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## COMMENT

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### VOWS TO COLLIDE: THE BURGEONING CONFLICT BETWEEN RELIGIOUS INSTITUTIONS AND SAME-SEX MARRIAGE ANTIDISCRIMINATION LAWS

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[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples . . . .<sup>1</sup>

California Supreme Court majority opinion,  
*In re Marriage Cases*, 2008

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## INTRODUCTION

A picturesque, seaside pavilion in Ocean Grove, New Jersey, owned and controlled by United Methodists since its creation in 1870, is described in its charter as a “portion of land skirting the sea, consecrated to sacred uses and with a single eye to the Divine Glory.”<sup>2</sup> Almost 150 years later, this one-time site of religious revival meetings has become one of the many flashpoints nationwide between religious groups supporting the traditional definition of marriage and same-sex marriage proponents seeking to enforce antidiscrimination laws. Despite the Methodist group’s desire that no one use its pavilion for activities directly contrary to its religious identity, New Jersey’s Division on Civil Rights held in January 2009 that the Methodists must allow a lesbian couple to use the pavilion for their same-sex civil union ceremony.<sup>3</sup> This finding is the subject of ongoing litigation in federal court.<sup>4</sup> Using the *Ocean Grove* case as a prototypical harbinger of

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<sup>2</sup> Leo H. Carney, *Ocean Grove Tries to Keep Its Old Charm in New Times*, N.Y. TIMES, June 29, 1986, at NJ1 (quoting the charter of the Ocean Grove Camp Meeting Association).

<sup>3</sup> Op. N.J. Att’y Gen., Div. on Civil Rights, No. PN34XB-03008 (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-06CMA.pdf>; see also Associated Press, *Lesbian Pair Wins Ruling over Refusal of Ceremony*, N.Y. TIMES, Dec. 30, 2008, at A22 (reporting on the New Jersey ruling that Ocean Grove’s refusal to host a lesbian wedding ceremony was a violation of anti-discrimination laws).

<sup>4</sup> After this ruling, Ocean Grove filed suit in federal district court seeking declaratory and injunctive relief, asserting that the state acceptance and investigation of antidiscrimination suits violated Ocean Grove’s First Amendment rights. *Ocean Grove Camp Meeting Ass’n of the United Methodist Church v. Vespa-Papaleo*, No. 07-3802, 2007 WL 3349787, at \*2 (D.N.J. Nov. 7, 2007). The district court dismissed the case based on abstention principles. *Id.* at \*6. On appeal, the United States Court of Appeals for the Third Circuit remanded the case to the federal district court to decide Ocean Grove’s request for declaratory relief clarifying its rights as to the use of the rest of its property. *Ocean Grove Camp Meeting Ass’n of the United Methodist Church v.*

future conflicts, this Comment explains why same-sex marriage antidiscrimination laws pose a genuine and sincere theological problem for many religious institutions and explores some of the possible First Amendment defenses with which religious institutions might respond to such laws.

For religious groups of all stripes, a case like the pavilion controversy in *Ocean Grove* is anything but an isolated anomaly; it is instead a signal of an increasingly frequent wave of conflicts between same-sex marriage proponents and traditional religious organizations. The same-sex marriage movement has rapidly gained steam through landmark state supreme court rulings establishing a constitutional right to same-sex marriage or civil union despite the movement's limited success in legislative spheres and, indeed, against legislative attempts to limit its spread.<sup>5</sup>

To be sure, the same-sex marriage movement has been a study in fits and starts. The movement's first wave began in 1993, when state courts in Hawaii,<sup>6</sup> Alaska,<sup>7</sup> and Vermont<sup>8</sup> recognized a constitutional right to same-sex marriage or civil unions. Answering this judicial activity, voters in Hawaii and Alaska passed state constitutional amendments overturning the decisions. Continuing the movement yet again a decade later—and with seemingly even greater momentum

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Vespa-Papaleo, Nos. 07-4253, 07-4543, 2009 WL 2048914, at \*1-2 (3d Cir. July 15, 2009).

<sup>5</sup> See, e.g., Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006) (defining marriage as “a legal union between one man and one woman”); 28 U.S.C. § 1738C (2006) (providing that states need not give effect to laws in other states providing for same-sex marriage). For information on state DOMAs, see *infra* note 85.

<sup>6</sup> See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that the state's definition of marriage requiring that couples be of the opposite sex implicated the state's Equal Protection Clause), *reh'g granted in part*, 875 P.2d 225 (Haw. 1993), *remanded sub nom. Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*18 (Haw. Cir. Ct. 1996) (striking down the state's opposite-sex definition of marriage on Equal Protection grounds and finding neither a compelling state interest nor narrow tailoring), *aff'd*, 950 P.2d 1234 (Haw. 1997), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

<sup>7</sup> See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*4-5 (Alaska Super. Ct. Feb. 27, 1998) (applying strict scrutiny standard to opposite-sex marriage laws and finding “the decision to choose one's life partner [is] a fundamental right”), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999).

<sup>8</sup> See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (holding that the State was “constitutionally required to extend to same-sex couples the common benefits and protections” of marriage but allowing the legislature to determine the name and form of the protection).

and success since 2006—Massachusetts,<sup>9</sup> New Jersey,<sup>10</sup> California,<sup>11</sup> and Connecticut<sup>12</sup> followed suit in recognizing same-sex marriage. In 2009, Iowa,<sup>13</sup> the District of Columbia,<sup>14</sup> and Vermont<sup>15</sup> became the most recent additions to the same-sex marriage column, the latter two by legislative rather than judicial action.

Some states, however, have successfully fought back against some of the judicially created same-sex marriages. Between 2004 and 2006, in the wake of the Massachusetts decision, eighteen states passed state constitutional amendments limiting marriage to heterosexual couples.<sup>16</sup> More recently, in November 2008, voters approved state referenda banning same-sex marriage in California, Arizona, and Florida.<sup>17</sup> The Arizona amendment prevailed after having been

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<sup>9</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (“The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.”).

<sup>10</sup> See *Lewis v. Harris*, 908 A.2d 196, 220-21, 224 (N.J. 2006) (holding that state opposite-sex marriage laws violate New Jersey equal protection rights and providing a 180-day deadline for establishing same-sex marriage or its equivalent). The New Jersey legislature complied and established civil unions without denominating them marriages. N.J. STAT. ANN. § 37:1-31 (West 2007). Although concluding at the time that the court would “not presume that a difference in name alone is of constitutional magnitude,” one might expect future litigation to require calling these civil unions “marriages,” as the plaintiff argued in *Lewis*. 908 A.2d at 221-22.

<sup>11</sup> See *In re Marriage Cases*, 183 P.3d 384, 435 (Cal. 2008) (holding that California equal protection law requires that same-sex couples have a right to “marriage” and not merely civil unions).

<sup>12</sup> See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (holding under intermediate scrutiny that despite civil union laws same-sex couples have an equal protection right to civil marriage).

<sup>13</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (holding unanimously that the state equal protection clause requires recognition of same-sex marriage).

<sup>14</sup> Gary Emerling, *D.C. to Recognize State Gay Marriages*, WASH. TIMES, Apr. 8, 2009, at A1, available at 2009 WLNR 6631146.

<sup>15</sup> David Abel, *Vermont Legalizes Same-Sex Marriage: 11th Hour Change of Heart Ends Veto*, BOSTON GLOBE, Apr. 8, 2009, at 1, available at 2009 WLNR 6539576.

<sup>16</sup> See Daniel Burke et al., *Scorecard: Who Won, Who Lost on Election Day*, CHRISTIAN CENTURY, Nov. 28, 2006, at 13 (describing the 2006 voter-approved amendments banning gay marriage in Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin); Thomas Roberts & Sean Gibbons, *Same-Sex Marriage Bans Winning on State Ballots: 11 States Approve Constitutional Amendments to Outlaw Gay Nuptials*, CNN.COM, Nov. 3, 2004, <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/index.html> (reporting the 2004 voter-approved amendments banning gay marriage in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah).

<sup>17</sup> See Ariz. Sec’y of State’s Office, Proposition 102 Unofficial Results for the 2008 General Election (Nov. 25, 2008), <http://www.azsos.gov/results/2008/general/BM102.htm> (citing that 56% of voters approved a constitutional amendment to limit marriage to opposite-sex couples); Cal. Sec’y of State’s Office, Proposition 8 Election

defeated in 2006—the first time an amendment to ban same-sex marriage had been defeated.<sup>18</sup> In California, the state supreme court upheld Proposition 8 as a valid state constitutional amendment in May 2009, but Ted Olson and David Boies have initiated a federal suit challenging the ban on federal equal protection grounds.<sup>19</sup> Evident in this conflicting and messy recent history is every indication that, at least for the foreseeable future, same-sex marriage will be a reality alongside which religious institutions will have to operate.

While same-sex marriage has made similar inroads in other countries around the world,<sup>20</sup> the particular challenge facing same-sex marriage in the United States is its reception into such an historically and enduringly religious context—in particular, a context where homosexuality has traditionally been opposed on religious grounds.<sup>21</sup>

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Night Results (Nov. 4, 2008), [http://www.sos.ca.gov/elections/sov/2008\\_general/maps/returns/props/prop-8.htm](http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-8.htm) (citing 52% approval for a constitutional ban on same-sex marriage); Fla. Dep't of State, Div. of Elections, Proposition 2 Official Results (Nov. 4, 2008), <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2008> (citing 62% approval for a constitutional amendment to limit marriage to opposite-sex couples).

<sup>18</sup> See Burke, *supra* note 16.

<sup>19</sup> See Bob Egelko, *Judge Sets January Trial for Prop. 8 Lawsuit*, S.F. CHRON., Aug. 20, 2009, at D3.

<sup>20</sup> The Netherlands (2000), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2008), and Sweden (2009) all permit same-sex marriage. See THE PEW FORUM ON RELIGION & PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>; see also Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 585-89 (2004) (discussing steps taken by European countries to recognize same-sex relationships).

