexuals are economically *advantaged*, and are more likely to have a professional or managerial career than are heterosexuals.¹⁹⁸ These laws seem to be the result more of interest group politics¹⁹⁹ than a conscious and deep commitment on the part of society to embrace the homosexual lifestyle as an interest of the highest order. However you view the state's interest in legislating homosexual rights, it is far from compelling.²⁰⁰

What is more, typical homosexual rights laws also fail the second part of the compelling interest test, because they are not the least restrictive means of carrying out the state's interests in protecting homosexuals. As previously discussed, these statutes usually contain a number of exemptions for small businesses and other classes of employers and landlords²⁰¹ and the existence of these secular exemptions "is substantial evidence that religious exemptions would not threaten the statutory scheme."²⁰² Recognition of a free exercise exemption would not destroy the state's asserted interest in providing housing and employment opportunities to homosexuals—religious observers would be treated the same as other classes entitled to exemptions, but the laws could still be enforced widely to achieve most, if not all, of the intended legislative benefits.²⁰³ Once a free exercise claim satisfies the re-

198 See *supra* notes 49-54 and accompanying text.

199 For a self-described "manifesto" setting forth in detail the strategy for this political and media campaign, see KIRK & MADSEN, *supra* note 73. See also Altman, *supra* note 19, at 125 ("the contemporary gay movement is following the style of traditional American pressure-group politics, working through sympathetic politicians and party organizations").

200 In *Donahue v. Fair Employment & Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. App. 2d Dist. 1991), *review granted*, 825 P.2d 766 (Cal. 1992); *review dismissed* and *cause remanded*, 859 P.2d 671 (Cal. 1993), a California appellate court held that in the hierarchy of state interests a law prohibiting housing discrimination against unmarried cohabitants was not compelling. The court observed that the state housing commission had "failed to explain what exactly is so invidious or unfairly offensive in not treating unmarried cohabiting couples as if they were married." *Id.* at 46. See also SEXUAL ORIENTATION AND THE LAW, *supra* note 23, at 160 (noting that "[b]ecause the Supreme Court has refused to define homosexuality as a suspect classification," the state interest in protecting homosexuals against private discrimination is not a "sufficiently compelling justification" for restricting free exercise).

201 See *supra* notes 145-48 and accompanying text.

202 Laycock, *supra* note 99, at 50.

203 *Donahue*, 2 Cal. Rptr. 2d at 45 (free exercise exemption did not threaten goal of prohibiting discrimination in housing against unmarried applicants because only a limited

quirements of the *Smith* doctrine, the state should have a heavy burden of proving that a free exercise exemption would frustrate the legislation's goals. Mere assertions of necessity are inadequate when laws threaten fundamental rights of religious conscience.²⁰⁴

IV. THE RELIGIOUS FREEDOM RESTORATION ACT

As this Article was about to go to press, the Religious Freedom Restoration Act of 1993 ("RFRA")²⁰⁵ was signed into law by President Clinton. This law, which was supported by an amazing bipartisan coalition of liberals, moderates, and conservatives,²⁰⁶ recognizes that *Smith* "virtually eliminated" constitutional protection of religious freedom²⁰⁷ and seeks to restore that protection by creating a statutory exemption for religiously-motivated behavior burdened by governmental action. Specifically, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . ."²⁰⁸ There is only one exception to this otherwise absolute rule forbidding governmental burdens on religious freedom—government may substantially burden religious exercise only if it acts "in furtherance of a compelling governmental interest"

number of housing units would qualify for the exemption and "the state's . . . interest in providing housing is otherwise served by a plethora of other housing legislation"). As Prof. Rivera's research has shown, many labor unions and corporations have policies already in place stating that sexual orientation is not a factor in employment. Rivera, *supra* note 39, at 477-79.

204 In *State v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986), the Minnesota Supreme Court merely asserted that a free exercise exemption would frustrate the state's goal of eliminating discrimination. This case hardly seems to live up to the notion of "most rigorous" scrutiny required for free exercise claims under *Hialeah*. See *supra* notes 172-74 and accompanying text.