<sup>21</sup> See, e.g., Adelle M. Banks, *Think You Know What Americans Believe About Religion? You Might Want to Think Again*, RELIGION NEWS SERVICE, June 23, 2008, <http://pewforum.org/news/display.php?NewsID=15907> (finding that 57% of Americans who attend religious services weekly believe that “homosexuality should be discouraged by society”); News Release, The Pew Forum on Religion & Public Life & The Pew Research Ctr. for the People & the Press, Religious Beliefs Underpin Opposition to Homosexuality (Nov. 18, 2003), available at <http://pewforum.org/docs/index.php?DocID=37> (finding that “those with a high level of religious commitment now oppose gay marriage by more than six-to-one”); cf. Pew Research Ctr. for the People & the Press & Pew Forum on Religion & Public Life, *Most Still Oppose Gay Marriage, but Support for Civil Unions Continues to Rise* (Oct. 9, 2009), <http://pewresearch.org/pubs/1375/gay-marriage-civil-unions-opinion> [hereinafter *Pew Research Ctr., Most Still Oppose Gay Marriage*] (“More than three-quarters of white evangelical Protestants (77%) and two-thirds of black Protestants (66%) oppose same-sex marriage, as do half of white mainline Protestants (50%). Catholics are evenly divided on the issue, with 45% favoring same-sex marriage and 43% opposing it. Most of those unaffiliated with any particular religion support same-sex marriage (60%).”). It is clear that among religiously identified respondents—those who attend services more frequently and are presumably more devout—the alignment is starker.

Unlike in other industrialized nations—consider the almost completely secularized countries of Western Europe—Americans continue to exhibit high rates of religious belief, practice, worship attendance, and service.<sup>22</sup> In addition to the history and continuing private practices of citizens, freedom of religion has been legally enshrined in the First Amendment to the U.S. Constitution;<sup>23</sup> it is even popularly known to some as America’s “first freedom,” because it is the first protection enumerated in the Bill of Rights.<sup>24</sup> Despite the claim of some that religion, even in America, is undergoing an inevitable decline, plenty of evidence suggests otherwise.<sup>25</sup>

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*See id.* (“Overall, a strong majority of those who attend services at least weekly oppose same-sex marriage (71%), while about half of those who seldom or never attend religious services favor it (54%). . . . Most regularly attending white Catholics in the survey oppose same-sex marriage, while most white Catholics who attend Mass less often favor it. Among white evangelicals, 85% of those who attend services at least weekly oppose same-sex marriage, 21 percentage points higher than among less-observant white evangelicals.”).

<sup>22</sup> *See, e.g.,* SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 82 (2005) (arguing that popular uproar over Michael Newdow’s lawsuit challenging the phrase “under God” in the Pledge of Allegiance indicates “the extent to which Americans are one of the most religious people in the world, particularly compared to the peoples of other highly industrialized democracies”). Huntington also cites statistics that support the common view of America’s religiosity: 92% of Americans believe in God, 85% believe that the Bible is in some way the word of God, and 63 to 66% of Americans claim membership in a church or synagogue. *Id.* at 86-87; *see also* Carolyn A. Deverich, Comment, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 BYU L. REV. 211, 212 (citing similar statistics indicating that Americans are relatively religious compared to citizens of other industrialized countries).

<sup>23</sup> U.S. CONST. amend. I.

<sup>24</sup> *See* Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1244 (2000) (discussing why the First Congress made religious freedom the subject of the First Amendment); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 563 (1997) (O’Connor, J., dissenting) (viewing the Free Exercise Clause’s substantive guarantee of liberty as “no less important” than the Free Speech or Takings Clauses); PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 17 (1964), *quoted in* *City of Boerne*, 521 U.S. at 563 (O’Connor, J., dissenting) (“[O]ur whole constitutional history . . . supports the conclusion that religious liberty is an independent liberty, that its recognition may either require or permit preferential treatment on religious grounds in some instances . . .”). Despite the brevity and deceptive simplicity of the First Amendment’s text, the Religion Clauses are some of the most hotly contested words in the Constitution, and there is no shortage of secularists who decline to accord the Clauses much importance. *See, e.g.,* Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 477 (1996) (calling the Free Exercise Clause “a limited aberration in a secular state”).

<sup>25</sup> *See* Michael Novak, *The First Institution of Democracy. Tocqueville on Religion: What Faith Adds to Reason*, 6 EUR. VIEW 87, 92 (2007) (arguing with survey data that “empirical evidence does not show that religion has lost public salience in recent

In addition to the nation's pervasive religious character, Americans have historically conceived of marriage in both law and society as a sacred, religious, and pre-political institution that is the foundation of society. In his influential *Commentaries on American Law*, Chancellor James Kent observes that “[t]he primary and most important of the domestic relations is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race.”<sup>26</sup> The belief in the power of traditional marriage originated in the United States not only through the mostly homogenous Christian beliefs about marriage in the late eighteenth century but also because the American founders understood “the symbiotic connection between family virtues and civic virtues” and believed that traditional marriage was a way to sustain the virtue necessary for the smooth running of the Republic.<sup>27</sup>

Amidst an enduringly religious population and against such a deeply rooted institution as traditional marriage, common sense suggests that the introduction of same-sex marriage into American law would represent anything but a seamless transition. Contrary to that supposition, same-sex marriage proponents—even some of the state courts responsible for constitutionalizing same-sex marriage—are optimistic about the ease of transition. In its majority opinion in *In re Marriage Cases*, the California Supreme Court predicted that “affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples.”<sup>28</sup> Similarly optimistic, the 2004 *Goodridge* Court in Massachusetts declared, “Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or

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times”); Peter Baker, *Bush Tells Group He Sees a “Third Awakening.”* WASH. POST, Sept. 13, 2006, at A6 (noting that some “scholars and writers have debated for years whether a Third Awakening has been taking place”).

<sup>26</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 74 (3d ed., New York, E.B. Clayton & James van Norden 1836).

<sup>27</sup> David F. Forte, *The Framers’ Idea of Marriage and Family*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, & MORALS 103 (Robert P. George & Jean Bethke Elshtain eds., 2006); see also *id.* at 106 (noting that the Founders’ synthesizing of marriage as a political institution and an entity governed by Christian norms “gave the institution of marriage and the family more power, authority, and inner strength than at any time in [the] history of the West”).

<sup>28</sup> *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008).

any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage.”<sup>29</sup>

Yet the notion that expanding the definition of marriage to include same-sex couples will “not impinge upon” religious freedoms is difficult to square with reality on the ground.<sup>30</sup> In a world where same-sex marriage did not impinge upon religious freedoms, the United Methodists who own the pavilion in *Ocean Grove* would not be forced to rent their facility for a same-sex civil commitment ceremony.

The foundation of this Comment is the belief that the legalization and spread of same-sex marriage will indeed have far-reaching and profound effects on religious liberty, particularly on the rights of many religious institutions that oppose same-sex marriage and wish to avoid appearing to endorse such marriage through compelled compliance with prospective same-sex antidiscrimination laws. There are a host of areas in which conflict seems likely: violations of antidiscrimination laws in public accommodations, employment, housing, education, or charitable services;<sup>31</sup> loss of tax-exempt status for violating “public policy”;<sup>32</sup> and violation of hate-crime laws,<sup>33</sup> just to name a few. Absent explicit statutory exemptions for religious institutions, the possibility for serious conflict exists.<sup>34</sup>

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<sup>29</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 965 n.29 (Mass. 2003).

<sup>30</sup> Indeed, conflicts in this area abound. In 2006, Massachusetts prevented adoption agencies from declining to place children with same-sex couples, and the decision forced the state’s largest such agency, Catholic Charities, to exit the adoption business altogether. See Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD, May 15, 2006, at 17. Litigation is currently pending in a case regarding a New Mexico wedding photographer who faces \$6,600 in attorneys’ fees for declining to take pictures of a lesbian civil commitment ceremony and in the case of a Christian counselor in Georgia who declined to advise a woman in a lesbian relationship and referred her to another therapist. Jacqueline L. Salmon, *Faith Groups Increasingly Lose Gay Rights Fights*, WASH. POST, Apr. 10, 2009, at A4.

<sup>31</sup> Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939, 957-58, 964 (2007) (arguing that antidiscrimination laws in these areas pose potential threats to religious liberty).

<sup>32</sup> See *infra* text accompanying notes 88-91.

<sup>33</sup> See *infra* note 81 (describing the pervasiveness of hate-crime laws referencing sexual orientation).

<sup>34</sup> See David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11 (proposing that Congress grant federal civil union status to state same-sex marriages and grant exemptions for religious institutions in states with religious-conscience exceptions).

Rather than catalog the countless foreseeable legal conflicts between same-sex marriage and religion, as others have done,<sup>35</sup> this Comment seeks to explore in greater depth the seriousness of the challenge to religious activity and to assess some potential First Amendment defenses with which a confronted religious actor or institution could respond, paying particular attention to the likeliest successful argument: the right to expressive association.

Part I discusses why marriage is a fundamentally religious—not just social or political—issue on which religious institutions have a particularly justifiable desire to advance and protect their theological viewpoint. Part II emphasizes the breadth of religious activity in the United States as a prelude to revealing the particular ways in which same-sex antidiscrimination laws pose serious challenges to dissenting religious institutions; contrary to the position of the state supreme courts of California and Massachusetts, the challenge is real and pervasive. Part III briefly examines the Free Exercise Clause from one conceptual perspective and concludes in light of recent jurisprudence—quite ironically to anyone unfamiliar with Free Exercise case law—that a stronger defense for dissenting religious institutions likely resides elsewhere. Finally, Part IV articulates the expressive association doctrine of the First Amendment and, through application to the pending *Ocean Grove* case, argues that this doctrine provides a more robust defense for religious institutions seeking to avoid endorsing same-sex marriage despite the presence of same-sex antidiscrimination laws.

## I. THE RELIGIOUS NATURE OF MARRIAGE

Religious institutions express substantial concern about marriage because of their belief that marriage carries deep theological meaning and significance. Many view marriage not only as a social institution in which religious actors play a role but also as an intrinsically religious concept in itself. This theological understanding does not, of course, negate the reality that marriage is also a social institution regulated by secular authorities. However, the longstanding and widely shared theological view of marriage serves as a necessary foundation justifying many religious institutions' belief that

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<sup>35</sup> Especially helpful as a catalog of potential areas for legal skirmishes between religious actors who oppose same-sex marriage and same-sex marriage proponents is *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY* (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008).

promoting their understanding of marriage constitutes a core tenet of their religious mission.<sup>36</sup> Appreciating the specifically religious character of marriage is important because presumably, under either the Free Exercise Clause or the expressive association doctrine, religious institutions should have a greater expectation of protection for clearly *religious*—rather than secular or political—beliefs and actions. The dominant religious traditions in the United States today all endow marriage with a complex, specifically religious conceptualization separate from and in addition to secularly based social understandings of marriage.<sup>37</sup> The discussion below details this religious conceptualization from the Christian perspective, the dominant strand of religion in the United States.<sup>38</sup>

In the Roman Catholic Church, the largest single religious denomination in the United States,<sup>39</sup> marriage is understood not just as a religious concept but also as a sacrament. Marriage is one of only seven sacraments recognized by the Roman Catholic Church.<sup>40</sup> Thus, to mark marriage as a sacrament is to place it within a collection of

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<sup>36</sup> The same-sex marriage controversy does not mark the first time Christians have attempted to enforce their own views of marriage against a competing secular definition. Ancient Roman law forbade slaves from marrying unless their unions were characterized as concubinage; because the early Church would not tolerate the denial of “proper married status” to any Christian, bishops gave slaves special permission to marry and kept it secret from the Roman authorities. See ROSEMARY HAUGHTON, NO. 23: THE THEOLOGY OF MARRIAGE 41 (Edward Yarnold ed., Fides Publishers Inc. 1971).

<sup>37</sup> As Pope Leo XIII declared in his encyclical *Arcanum Divinae Sapientiae*,

Let no one, then, be deceived by the distinction which some civil jurists have so strongly insisted upon—the distinction, namely, by virtue of which they sever the matrimonial contract from the sacrament . . . . [I]n Christian marriage the contract is inseparable from the sacrament . . . for this reason, the contract cannot be true and legitimate without being a sacrament as well.

Pope Leo XII, Encyclical Letter *Arcanum Divinae Sapientiae* ¶ 23 (Feb. 10, 1880), [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_10\\_021880\\_arcanum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_10_021880_arcanum_en.html).

<sup>38</sup> For the sake of simplicity and brevity, this Part includes a number of generalizations that will pertain to some—I would argue many—but not all Christian institutions in the United States. The nature of this discussion should not obscure the variety of views on marriage held by American religious institutions. See generally Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 604-10 (2002) (discussing the multiplicity of religious views regarding the permissibility of same-sex marriage).

<sup>39</sup> See, e.g., Richard John Neuhaus, *Columnists Say It . . .*, FIRST THINGS, Nov. 2, 2005, <http://www.firstthings.com/onthesquare/2005/11/rjn-11205-columnists-say-it> (noting that, with 66 million members in the United States, Catholicism is the largest Christian denomination in the country).

<sup>40</sup> CATECHISM OF THE CATHOLIC CHURCH § 1210 (2d ed. 1997).

the most sacred religious practices of the Church. The Catechism of the Catholic Church describes the sacraments as

efficacious signs of grace, instituted by Christ and entrusted to the Church, by which divine life is dispensed to us. The visible rites by which the sacraments are celebrated signify and make present the graces proper to each sacrament. They bear fruit in those who receive them with the required dispositions.<sup>41</sup>

Thus, according to the Catholic Church, sacraments are divine in origin and are the primary means by which believers receive spiritual nourishment from God through the Church. The six other sacraments are Baptism, Confirmation, the Eucharist, Penance and Reconciliation, the Anointing of the Sick, and Holy Orders.<sup>42</sup> Considering this list, which includes the beginning, end, and weekly rituals of a Christian's life, marriage is included among the most important religious marks of Christian life. It is also noteworthy that this list contains purely religious concepts, not moral, social, or political concepts derived from religion.

For Protestants, although marriage is not deemed a sacrament, it is nonetheless proclaimed as an important and distinctly religious concept, frequently described as a covenant.<sup>43</sup> Mainly for historical reasons stemming from perceived Roman Catholic abuses that precipitated the Protestant Reformation, Protestants retain a belief in the religious significance of marriage as an important part of religious life without identifying it as a sacrament as Roman Catholics do.<sup>44</sup> Nonetheless, Protestants have esteemed marriage as equally important in content and imbued with distinct religious significance. Many Protestant churches describe marriage as a covenant—a deeply religious term permeated with biblical significance—that churches believe is “a God-willed, holy, and sanctifying vocation.”<sup>45</sup>

<sup>41</sup> *Id.* § 1131.

<sup>42</sup> *Id.* § 1210.

<sup>43</sup> See, e.g., DOUGLAS J. BROUWER, BEYOND “I DO”: WHAT CHRISTIANS BELIEVE ABOUT MARRIAGE 21-23 (2001) (describing a covenant as an unbreakable, enduring bond possessing religious significance).

<sup>44</sup> Appealing to scriptural authority rather than tradition or Catholic Church authority, Protestants limited the sacraments they recognized to two: baptism and communion. In doing so, they did not necessarily demean the religious significance of concepts not designated as sacraments. Two of the hallmarks of Protestantism are preaching and Bible study, yet neither is a sacrament.

<sup>45</sup> Michael G. Lawler, *Marriage*, in THE OXFORD COMPANION TO CHRISTIAN THOUGHT 410 (Adrian Hastings et al. eds., 2000).

Although they have different labels for it, almost all Christian churches share a similar theological view of the religious significance and particular importance of marriage. Contrary to some popular perceptions, the Christian theological interpretation of marriage is richer and more sophisticated than merely supporting a particular view on sexual ethics or a beneficial way of life.<sup>46</sup> Rather, as the Catechism of the Catholic Church explains, "The marriage covenant, by which a man and a woman form with each other an intimate communion of life and love, has been founded and endowed with its own special laws by the Creator."<sup>47</sup>

Christian theology views the institution of marriage as a divinely granted order that has existed since the very creation of humanity itself. The account of creation in the Book of Genesis indicates that God intended marriage as a necessary and proper relationship between men and women.<sup>48</sup> Because this recognition of marriage is tied textually to Christian beliefs about the origins of humanity, the institution of marriage also signifies broader theological views about humanity itself.<sup>49</sup> This includes, for example, belief in the intrinsic equality between men and women: humanity as the image of God is not complete until the expression of male and female unity is achieved.<sup>50</sup>

Marriage also holds significance for Christians as a symbol of God's redemption of and continued unity with humanity. The Hebrew prophetic literature conceives of marriage as a symbol of the

<sup>46</sup> One commentator describes the mischaracterization as follows:

There is a not uncommon assumption to the effect that Christian marriage is essentially ethical marriage, that is, that a couple have a Christian marriage if they live together with at least a minimum level of respect, love, and decency. . . . But if Christianity is no more than that, there is no such thing as the Christian religion.

HENRY A. BOWMAN, *A CHRISTIAN INTERPRETATION OF MARRIAGE* 19 (1959).

<sup>47</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, § 1660.

<sup>48</sup> See *Genesis* 2:18 (quoting God as saying, "It is not good that the man should be alone; I will make him a helper as his partner"); *Id.* 2:24 ("Therefore a man leaves his father and his mother and clings to his wife, and they become one flesh.").

<sup>49</sup> See JOHN L. THOMAS, *THE CATHOLIC VIEWPOINT ON MARRIAGE AND THE FAMILY* 56 (John J. Delaney ed., rev. ed., Image Books 1965) (1958) ("Catholic teaching on marriage and the family must be viewed within this wider context, embodying a concept of the Church's mission, the nature of man, and the nature of grace.").

<sup>50</sup> See CHARLES P. KINDREGAN, *A THEOLOGY OF MARRIAGE* 14-15 (1967) ("Man, complete and whole, is not created until male and female come together in a union of one flesh which makes them a whole being. . . . [A person] makes himself fully human by finding in his spouse the remedy for his own inadequacies as a male or female.").

unbreakable covenant between God and God's people, Israel.<sup>51</sup> Bolstered by a similar understanding based on New Testament scripture, "Christian matrimony [signifies] a great supernatural reality (union of Christ and the Church)."<sup>52</sup> To religious institutions, these theological bonds between Christ and the Church and between God and Israel are theological expressions of the permanent, covenantal unity between God and God's people as well as an expression of love. As a result, many view marriage analogously as a relationship connected to God that is covenantal, permanent, and an ultimate expression of love.<sup>53</sup> Pope John Paul II even describes marriage as "a real symbol of the event of salvation."<sup>54</sup>

Finally, the theological view regarding the purposes of marriage provides another important indication of marriage's specifically

<sup>51</sup> See Lawler, *supra* note 45, at 410 ("The root of Christian ideas about the sacramentality of marriage goes back to the prophet Hosea's enthronement of marriage as a prophetic symbol of the covenant between God and Israel.").

<sup>52</sup> OUR SUNDAY VISITOR'S ENCYCLOPEDIA OF CATHOLIC DOCTRINE 414 (Russell Shaw ed., 1997).

<sup>53</sup> Lawler supports the idea that marriage is analogous to and revelatory of God's love:

The conscious presence of Christ, that is, of grace in its most ancient Christian meaning, is not something extrinsic to Christian marriage. It is something essential to it, something without which it would not be *Christian* at all. Christian marriage reveals the love of the spouses for one another; but, in the image of their love, it also reveals the love of God and of God's Christ for them. It is in this sense also that, in the Catholic tradition, it is said to be a sacrament of the presence of Christ and of the God he reveals.

Lawler, *supra* note 45, at 410. Other commentators describe an even deeper connection between God and marriage:

Christian marriage . . . has a real, essential, and intrinsic reference to the mystery of Christ's union with His Church. It is rooted in this mystery and is organically connected with it, and so partakes of its nature and mysterious character. Christian marriage is not simply a symbol of this mystery or a type that lies outside it, but an image of it growing out of the union of Christ with the Church, an image based upon this union and pervaded by it. For it not only symbolizes the mystery but really represents it. It represents the mystery because the mystery proves active and operative in it.

MATTHIAS J. SCHEEBEN, MYSTERIES OF CHRISTIANITY 601-02 (1946). The symbol of the universal Church and Christ united as a bride and groom is a central analogy in Christian theology and pervades the New Testament. See, e.g., *John* 3:28-29; *Matthew* 9:14-15; *Ephesians* 5:31-33; *Revelation* 19:6-9.