205 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

206 For example, in the United States Senate, which approved the bill by a vote of 97-3, its sponsors included liberal Sen. Edward M. Kennedy and conservative Sen. Orrin G. Hatch. Moreover, groups supporting the bill included the National Association of Evangelicals, the National Council of Churches, the Traditional Values Coalition, and the American Civil Liberties Union. This remarkable alliance led President Clinton to remark that the "power of God is such that even in the legislative process miracles can happen." Peter Steinfeld, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

207 Religious Freedom Restoration Act of 1993 § 2(a)(4).

208 *Id.* at § 3(a). The reference to governmental action "substantially" burdening religious exercise was added to clarify that RFRA was intended to codify "prior caselaw, which does not protect persons against State actions which have only an incidental burden on their religious exercise." 139 CONG. REC. H8714 (daily ed. Nov. 3, 1993) (statement of Rep. Brooks).

and by “the least restrictive means of furthering that compelling governmental interest.”²⁰⁹ In effect, RFRA creates, as a matter of national civil rights policy, a statutory exemption for free exercise equal in scope to the pre-*Smith* constitutional rule.²¹⁰

As applied to typical homosexual rights laws, RFRA provides that—even if these laws are neutral and generally applicable—they may not be enforced against religiously-motivated discrimination unless the government is able to demonstrate that the legislation is the least restrictive means of furthering a governmental interest of the highest order. As previously discussed, this test is a very rigorous one and should be difficult, if not impossible, for the state to pass in the context of homosexual rights in employment and housing.²¹¹

V. A NARRATIVE AND A CONCLUSION

A. *Narrative: How I Learned Who Wants to Stop The Church*

Shortly after *Smith* was decided, a colleague observed that the church could now be regulated to the same extent as General Motors.²¹² Although the analogy seemed apt, the threat appeared remote. Surely, I thought, Ralph Nader doesn’t wish to require air bags to be installed in church pews. “Who,” I asked myself, “has a regulatory agenda that includes the church? Who wants to stop the church?”

A few months later, the answer came to me when I was asked to participate in a panel discussion on government-subsidized art and censorship. The panel discussion was to take place at the University film theater, and I prepared my remarks for what I thought would be a typical University crowd—English professors wearing tweed jackets and sandals (with socks!) armed with quotations from Milton’s *Areopagitica*. But as I walked into the screening room at the theater, I sensed the room was filled with hate and anger, not intellectual fervor.

One of the films being screened for our presentation was Robert Hilferty’s STOP THE CHURCH, a self-described “documentary” about what can only be described as a hate crime—the illegal disruption of Mass at St. Patrick’s Cathedral by a group of homo-

209 Religious Freedom Restoration Act of 1993 § 3(b).

210 *See id.* at § 2(a)(5).

211 *See supra* notes 172-204 and accompanying text.

212 *See Laycock, supra* note 113, at 1009.

sexual and abortion activists. I had come prepared to witness what I thought would be offensive films, but I was totally unprepared for the hatred and blasphemy that flickered on the big screen.

Let me share with you just a few examples of this film's Christophobia.²¹³ When asked to describe the Catholic Church, one woman responds: "The Catholic Church is hypocrisy and hate." When asked the same question, a man says: "The Catholic Church is arrogant, sterile, retrograde, blind." Another man is even more forthcoming: "The Catholic Church is a tiny, anachronistic, feudalist leftover which practices ritual sacrifice on the bodies of gay men, lesbians, women, and people of color."

The scene shifts to inside St. Patrick's Cathedral where the filmmaker ridicules worshippers with a tune called *The Vatican Rag*:

First you get down on your knees
Fiddle with your rosaries
Bow your head with great respect
And genuflect, genuflect, genuflect.

Another scene change and we are privileged to witness the activists at a pep rally warming up for their demonstration. A sign declares, "Curb Your Dogma." A man shouts: "The Church is our enemy." A woman tells the crowd that "freedom of religion is bullshit, man." And so they seem to think it is. The film concludes with coverage of the illegal disruption of Mass at St. Patrick's—shrill whistles blowing, demonstrators screaming insults, many people blocking aisles and the Communion rail in a mock "die-in."

The audience here at the University was enthralled. They particularly loved the scene in which Catholic worshippers were ridiculed by the filmmaker's clever use of *The Vatican Rag*. I was ashamed of my University that evening for sponsoring this "documentary," but I was even more ashamed for those in the audience who so thoroughly enjoyed this angry, hateful, Christophobic film.