<sup>54</sup> Pope John Paul II, Apostolic Exhortation *Familiaris Consortio* § 13 (Nov. 22, 1981), [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_19811122\\_familiaris-consortio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html) (describing marriage as "a typically Christian communion of two persons because it represents the mystery of Christ's incarnation and the mystery of His covenant").

religious character. In addition to being a state intrinsically “ordered toward the good of the spouses,”<sup>55</sup> Christian theology has traditionally affirmed the purposes of marriage as directed towards procreation and education. First, according to Christian theology, marriage is the ideal context in which human reproduction occurs, a process in which husband and wife affirm their place as a reflection of the image of God by undertaking a traditionally exclusive action of divinity: creation.<sup>56</sup> Second, marriage and the development of families are the central bases outside the Church itself for teaching the Christian faith.<sup>57</sup>

This discussion of the specifically religious character of marriage is important because it illustrates the extent to which religious institutions hold a particularly religious belief in marriage that—at least theoretically—should receive more constitutional protection than a nonreligious belief. Imagine a spectrum of subjects on which a religious institution could hold a belief, with purely religious concepts at one end and purely secular concepts at the other end. Marriage, as the above discussion shows, falls much closer to the religious end than to the secular. A religious institution might also hold a belief or preference regarding a purely secular issue—for example, whether trigger locks should be required for gun owners. But while a religious group may hold this secular policy position as a result of religious principles, the position is attenuated from the institution’s central

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<sup>55</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, § 1601. Bolstering the link between theological arguments and real-world impact, empirical research suggests a link between greater religious commitment and stronger marriages. See, e.g., Kieran T. Sullivan, *Understanding the Relationship Between Religiosity and Marriage: An Investigation of the Immediate and Longitudinal Effects of Religiosity on Newlywed Couples*, J. FAM. PSYCHOL. 610, 617 (2001) (finding that more religious husbands and wives exhibited stronger feelings of aversion to divorce and a greater willingness to seek help to preserve the marriage).

<sup>56</sup> See BOWMAN, *supra* note 46, at 22 (“The couple’s bodies will permit them to establish a sexual, a procreative relationship. Their God-centered orientation will permit them to establish a spiritual, a creative relationship.”); cf. Pope Pius XI, Encyclical Letter *Casti Connubii* (Dec. 31, 1930) ¶ 80, [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/index.htm](http://www.vatican.va/holy_father/pius_xi/encyclicals/index.htm) (describing marriage as “the means of transmitting life, thus making the parents the ministers, as it were, of the Divine Omnipotence”).

<sup>57</sup> See SECOND VATICAN ECUMENICAL COUNCIL, GRAVISSIMUM EDUCATIONIS [DECLARATION ON CHRISTIAN EDUCATION] art. 3 (1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/index.htm](http://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm) (noting that it is “particularly in the Christian family, enriched by the grace and the office of the sacrament of matrimony, that children should be taught from their early years to have a knowledge of God according to the faith received in Baptism, to worship Him, and to love their neighbor”).

expertise in and concern for religious matters. It is also less likely that the group's religious identity would turn on the viewpoint it offered on such a purely secular question. Marriage, however, is different—at least for many religious institutions—precisely because it is an independent, even central, religious concept that can connect directly to the institution's religious identity. Religious institutions should be able to expect, at least presumptively, that the government may not constitutionally bar them from expressing their *religious* beliefs or identity.

## II. THE CHALLENGE OF SAME-SEX MARRIAGE TO LEGITIMATE RELIGIOUS DISSENT

Despite reassuring words by recent state supreme court decisions addressing same-sex marriage and dismissing the potential danger, the growing movement for same-sex marriage poses a legitimate and serious threat to the conscientious beliefs of many religious institutions. Were religion purely a private and individual matter, as some commentators and courts have presumed, perhaps the conflict would be less ominous than it is.<sup>58</sup> But while it would be convenient to cabin religious activity to a narrow and identifiable realm to minimize the conflict between religion and an increasingly large and invasive bureaucratic state, this categorization belies the theological beliefs and practices of many religious institutions.

As religious actors attempt to operate consistently with their religious principles, both in public and in private, they will confront some state or federal laws that will seek to enforce competing but, in the government's eyes, equally legitimate goals. The sweeping changes to the definition of marriage wrought by recent and increasingly frequent state supreme court decisions like *Goodridge, In*

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<sup>58</sup> Justice Scalia has put the problem this way:

Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals . . . .

*Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting); see also Mary Ann Glendon, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 385, 408 (noting that the Supreme Court has "repeatedly characterized [religion] . . . as a purely private individual experience" and that the Court has "ignored the fact that for many individuals religious freedom has important associational and institutional aspects").

*re Marriage Cases*, and *Conaway v. Deane*,<sup>59</sup> have given same-sex marriage supporters well-justified hope that the likely irreversible train of same-sex marriage has already left—or will soon leave—the station. Because marriage serves as a foundational part of the United States' social structure, changes to marriage law will necessarily implicate actors and institutions in a wide variety of contexts throughout society. Given how “deeply intertwined” religious institutions are with the celebration of and belief in marriage, religious institutions will face a disproportionately large burden when marriage laws are fundamentally altered.<sup>60</sup>

### A. *The Multifaceted Nature of Religious Activity*

How broadly one defines the scope of religious activity and identity will shape, in part, the extent of the threat posed by same-sex marriage. How, then, should one understand the nature and extent of religious activity? At one time this question may have been less important because sectarian religious activity was not always as suspect as it has become today. While Christianity remains overwhelmingly the single largest religious influence, it (and to some extent religion in general) may be fading in the United States in favor of privatization, pluralism, and secularism.<sup>61</sup> As such, society as a whole may be less familiar than earlier eras with what, broadly speaking, orthodox Christianity teaches about the scope of religious activity. Because Christianity is the majority American religion, this Section will focus on what Christian theology teaches about the nature of religious exercise. Despite the multiplicity of denominations in the United States,<sup>62</sup> it is possible to make some generalizations regarding what Christian theology teaches about religious activity.

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<sup>59</sup> 932 A.2d 571 (Md. 2007).

<sup>60</sup> See Severino, *supra* note 31, at 943 (“The specific consequences that will likely flow from legalizing same-sex marriage include both government compulsion of religious institutions to provide financial or other support for same-sex married couples and government withdrawal of public benefits from those institutions that oppose same-sex marriage.”).

<sup>61</sup> See generally STEVE BRUCE, *GOD IS DEAD: SECULARIZATION IN THE WEST* 20 (2002) (arguing that “the privatization of religion removes much of the social support that is vital to reinforcing beliefs . . . and encourages a *de facto* relativism that is fatal to shared beliefs”).

<sup>62</sup> See *United States v. Seeger*, 380 U.S. 163, 174-75 (1965) (noting the great variety of belief within religious groups, evidenced by the multiplicity of denominations within those groups).

First, despite the American preoccupation with individualism and autonomy, Christian theology teaches that religion is a corporate endeavor. While it is true that religion is *also* an association with God at the individual level—questions regarding one’s soul are ubiquitous—Christianity is viewed as a corporate religion.<sup>63</sup> The Catechism of the Catholic Church goes so far as to assert, “No one can believe alone, just as no one can live alone.”<sup>64</sup>

Second, while worship and corporate gatherings are central to Christianity, those specific events do not exhaust the definition of religious exercise, despite some claims to the contrary. Some argue that one can express the essence, and perhaps the very metes and bounds of religious exercise, via a short list of activities connected to religious ceremony, ritual, and proselytizing.<sup>65</sup> For those desiring to limit the scope of authentic religious expression and exercise, this definition is advantageous because it largely confines religious activity to the sanctuary. However, as Harold J. Berman, renowned Harvard Law professor and expert on the relationship of Christianity and the rise of Western law, has explained, religion “is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values.”<sup>66</sup> Thus, while it is easy to admit that worship and sacraments are central components of religious exercise, one understands the complete picture only by considering the *ends* of worship and the sacraments.

Christian worship in its different forms has slightly different emphases. Broadly speaking, Catholic and Episcopal traditions focus more on the liturgical and sacramental acts of worship, while for many in Protestant traditions the sermon or interpretation and teaching of Scripture receives the greater emphasis. Each, however, imparts great significance not only to the worship acts of adoration, prayer, and

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<sup>63</sup> Describing the vocation of humanity, the Catechism states, “This vocation takes a personal form since each of us is called to enter into the divine beatitude; it also concerns the human community as a whole.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, § 1877; see also JOHN H. LEITH, BASIC CHRISTIAN DOCTRINE 234 (1993) (“To be a Christian and to be the church are one and the same existence.”).

<sup>64</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, § 166.

<sup>65</sup> See, e.g., Lighthouse Inst. for Evangelism, Inc., v. City of Long Branch, 510 F.3d 253, 273 (3d Cir. 2007) (listing potentially covered acts as “assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation” (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990))).

<sup>66</sup> HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 24 (1974).

bearing witness to the mysteries of faith through Word and sacrament, but to how the act of worship empowers and teaches the individual to be fit to serve God and neighbor in the world. The Roman Catholic Catechism explains that the purpose of worship is “so that the faithful may live from it and bear witness to it in the world.”<sup>67</sup> Indeed, the “sacred liturgy does not exhaust the entire activity of the Church.”<sup>68</sup> For Protestants, the statement of the Great Ends of the Church by the Presbyterian Church (USA) provides a pertinent summary of the nature and ends of religious exercise, and only two of the six items mentioned directly involve worship.<sup>69</sup>

The Presbyterian Church’s statement of the overarching ends of the Church include, in addition to worship, fellowship, the preservation of truth, the promotion of social righteousness, and the exhibition of the Kingdom of Heaven to the world.<sup>70</sup> Two important points emerge from this exposition. First, religious activity is necessarily concerned with service and advocacy that attempt to shape the social order of the world. Second, the Church’s mission includes a solemn commitment to maintain, develop, and defend certain ideas and arguments—the preservation of truth—both inside and outside the Church. Religion is, then, much more than ceremony and is necessarily both a private and a public undertaking. Religious activity deals intimately not just with private belief and actions, but also with actions that are often public and representative of corporate beliefs. The Presbyterian Church (USA) affirms that one of the key tenets of the Reformed Protestant tradition is to “work for the transformation of society.”<sup>71</sup> This is necessarily public work, and its truth did not escape famed nineteenth-century French visitor to the United States Alexis de Tocqueville, who observed for this reason that religion is America’s “first political institution.”<sup>72</sup>

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<sup>67</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, § 1068.

<sup>68</sup> *Id.* § 1072 (quoting SECOND VATICAN ECUMENICAL COUNCIL, SACROSANCTUM CONCILIIUM [CONSTITUTION ON THE SACRED LITURGY] art. 9 (1963), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/index.htm](http://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm)).

<sup>69</sup> The “proclamation of the gospel for the salvation of humankind” and “the maintenance of divine worship” are the two ends that directly involve worship. THE CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.) PART II: BOOK OF ORDER, 2009–2011 § G-1.0200 (2009).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § G-2.0500.

<sup>72</sup> See Novak, *supra* note 25, at 92 (explaining the visible and often highly political nature of religion in early America).

Even if religious activity is broad, it is not all-encompassing. Christianity, like most religions, necessarily pertains to ultimate concerns about how adherents should live. With such all-encompassing categories as these, it is possible to conceive of a limitless concept of religious activity. Towards this end, for example, theologian Martin Luther challenged the Roman Catholic notion of religious vocations by arguing that a Christian had a religious vocation in whatever profession he or she engaged—even if it were sweeping floors—because of the Christian’s identity as a Christian rather than any one particular career choice.<sup>73</sup> That said, traditional Christian theology recognizes that secular authorities exist in the world and, derivatively, that some activities fall outside the scope of what could be defined as religious activity.<sup>74</sup>

To help determine what exactly counts as religious activity, consider again the spectrum discussed above.<sup>75</sup> When a religious institution’s belief or activity pertains specifically to a theological matter or religious practice, the religious institution may more easily argue that its activity is religious. For purely secular matters that contain no direct religious component, the religious institution will be less able to argue that its belief or activity is religious. If, as argued in Part I, marriage is a religious concern, then a religious institution’s beliefs and actions with respect to marriage should presumably be considered “religious activity.”

### B. *Challenges to Religious Institutions Opposed to Same-Sex Marriage*

Religious institutions that support traditional marriage will likely face serious legal challenges and catch-22 situations should they choose to support traditional marriage in opposition to constitutional or statutory rights for same-sex marriage. Nonetheless, in its 2008 decision constitutionalizing same-sex marriage, the California Supreme Court argued, “[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no

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<sup>73</sup> MARTIN MARTY, *MARTIN LUTHER: A LIFE* 104 (2008) (“Luther . . . made a distinction between the honored way that one lives out a calling in the professions, jobs, tasks, and roles here below on earth and the also honored way that the same person receives a calling from God through the grace which relates to life above in heaven.”).

<sup>74</sup> See *Matthew* 22:21 (“Render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.”).

<sup>75</sup> See *supra* Part I.

religion will be required to change its religious policies or practices with regard to same-sex couples . . . .”<sup>76</sup> Against the easy dismissals of the California and Massachusetts Supreme Courts, Roger Severino of the Becket Fund for Religious Liberty (an interfaith public interest law firm that promotes religious expression) notes four reasons why the conflict between same-sex marriage and religious liberty is inevitable.

First, marriage, as a uniform concept, pervades the law; second, religious institutions are regulated, both directly and indirectly, by laws that turn on the definition of marriage; third, religion has an historically public relationship with marriage that resists radical change as a deep matter of conscience; and fourth, same-sex marriage proponents are similarly resistant to compromise since many believe, in line with the *Goodridge* concurrence, that “[s]imple principles of decency dictate that we extend to [same-sex couples], and to their new status, full acceptance, tolerance, and respect.”<sup>77</sup>

The particular concern of this Comment is whether religious institutions may successfully oppose same-sex marriage and avoid the appearance of endorsement that compelled compliance with prospective antidiscrimination laws would bring. If state or federal governments fail to provide any religious exemptions for same-sex antidiscrimination laws, religious institutions that wish to avoid liability under those laws will require a constitutional defense.

Concretely, one recent source of danger to the religious activity of traditional marriage proponents is the increasingly expansive conception given to public accommodation law as a vehicle for reaching private actors like religious institutions. As they stand today, the public accommodation provisions of federal law contain no specific religious exemptions.<sup>78</sup> The particular law at issue in the *Ocean Grove* case provides an excellent example of the type of statute

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<sup>76</sup> *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008).

<sup>77</sup> Severino, *supra* note 31, at 942 (alteration in original) (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring)); *cf.* Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 625, 629 (2003) (“Conflicts due to laws burdening religious conduct present the most controversial and difficult free exercise questions since there are many laws designed to regulate the health, safety, and welfare of society that unintentionally burden religiously motivated conduct.”).

<sup>78</sup> Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 1 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (discussing the coverage of the public accommodations provisions of the Civil Rights Act of 1964).

religious organizations could face. The New Jersey law states in relevant part that

[a]ll persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . marital status, [or] affectional or sexual orientation . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.<sup>79</sup>

Additional troubling areas for religious institutions could include violations of antidiscrimination laws in employment, housing, education, or charitable services simply for following their conscience or theology with respect to same-sex marriage.<sup>80</sup> There is even the prospect of “hate speech” laws that could prevent or at least chill an organization from expressing even rationally grounded natural law arguments or widely shared theological arguments against same-sex marriage.<sup>81</sup> It is true that the prospect of clergy being compelled personally to perform same-sex marriage ceremonies is not now a cognizable threat. Nonetheless, religious actors and institutions do face both potential lawsuits and the prospect of losing tax-exempt status or other government privileges as a result of their advocacy against same-sex marriage or their desire to avoid the appearance of its endorsement by forced association with the practice (such as

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<sup>79</sup> N.J. STAT. ANN. §§ 10:5-4, -5 (West 2002). The New Jersey Supreme Court’s interpretation of New Jersey’s public accommodation law provides more substantial coverage than similar laws in other states. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 663 (2000) (Stevens, J., dissenting).

<sup>80</sup> *See* Severino, *supra* note 31, at 957-58 (“[A]ntidiscrimination regulations that would attend the widespread recognition of same-sex marriage threaten to erode the traditional deference to religious sensibilities, thus creating traction for . . . lawsuits.”).

<sup>81</sup> The Becket Fund for Religious Liberty observed, in a 2007 amicus brief, that “[g]eneral hate-crime statutes exist in at least 45 states. Of those, currently 32 states . . . have hate-crime laws referencing sexual orientation. . . . Some states have already taken the next step and banned sexual-orientation related hate speech directly, as in Massachusetts and Pennsylvania.” Brief [of] Amicus Curiae the Becket Fund for Religious Liberty in Support of Defendant at 8-9, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 5965). Specifically, in 2004, Christians who were peaceably protesting were arrested on public property at a Philadelphia gay pride event for “ethnic intimidation” under hate crimes laws. *See* *Startzell v. City of Phila.*, No. 05-05287, 2007 WL 172400, at \*3-4 (E.D. Pa. Jan. 18, 2007). Also consider the church that offered a series of discussions regarding the theological case against homosexuality after it discovered that its youth minister had participated in a civil commitment ceremony with her lesbian partner; the youth minister sued the church for its religious speech. *See* *Bryce v. Episcopal Church*, 289 F.3d 648, 651-53 (10th Cir. 2002) (affirming the dismissal of the youth minister’s case).

through the forced renting of a church banquet hall for a same-sex wedding reception).

At the constitutional level, the fact that each of the landmark state supreme court decisions has so far been confined to the respective state's boundaries should provide little comfort to religious institutions supporting traditional marriage. Same-sex marriage proponents envision a day when the Full Faith and Credit Clause<sup>82</sup> will be used to recognize, in a state prohibiting same-sex marriage, a same-sex marriage validly entered into in a state allowing such marriage.<sup>83</sup> This possibility remains real despite the federal Defense of Marriage Act (DOMA)<sup>84</sup> and the fact that thirty-nine states have passed state versions of DOMA or its equivalent.<sup>85</sup> Although some scholars have argued persuasively against it,<sup>86</sup> there is reason to suspect that, after the United States Supreme Court's decision in *Lawrence v. Texas* struck down Texas's anti-sodomy law, DOMA faces a serious threat of being ruled unconstitutional.<sup>87</sup>

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<sup>82</sup> U.S. CONST. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

<sup>83</sup> See, e.g., Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 35-36 (2005) (arguing that the Full Faith and Credit clause should be interpreted to require interstate recognition of valid Massachusetts same-sex marriages).

<sup>84</sup> DOMA is comprised of two important provisions. First, with respect to federal laws and regulations, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2006). Second, the law provides that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C (2006).

<sup>85</sup> See Alliance Defense Fund, DOMA Watch Home Page, <http://www.doma-watch.org/index.php> (last visited Oct. 15, 2009) ("37 states have their own Defense of Marriage Acts (DOMAs), while 2 more states have strong language that defines marriage as one man and one woman.").

<sup>86</sup> See, e.g., Randy Beck, *The City of God and the Cities of Men: A Response to Jason Carter*, 41 GA. L. REV. 113, 150 (2006) (concluding that *Lawrence v. Texas* does not imply a "constitutional right to same-sex marriage").

<sup>87</sup> See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."); see also Severino, *supra* note 31, at 957 ("Anyone seeking to strike down DOMA and establish same-sex marriage nationwide will find plenty of ammunition in *Lawrence*.").

The *Bob Jones* decision should also give religious institutions pause in the event that public opinion polls slide decisively toward permitting same-sex marriage. In *Bob Jones University v. United States*, the United States Supreme Court held that a private, Christian fundamentalist university must lose its tax-exempt status or forfeit its religiously based policy of denying admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating.<sup>88</sup> The Court based its decision in part on IRS Revenue Ruling 71-447,<sup>89</sup> which embraces the common law definition of “charity.” Under § 170 and § 501(c)(3) of the Internal Revenue Code, tax exempt organizations must not engage in activity contrary to settled “public policy.”<sup>90</sup> Given *Bob Jones*, if same-sex marriage becomes even more widespread and accepted throughout society, dissenting religious organizations could lose their tax-exempt status for adhering to their religious beliefs about marriage.<sup>91</sup> Regardless of one’s beliefs about the substantive merits of any particular public policy-based restriction via *Bob Jones*, religious institutions should be wary of effectively losing their advocacy rights through this back door.

While recent polling data continues to suggest that a majority of Americans disapprove of same-sex marriage, the margin has diminished.<sup>92</sup> Furthermore, support for acceptance of homosexuality generally, and thus for allowing civil unions or other benefits short of marriage to same-sex couples, has risen.<sup>93</sup> The demographic most likely to support gay rights is the young.<sup>94</sup> If this fact foretells a generational change of attitude towards homosexuality, instead of merely a belief that most young people outgrow over time, religious

<sup>88</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>89</sup> Rev. Rul. 71-447, 1971-2 C.B. 230.

<sup>90</sup> *Bob Jones Univ.*, 461 U.S. at 585, 591-92.

<sup>91</sup> Conceivably, courts could also simply rule that infringement of an antidiscrimination statute violates “public policy” by definition.