213 I use this term, which refers to the fear and loathing of Christians (particularly orthodox Christians who have the courage to take a public stand in defense of Biblical morality), advisedly and literally. STOP THE CHURCH is pure hate. For a compelling account of a pastor of a small church in San Francisco who became the target of Christophobic violence and hatred when he fired his church's organist after discovering he was a practicing homosexual, see CHUCK MCLHENNY ET AL., WHEN THE WICKED SEIZE A CITY (1993). Pastor McIlhenny's successful battle for religious freedom is reported in Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980).

In the car on the way home I realized that I had just learned who has a regulatory agenda aimed at stopping the Church, one designed to "curb" those who believe in the orthodox teachings of Christianity, Judaism, Islam, and other religious traditions about sin and about sexuality. It was at that moment (or soon after) that I decided to write this Article about the tension between religious freedom and gay rights.

Religious freedom may be "bullshit" to some, but I believe it is the cornerstone of our scheme of government. Charles Kingsley speaks of two kinds of freedom, "the false where one is free to do what he likes, and the true where he is free to do what he ought."²¹⁴ Gay rights legislation shackles true freedom in the chains of false freedom. At least, that's what I learned at the movies.

B. Conclusion

As Douglas Laycock has noted, unless the Court gives full scope to the exceptions to the general rule of *Smith*, that general rule of no free exercise protection for religiously motivated conduct will create a "legal framework for persecution."²¹⁵ Just as our federal government once "was quite willing to destroy Mormonism entirely if that were necessary to suppress polygamy,"²¹⁶ it is not inconceivable that government may be willing to destroy orthodox Christianity, Judaism, and Islam if necessary to protect homosexuals from discrimination in employment, housing, and public accommodations. The scenario could go something like this. First, prosecute individual believers like Margaret McCabe and Mike Strong for discriminating against homosexuals in housing and employment.²¹⁷ Next, prosecute Christian schools²¹⁸ and

214 THE INTERNATIONAL ENCYCLOPEDIA OF QUOTATIONS 308 (John P. Bradley et al. eds., 1978).

215 Laycock, *supra* note 99, at 59.

216 *Id.* at 62. "The government prosecuted . . . Mormons for polygamy, it imposed test oaths that denied Mormons the right to vote, and it dissolved the Mormon Church and confiscated its property. The Supreme Court upheld all of this." *Id.* (footnotes omitted). See generally EDWIN B. FIRMAGE & R. COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900 (1988); LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS (1979). As Professor Laycock documents, religious persecution "can happen, is happening, in the United States, even in 1991." Laycock, *supra* note 99, at 67. "[U]nfamiliar, high-demand, proselytizing religions" are particularly vulnerable to present-day inquisitions. *Id.* at 64.

217 Cf. *Donahue v. Fair Employment & Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. App.

even churches²¹⁹ that discriminate against homosexuals. Then, withdraw tax exempt status from religious schools that forbid homosexual dating or even from churches that refuse to ordain homosexual pastors.²²⁰

Religions that make peace with the spirit of the age have little to fear from the rulers of the day. But believers who refuse to adapt their religious practices to the *Zeitgeist* are vulnerable under *Smith*, unless the Court decides to protect religious pluralism by giving full scope to *Smith's* exceptions.²²¹

I have tried to show that homosexual rights legislation imposes heavy costs on the right of employers and landlords to take character into account when making business decisions. These costs are particularly heavy when borne by religiously-motivated persons, who are declared outlaws merely for trying to obey God in the conduct of their businesses. As Professor Laurence Tribe once stated in a different context, "the power to reinforce one type of relationship must not extend to an authority to stamp out another."²²²

2d Dist. 1991), *review granted*, 825 P.2d 766 (Cal. 1992); *review dismissed and cause remanded*, 859 P.2d 671 (Cal. 1993); *Commonwealth of Massachusetts v. Desilets*, No. 90-178 (Super. Ct. Mass. Dec. 21, 1992).