<sup>92</sup> Charles Franklin, *Gay Marriage Support and Opposition*, POLLSTER.COM, May 21, 2008, [http://www.pollster.com/blogs/gay\\_marriage\\_support\\_and\\_oppos.php](http://www.pollster.com/blogs/gay_marriage_support_and_oppos.php) (“The net effect of some 16 years of public debate was a 10 point decline in opposition and a 12 point rise in support.”).

<sup>93</sup> *Id.* (“When the ‘civil unions’ option is added, opposition to gay rights drops significantly from about 55% to 40%. Likewise, support for gay marriage drops from 40% to 29%.”); see also Pew Research Ctr., *Most Still Oppose Gay Marriage*, *supra* note 21 (“Over the past year, support for civil unions has grown significantly among those who oppose same-sex marriage (from 24% in August 2008 to 30% in 2009) while remaining stable among those who favor same-sex marriage.”).

<sup>94</sup> See Leslie Fulbright, *Voters Still Split on Same-Sex Marriage*, S.F. CHRON., Mar. 10, 2009, at B1 (“Voters aged 18 to 39 favor gay marriage by 55 percent while those 65 or older are 58 percent opposed, according to the poll.”).

institutions have even more cause for concern. None of this is to say that religious actors and institutions have a right to have others agree with them or that public mores and policies cannot change. Yet all of these data are relevant because judicial history in dealing with similarly divisive social issues has demonstrated the reliance of courts on public opinion polls.<sup>95</sup> Even if a significant minority of religious actors maintains traditional beliefs on same-sex marriage, as those beliefs become more unpopular, religious institutions' ability to exercise those beliefs publicly will become much more difficult, even if theoretically they should be protected under the First Amendment.<sup>96</sup>

For religious institutions with limited budgets that may be averse to litigation risk, the advocacy of traditional marriage could be chilled, potentially increasing even further the popular support for same-sex marriage as fewer organizations make public arguments to oppose it. Harmful in a different way, if religious institutions' silence is interpreted as tacit support for, or indifference to, same-sex marriage, religious institutions could send an unintended message. If the public sees religious institutions such as the Methodist pavilion owners allowing same-sex civil commitment ceremonies on their premises, casual observers may erroneously think the Methodist church has changed its historic stance against same-sex marriage. Likewise, if a church is reluctant to publicly make the case against same-sex marriage out of fear of facing an expensive and distracting lawsuit or fear of losing tax-exempt status, it may decide simply to avoid the issue instead. Given the general dearth of reasoned arguments against same-sex marriage in academia, the media, and the entertainment industry, should religious actors and institutions be misperceived or unfairly quieted, the public would lose one of the most important

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<sup>95</sup> See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (noting as part of the argument for overturning *Bowers* "an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added)); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting) ("Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions [regarding homosexuality]."); see also Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 291-93 (1957) (demonstrating that the Supreme Court rarely "plant[s] itself firmly against a lawmaking majority" by holding federal legislation unconstitutional).

<sup>96</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-05 (1983) (revoking the tax-exempt status of a religious university that banned interracial dating and marriage as part of its admissions policy, even though the policy stemmed directly from sincerely held religious beliefs).

sources of debate and discussion on this social controversy. With religious actors thus diminished in their power to make public arguments or statements, one should not be surprised that public opinion on same-sex marriage would become more permissive.

Similarly, Harvard Law professor and former United States ambassador to the Holy See, Mary Ann Glendon, has argued that same-sex marriage is dangerous for religious institutions supporting traditional marriage because, once legal, opponents of same-sex marriage will be treated as pariahs, and a form of reverse discrimination will occur. Glendon writes,

As much as one may wish to live and let live, the experience in other countries reveals that once these arrangements become law, there will be no live-and-let-live policy for those who differ. Gay-marriage proponents use the language of openness, tolerance and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination the likes of which we have rarely seen before. Every person and every religion that disagrees will be labeled as bigoted and openly discriminated against. The ax will fall most heavily on religious persons and groups that don't go along. Religious institutions will be hit with lawsuits if they refuse to compromise their principles.<sup>97</sup>

Regarding scenarios exactly like this, the late Father John Neuhaus, one of *Time's* 100 most influential public intellectuals, often quipped (but only half in jest) that where orthodoxy becomes optional, orthodoxy will sooner or later be proscribed.<sup>98</sup>

### III. THE FREE EXERCISE DEFENSE

The purview of this Comment is not to provide an exhaustive analysis of the Free Exercise Clause. Given the varied interpretations the Clause has received in the past, however, it is worth investigating

<sup>97</sup> Mary Ann Glendon, *For Better or for Worse?*, WALL ST. J., Feb. 25, 2004, at A14; see also Mark Galli, *Is the Gay Marriage Debate Over? What the Battle for Traditional Marriage Means for Americans—and Evangelicals*, CHRISTIANITY TODAY, July 2009, at 31 (“A recent poll of Massachusetts residents revealed that 36 percent of voters who oppose gay marriage agreed with the statement, ‘If you speak out against gay marriage in Massachusetts you really have to watch your back because some people may try to hurt you.’”).

<sup>98</sup> Victor Morton & Julia Duin, *Faith Community Mourns ‘Inspirational’ Neuhaus: Catholic Leader, 72, Dies from Cancer*, WASH. TIMES, Jan. 9, 2009, at A1, available at 2009 WLNR 465436; see also Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774) (describing the “diabolical, hell-conceived principle” that allowed “five or six well-meaning men [being imprisoned] in close jail for publishing their religious sentiments, which in the main are very orthodox”), in 1 WRITINGS OF JAMES MADISON, 1769–1783, at 18, 21 (Gaillard Hunt ed., 1900).

whether the Clause could assist religious institutions as a defense against same-sex antidiscrimination laws. First, does the text and intent of the Free Exercise Clause provide support for a defense of religious institutions promoting traditional marriage? Second, how does the Supreme Court's contemporary free exercise jurisprudence treat these types of cases? Despite a compelling argument that the text and intent of the Free Exercise Clause could be understood to provide a defense for religious institutions on an issue like marriage, the Court's new line of jurisprudence, begun in *Employment Division v. Smith*,<sup>99</sup> regarding neutral, generally applicable laws, casts doubt upon the success of such an argument without a marked change in the Court's analysis.

A. *One View of the Text and Intent of the Free Exercise Clause*

Although competing theories exist, it is at least plausible that the text and intent of the Free Exercise Clause should provide religious institutions meaningful protection for their beliefs and actions with respect to marriage. While it is the text of the amendment—not the history or the intentions of the drafters—that is constitutional law, in order to respect the reality that the government is guided by a written constitution, it is both necessary and instructive to consider seriously the original meaning of the Free Exercise Clause as it was understood when ratified.<sup>100</sup> As the Court has observed, “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.”<sup>101</sup> Finally, at the outset, it is worth noting the obvious: the Free Exercise Clause is an explicit constitutional provision in which the framers chose to protect “religion” rather than similar or similarly important categories.<sup>102</sup> This point may be relevant for same-sex marriage antidiscrimination statutes in as-applied challenges by religious institutions; the United States Supreme Court has long held that more

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<sup>99</sup> 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause does not exempt religious actors from duties imposed by neutral and generally applicable laws).

<sup>100</sup> See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 11-15 (1986) (arguing that it is appropriate to use history in interpreting the Free Exercise Clause).

<sup>101</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting).

<sup>102</sup> *Africa v. Pennsylvania*, 662 F.2d 1025, 1034 (3d Cir. 1981) (“[I]t is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however ‘ultimate’ their ends or all-consuming their means.”).

stringent scrutiny applies to statutes that fall under specific textual prohibitions of the Bill of Rights.<sup>103</sup>

The Religion Clauses read, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>104</sup> Distinct from other constitutional amendments, the First Amendment is a negative right, today preventing both the federal and state governments from enacting certain types of laws, rather than a positive “right, privilege, or immunity.”<sup>105</sup> The Department of Justice has expressed the view that, as a negative right, the text may suggest that the framers viewed the free exercise of religion as the type of right that is inalienable rather than as one of the “mere civil privileges conferred by a benevolent sovereign.”<sup>106</sup>

“Free exercise,” however, is not a crystalline term; the scope of its coverage is open to interpretation. Thus, crucial to understanding free exercise is familiarity with the debate about which categories of religious activities it protects.<sup>107</sup> The classic and perhaps most important debate has centered on whether the Free Exercise Clause protects both beliefs and actions or only the former. The proposition that the Clause protects the *belief* and the profession of religious doctrine against unfavorable government compulsion, punishment, disabilities, or favoritism is widely accepted today.<sup>108</sup>

However, the history of the extent to which *action* was thought to be protected is complicated and has vacillated over time. In his famous “wall of separation” letter to the Danbury Baptist Association, Thomas Jefferson wrote, “the legislative powers of government reach actions only, and not opinions . . . [M]an . . . has no natural right in

<sup>103</sup> See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 n.27 (2008) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .” (italics omitted) (alteration in original) (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938))).

<sup>104</sup> U.S. CONST. amend. I.

<sup>105</sup> OFFICE OF LEGAL POLICY, *supra* note 100, at 15. On the incorporation of the Free Exercise Clause to the states through the Fourteenth Amendment, see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>106</sup> OFFICE OF LEGAL POLICY, *supra* note 100, at 16.

<sup>107</sup> See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1463 (2d ed. 2005) (“The Free Exercise Clause . . . obviously does not provide absolute protection for religiously motivated conduct.”).

<sup>108</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (indicating a number of different prohibitions on government conduct as it relates to religious belief, including government’s inability to compel belief affirmation or to punish the expression of beliefs it deems false).

opposition to his social duties.”<sup>109</sup> This opinion of Jefferson’s was the basis for the Court’s early ruling that free-exercise exemptions to generally applicable laws may apply to opinions but not to actions.<sup>110</sup> However, both before and after Jefferson, commentators and courts took a less restrictive view. William Penn in 1670 understood freedom of conscience to include “the exercise of ourselves in a visible way of worship,”<sup>111</sup> and well-known Virginia judge and professor St. George Tucker, a religious moderate, included in an 1803 definition of freedom of conscience both religious opinions “and duties.”<sup>112</sup>

Consideration of the historic context of religion in the Founding period adds further perspective for interpreting the Religion Clauses. It is well known that some of the founders, including Thomas Jefferson, favored the period’s more philosophical approach to religion, deism, but Michael McConnell argues that to place the focus there is a mistake.<sup>113</sup> Rather, McConnell contends, the existence of a widespread and powerful evangelical religious revival provides the more determinative historical focal point.<sup>114</sup> In an irony often underappreciated in history lessons, religious rationalists, to whom many attribute the very same deist tendencies suspected by some to buttress the Religion Clauses, were the ones that were “far more likely than the enthusiastic believers to side with the established church.”<sup>115</sup>

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<sup>109</sup> Letter from Thomas Jefferson to a Comm. of the Danbury Baptist Ass’n (Jan. 1, 1820), in 16 THE WRITINGS OF JEFFERSON 281, 281-82 (A. Lipscomb ed., 1904).

<sup>110</sup> See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (“Laws . . . cannot interfere with mere religious belief and opinions, [but] they may with practices.”).

<sup>111</sup> Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1451-52 (1990) (quoting WILLIAM PENN, *The Great Case of Liberty of Conscience Debated*, in 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 447 (1726)).

<sup>112</sup> ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES, reprinted in 5 THE FOUNDER’S CONSTITUTION 96, 97 (Philip B. Kurland & Ralph Lerner eds., 1987); see also JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 45 (2005) (“For most eighteenth-century writers, religious belief and religious action went hand in hand, and each deserved legal protection.”).

<sup>113</sup> McConnell, *supra* note 112, at 1437 (“It is a mistake to read the religion clauses under the now prevalent assumption that ‘the governing intellectual climate of the late eighteenth century was that of deism (or natural law).’” (quoting William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 377 (1989))).

<sup>114</sup> *Id.* (citing a historian who believed that “the Enlightenment world view ‘excludes many, probably most, people who lived in America in the eighteenth and nineteenth centuries’”).

<sup>115</sup> *Id.* at 1440.

On the one hand, representatives of non-established religions—such as Baptists—took free exercise and disestablishment principles very seriously to demand a separation of church and state,<sup>116</sup> while it was republicans who regarded religion no less seriously but saw it more instrumentally as an important guarantor of civic virtue, meaning it should be in some way affiliated with, and supported by, the state. McConnell observes,

The paradox of the religious freedom debates of the late eighteenth century is that one side employed essentially secular arguments based on the needs of civil society for the support of religion, while the other side employed essentially religious arguments based on the primacy of duties to God over duties to the state in support of disestablishment and free exercise.<sup>117</sup>

The upshot of this analysis is that it avoids perceiving the church/state problem at the Founding as understood predominantly in either Lockean terms (preventing religious discord through tolerance and making religion irrelevant to political affairs) or in republican terms (viewing religion as an instrument that serves the state's interest). Rather, from the dominant perspective of the religious enthusiasts whose political efforts, McConnell claims, most helped bring about the First Amendment, the crux of the problem was too much state power and interference directed against religious freedom. As such, the proper meaning and scope of protected free exercise may very well be determined not by the matters the public or state is concerned about but “by [the] matters God is concerned about, according to the conscientious belief of the individual.”<sup>118</sup>

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<sup>116</sup> The Supreme Court has also noted the historical link between calls for strict disestablishment and free exercise. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947) (“[I]ndividual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”).

<sup>117</sup> McConnell, *supra* note 111, at 1442.

<sup>118</sup> *Id.* at 1446; see also WITTE, *supra* note 112, at 97 (“To read the [F]ree [E]xercise [C]ause too minimally is hard to square with the widespread solicitude for rights of conscience and free exercise reflected in the First Congress’s debates.”); James Madison, *Memorial and Remonstrance Against Religious Assessments* (“Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe.”), in 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 185 (Gaillard Hunt ed., 1901). Despite Madison’s absolutist disestablishment view of church and state presented by Justice Rutledge’s famous dissent in *Everson v. Board of Education*, 330 U.S. at 28-63 (Rutledge, J., dissenting), in which Rutledge identifies Madison as the premier authority on the meaning of the Religion Clauses, Madisonian thinking on free exercise was similarly starkly drawn in favor of broad religious exercise. As the discussion herein observes, this seeming inconsistency between strict

Given this history, Professor John Witte's formulation of free exercise is apt: "[T]he right to act publicly on the choices of conscience once made—up to the limits of encroaching on the rights of others or the general peace of the community."<sup>119</sup> Contrast this view with the perspective of modern liberalism, which "tends to protect religious freedom only when it does *not* matter—when it is private and inconsequential."<sup>120</sup> At least one important reading of the Free Exercise Clause suggests that this latter view is incompatible with the intent behind the Religion Clauses.<sup>121</sup>

### B. Supreme Court Free Exercise Jurisprudence

Despite good arguments for a robust interpretation of the Free Exercise Clause based on text, history, and public policy, the Clause in practice has not provided as much protection as some religious adherents might desire.<sup>122</sup> The text of the Free Exercise Clause is brief

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disestablishment and robust free exercise is friendly, rather than unfriendly, to religion, and is indeed no contradiction at all. *But see* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1085 (2008) (arguing that the drafters' notes on the Free Exercise Clause shed "almost no light" on its original meaning but that the Clause likely did not support conscientious exemptions because when Congress considered what would become the Second Amendment, the First Congress "directly considered and rejected a constitutional right to religious-based exemption from militia service"). This debate played itself out in the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Justices O'Connor, Breyer, and Souter generally agreed with McConnell's interpretation of the history discussed herein, *id.* at 548-65 (O'Connor, J., dissenting), and Justices Scalia and Stevens rejected the same history as inconclusive. *Id.* at 537-44 (Scalia, J., concurring).

<sup>119</sup> WITTE, *supra* note 112, at 45.

<sup>120</sup> McConnell, *supra* note 24, at 1265.

<sup>121</sup> There is also a competing body of academic literature against favoring widespread exemptions under the Free Exercise Clause. *See generally* MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Philip A. Hamburger, *More Is Less*, 90 VA. L. REV. 835 (2004); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979); Marshall, *supra* note 113; Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1993-94).

<sup>122</sup> Scholars note two broad understandings of the Free Exercise Clause:

and open to multiple interpretations, and the history regarding its intent and purpose is widely debated; consequently, this area of constitutional law is one that is driven by common law.<sup>123</sup> This Section examines the Court's position, not on every potential free exercise issue, but on a sample of the likely critical issues for religious institutions facing same-sex antidiscrimination statutes: namely, the extent to which the Clause covers actions as well as beliefs and how the Clause is interpreted as a defense against neutral, generally applicable laws.

Separating religious free exercise into its two components—belief and action—the Free Exercise Clause has successfully protected religious belief absolutely but provides only qualified protection for religiously motivated conduct.<sup>124</sup>

The Supreme Court first had occasion for significant treatment of the Free Exercise Clause's protection of beliefs versus actions in

First, one could conceive of the Free Exercise Clause as primarily promoting religious autonomy—facilitating the ability of religious adherents to practice their faiths, even when such practice entails violating generally applicable laws enacted without religiously discriminatory intent. The alternative approach would conceptualize the Clause in terms of enhancing relative equality among and between religious sects.

Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1192 (2008). The latter reading, of course, provides less support to religious institutions. One scholar has noted the lack of doctrinal development in free exercise and suspects that courts may be uncomfortable with combining necessary judicial compromise and eternal truths. See Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 506 (2003) (“Comparing religion clause doctrine to free speech or equal protection doctrine today is like comparing a Dick and Jane reading primer to *The Brothers Karamazov*.”).

<sup>123</sup> STEVEN G. GEY, RELIGION AND THE STATE, at iii (2d ed. 2006) (“Because the Court has gone beyond the First Amendment’s text to define the proper limits of the relationship between church and state, interpretive issues have always been at the forefront of Religion Clause litigation.”).

<sup>124</sup> The Supreme Court discussed the distinction between regulating belief and action in the first *Smith* case:

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such . . . . On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.”

Employment Div. v. Smith, 485 U.S. 660, 670 n.13 (1988) (alteration in original) (citations omitted) (internal quotation marks omitted) (quoting Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)).

*Reynolds v. United States*,<sup>125</sup> where the Court held that beliefs are protected, but actions are not.<sup>126</sup> The case before the Court concerned a Mormon's argument that the Free Exercise Clause entitled him to an exemption from a law criminalizing polygamy. The Court cited Thomas Jefferson's view of the Religion Clauses as the nearly authoritative word on the Clauses' interpretation.<sup>127</sup> The effect of Jefferson's and the Court's reading is that the Free Exercise Clause protects an individual's religious beliefs but fails to protect the religious actions that flow from those beliefs.<sup>128</sup> At one level, this distinction is necessary for government to function. As the Court in *Reynolds* worried, there would be a point at which—free to act according to one's own religious beliefs regardless of the state's law—a person could become “a law unto himself.”<sup>129</sup>

Evolving over time from its initial position in *Reynolds*, the Court subsequently upheld the right of religious groups to solicit funds under the Free Exercise Clause.<sup>130</sup> Without going so far as to protect all religious conduct, the Court stated, “In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”<sup>131</sup> The Court further extended the protection of the Free Exercise Clause in *Sherbert v. Verner*,<sup>132</sup> a case involving a claim for unemployment benefits by a woman whose religion prevented her from working on Saturdays. The Court held that the plaintiff was entitled to the benefits and argued that “to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional

<sup>125</sup> 98 U.S. 145 (1878).

<sup>126</sup> *Id.* at 145 (“A party's religious beliefs cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land.”).

<sup>127</sup> *Id.* at 164 (concluding that Jefferson's view “may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured”).

<sup>128</sup> *Id.* (“Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”).

<sup>129</sup> *Id.* at 167. Even the Catholic Church recognizes this principle. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, § 2109 (“The right to religious liberty can of itself be neither unlimited nor limited only by a ‘public order’ conceived in a positivist or naturalist manner.”).

<sup>130</sup> CHEMERINSKY, *supra* note 107, at 1472 (tracing the development of the Court's free exercise jurisprudence).

<sup>131</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

<sup>132</sup> 374 U.S. 398 (1963).

liberties.”<sup>133</sup> For a law that infringes upon religious free exercise, strict scrutiny was the appropriate test.<sup>134</sup>

Then, in 1990, in *Employment Division, Department of Human Resources v. Smith*,<sup>135</sup> the Court significantly modified its free exercise doctrine and addressed both the issue of belief versus action and how the Free Exercise Clause applies against neutral, generally applicable laws. Additionally, the Court articulated what remains the current test for Free Exercise Clause violations. *Smith* involved a challenge to Oregon’s criminalization of the drug peyote. After being denied unemployment benefits because they were fired for violating Oregon’s controlled substance law, two Native American Church members unsuccessfully sought protection under the Free Exercise Clause, arguing that they had only used peyote as a ceremonial sacrament. The Court held that the Free Exercise Clause did not prohibit Oregon’s application of its drug laws to the ceremonial ingestion of peyote and that the state could, therefore, deny the men unemployment benefits. The Court, with Justice Scalia writing for the majority, held 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).’”<sup>136</sup>

Even under the narrow province given to Free Exercise by the Court in *Smith*, contra Jefferson, the Court believed that some room exists for protecting religious action.<sup>137</sup> Four Justices on the *Smith* Court, however, supported the argument Justice O’Connor made for an even more permissive protection for religious conduct, a view that may comport more faithfully with the First Amendment’s original purposes and context.<sup>138</sup> Justice O’Connor’s concurrence<sup>139</sup> rested on

<sup>133</sup> *Id.* at 406.