218 See *Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C. 1987).

219 See *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980).

220 Cf. *Bob Jones University v. United States*, 461 U.S. 574 (1983). If religiously-motivated individuals are persecuted merely for trying to live out their faith, there is no good reason to believe that the institutional church will be safe in the sanctuary when it engages in the same acts of obedience to God. Perhaps the true meaning of *Smith's* concept of religious neutrality is "[w]e must indeed all hang together, or most assuredly we shall all hang separately." The quoted language, of course, is Benjamin Franklin's famous statement at the signing of the Declaration of Independence. JOSEPH R. CONLIN, *THE MORROW BOOK OF QUOTATIONS IN AMERICAN HISTORY* 112 (1984).

221 RFRA is not sufficient to protect religious freedom from this risk, because as an act of Congress RFRA can be repealed at any time. Moreover, if Congress enacts homosexual rights legislation, it can avoid a conflict with RFRA simply by providing an explicit override. See *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, § 6(b), 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

222 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 989 (1978). Gay rights laws thus legislate one view of sexual morality—that of sexual relativism—and then enforce this code of morality in society to stigmatize orthodox religious believers as homophobes whose religious exercise is nothing more than irrational bigotry (and thus deserving of discouragement). As Professor Karst has observed in another context, it is illegitimate for a political majority "to use the power of government to express its moral values by stigmatizing another group." Karst, *supra* note 39, at 729. Through homosexual rights laws, the state chooses sides in the cultural war that has divided our society, and one side—orthodox religion—"is on the receiving end of the law's stigma and consequential material harms." *Id.*

Homosexuals are not similarly situated to racial and ethnic minorities and other groups protected by antidiscrimination laws, both because homosexuality remains a matter of moral controversy and because homosexuals have not been economically impoverished by pervasive and invidious discrimination. Therefore, the effect of homosexual rights legislation is primarily symbolic—the values of the sexual revolution are codified and legitimized (and inconsistent world views are correspondingly marginalized). I believe the costs of homosexual rights laws are too high, and I see no benefit even remotely worth the cost. These laws should not be passed and, where passed already, they should be repealed.

I have also tried to show that even under *Smith* (as properly understood) most homosexual rights laws are unconstitutional when enforced against employers and landlords who make distinctions on the basis of religious beliefs concerning sexual morality. Typical homosexual rights laws are neither neutral nor generally applicable. And, at least on occasion, these laws burden *Smith*-hybrid rights. Therefore, they must undergo the most rigorous of scrutiny when challenged by religiously-motivated actors. These laws cannot pass strict scrutiny, because they are not necessary means of achieving compelling governmental ends.²²³

If I am wrong and the Court allows homosexual rights laws to be enforced against religiously-motivated actors, it could be the beginning of the end for religious pluralism in America.²²⁴ Reli-

223 Shelley Wessels and Bruce Bagni argue for a more crabbed role for free exercise when it collides with restrictive anti-discrimination laws. They basically adopt a "prayer closet" approach to religious freedom which denies protection to believers when they "turn outward toward the world," to quote Wessels. Under this approach, which is inconsistent with the text, history, and caselaw of the Free Exercise Clause, religious freedom would receive little or no protection when believers have the audacity to venture out into what Professor Bagni refers to as "the secular world." Shelly K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1223 (1989); Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979).

224 A recent event in San Francisco provides further evidence that gay rights and religious pluralism are incompatible values. A committee of the San Francisco Board of Supervisors voted unanimously to urge mayor Frank Jordan to remove an African-American Baptist minister from his seat on the city's Human Rights Commission. It seems the minister, Rev. Eugene Lumpkin, had enraged gays and lesbians when he stated in a newspaper interview that homosexuality is a sin and "an abomination against God." Apparently this interpretation of the Bible disqualifies a person from holding public office in San Francisco. See Dan Levy, *New Push to Oust S.F. Rights Panelist*, S.F. CHRONICLE, Aug. 5, 1993, at A15. Interestingly, one of the Rev. Lumpkin's inquisitors, supervisor Terence Hallinan, claimed, in remarkably Orwellian fashion, to be protecting San Francisco's "live-and-let-live reputation." *Id.*

gions that are willing to follow the advice of MTV and “free their minds” by accepting homosexuality, bisexuality, and cohabitation as lifestyles that are pleasing to God will find favor with Caesar. However, those religions that stubbornly cling to old fashioned beliefs about sexual morality and marriage between husband and wife will thrive once again in the catacombs.