<sup>134</sup> *Id.* at 403.

<sup>135</sup> 494 U.S. 872 (1990).

<sup>136</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

<sup>137</sup> *Id.* at 877 (“[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”). The drawback of the Court’s definition is that it only protects actions that are prohibited because they were engaged in for religious reasons or for the religious belief they exhibit. *Id.*

<sup>138</sup> Because the makeup of the Court has changed since the 5-4 *Smith* decision, it is possible that the Court going forward may fall in line behind Justice O’Connor’s view. From the *Smith* Court, only Justices Scalia, Stevens, and Kennedy remain today (all in the *Smith* majority).

a more robust understanding of “exercise,” noting that it includes, among other things, permission to engage in “religious observances such as acts of public and private worship, preaching, and prophesying.”<sup>140</sup> Observing the absence of any distinction between belief and conduct in the Free Exercise Clause, Justice O’Connor concluded that “conduct motivated by sincere religious belief . . . must be at least presumptively protected.”<sup>141</sup>

This concurrence also resisted the *Smith* majority’s absolute deference to neutral laws of general applicability.<sup>142</sup> Instead, the O’Connor bloc emphasized that the logical and straightforward consequence of a neutral law of general applicability could easily accomplish the very end prohibited by the Free Exercise Clause: barring the free exercise of religiously motivated conduct.<sup>143</sup> The result of this restriction, Justice O’Connor argued, is to place would-be religious adherents between the Scylla of obeying civil law at the expense of divine law and the Charybdis of obeying divine law at the expense of civil law. Striking at the core of what free exercise means, Justice O’Connor concluded that

the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.<sup>144</sup>

Justice O’Connor believed it crucial to recognize that in placing “substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.”<sup>145</sup>

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<sup>139</sup> Justice O’Connor concurred with the majority in judgment, although the opinion she wrote and the more permissive view of free exercise she advocated make it difficult to explain her vote with the majority.

<sup>140</sup> *Smith*, 494 U.S. at 893 (O’Connor, J., concurring).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 901 (“There is nothing talismanic about neutral laws of general applicability . . . for [such laws] can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.”).

<sup>143</sup> *Id.* at 893 (“[A] law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person’s free exercise of his religion.”).

<sup>144</sup> *Id.* at 897.

<sup>145</sup> *Id.* (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981)).

What has the Court's stance been after *Smith*? *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*,<sup>146</sup> a case involving ritual animal sacrifice, is the only Supreme Court decision so far to interpret and apply *Smith*.<sup>147</sup> In this case, a church of the Santeria religion brought an action challenging city ordinances prohibiting the sacramental slaughter of animals. The Court held that the city ordinances were neither neutral nor generally applicable and that the governmental interest allegedly advanced by the ordinances did not justify targeting religious activity.<sup>148</sup> Thus, the Court affirmed that a free exercise claim could survive after *Smith* for statutes that were not actually neutral and generally applicable, but the *Lukumi* decision did nothing to ease the nearly impregnable barrier between a free exercise claim and a statute that is neutral and generally applicable.

### C. Problematic Application to the Ocean Grove Case

In sum, due to the high barrier erected by the *Smith* Court against free exercise claims challenging neutral, generally applicable laws, religious institutions will likely need more than the Free Exercise Clause to successfully mount a constitutional defense to same-sex antidiscrimination laws. Most likely, courts would consider the type of statute anticipated by this Comment to be neutral and generally applicable. Under the *Smith* doctrine, therefore, religious institutions would not be able to use the Free Exercise Clause as a source of constitutional protection for violating, in support of traditional marriage, same-sex antidiscrimination laws.

However, even if it were true that *Smith* made it significantly more difficult to challenge a neutral, generally applicable law on free exercise grounds, possible alternatives may exist. First, religious institutions in certain states could potentially avail themselves of the compelling interest test via state Religious Freedom Restoration Act statutes in making a free exercise defense based on state constitutional grounds.<sup>149</sup> Likewise, the federal Religious Freedom

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<sup>146</sup> 508 U.S. 520 (1993).

<sup>147</sup> CHEMERINSKY, *supra* note 107, at 1478.

<sup>148</sup> For commentary on both *Smith* and *Lukumi*, see Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001).

<sup>149</sup> See Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 253-62 (1998) (providing several examples of strong state protection of free exercise rights); Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 792-93

Restoration Act remains a valid route for satisfying the compelling interest test should a *federal* same-sex marriage antidiscrimination statute arise.<sup>150</sup>

Second, the majority opinion in *Smith* left open the possibility of a successful Free Exercise Clause defense when a neutral, generally applicable law was challenged on free exercise grounds *and* an additional constitutional ground.<sup>151</sup> Whereas the employment compensation statute in *Smith* only implicated free exercise concerns, a court could hold a statute unconstitutional in other “hybrid situation[s]” that implicate more than one constitutional right.<sup>152</sup> In discussing the fact that free speech cases often contain an additional dose of freedom of religion, the Court commented specifically that “it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”<sup>153</sup> As argued in Part IV of this Comment, there is a strong expressive association defense in the *Ocean Grove* case. Thus, even after *Smith* it is possible that a court could combine a free exercise and expressive association claim and receive compelling interest review even regarding a neutral, generally applicable antidiscrimination law. Some scholars are optimistic that this “hybrid rights” theory could be successful for Free Exercise claims even after *Smith*;<sup>154</sup> however, other scholars have offered strong objections to the

(1999) (surveying the issues a state faces if it wishes to pass RFRA laws that provide stronger free exercise protection).

<sup>150</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down RFRA on federalism grounds only with respect to a state law).

<sup>151</sup> *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990) (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law . . . have involved . . . the Free Exercise Clause in conjunction with other constitutional provisions . . .”).

<sup>152</sup> *Id.* at 882 (“The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.”).

<sup>153</sup> *Id.* Even if it is easy to envision, courts have had difficulty understanding and interpreting the hybrid rights doctrine. See Timothy J. Santoli, Note, *A Decade After Employment Division v. Smith: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 665-67 (2001) (identifying three separate approaches to interpreting *Smith*'s hybrid-rights exception among the circuit courts).

<sup>154</sup> One author argues, for example, that as same-sex marriage gathers increasing support from religious groups it may be possible to bring a free exercise claim challenging same-sex marriage bans under a hybrid rights theory. See Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23, 25 (2006) (arguing that “religious exemptions from same-sex marriage bans are required under a hybrid rights analysis”).

exception, leaving the doctrine's utility in question.<sup>155</sup> At minimum, the hybrid-rights theory could enable a sympathetic lower court to evade the *Smith* doctrine and find a free exercise claim colorable enough to warrant heightened scrutiny.<sup>156</sup> Because the viability of this strategy would turn on the success of an expressive association claim, it is to an analysis of that defense that we now turn.<sup>157</sup>

#### IV. THE EXPRESSIVE ASSOCIATION DEFENSE

##### A. *Doctrinal Overview*

Ironically, despite the explicit textual protection of the free exercise of religion in the First Amendment, religious institutions in practice often receive greater protection under First Amendment doctrines other than the Religion Clauses.<sup>158</sup> Another important locus of rights for religious entities is the right to freedom of association.<sup>159</sup> While the First Amendment text does not explicitly mention this right, the Supreme Court has upheld the “freedom to engage in association for the advancement of beliefs and ideas [as] an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech” and assembly.<sup>160</sup> The Court’s justification for this protection is consonant with concerns religious opponents to same-sex marriage would share: “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group

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<sup>155</sup> See William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 n.3 (1991) (criticizing the Court’s use of the “hybrid” exception as “illustrative of poetic license”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) (“One suspects that the notion of ‘hybrid’ claims was created for the sole purpose of distinguishing *Yoder* . . .”).

<sup>156</sup> See Clark, *supra* note 77, at 660 (describing a free exercise case barred by *Smith* that could potentially be made viable through the use of the hybrid-rights exception).

<sup>157</sup> A free speech claim could also comprise part of a hybrid rights claim or even constitute a stand-alone defense to same-sex marriage antidiscrimination laws; however, a free speech analysis lies beyond the confines of this Comment.

<sup>158</sup> WITTE, *supra* note 112, at 169 (2005) (“It is no small irony that today the free speech clause affords considerably more protection to religious liberty than the free exercise clause.”).

<sup>159</sup> 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.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

<sup>160</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

association . . . .”<sup>161</sup> The expressive association right is correlative to the free speech right because it is sometimes only possible for an individual to have grievances heard or to obtain relief by banding together with other like-minded speakers.<sup>162</sup> As discussed above, both the mere existence of a group and one’s membership in that group, which to some degree signifies assent to the group’s shared beliefs, can send powerful messages to members and non-members alike.<sup>163</sup>

Like other First Amendment rights, the freedom of association right is not absolute. Indeed, it is commonplace to find state and local laws prohibiting private groups and clubs from discriminating with respect to their membership, and the Supreme Court has held that such discrimination is only protected in cases of intimate association (meaning having only a few members) or where the discrimination is integral to expressive activity.<sup>164</sup> The qualified nature of this right is especially relevant for religious entities that would seek to exclude same-sex marriage couples from leadership or other public positions that might suggest religious endorsement of their marriage status.<sup>165</sup> Absent statutory exemptions, these organizations would have to rely on this circumscribed constitutional protection as articulated by the courts.

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<sup>161</sup> *Id.*; cf. David B. Salmons, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243, 1245 (1995) (asserting that “[p]ublicly expressing one’s . . . membership in a class or group . . . is at the core of political speech”).

<sup>162</sup> CHEMERINSKY, *supra* note 107, at 1396 (regarding freedom of association as integral to free speech because “[g]roups have resources—in human capital and money—that a single person lacks”).

<sup>163</sup> *Id.* (noting that “the very existence of group support for an idea conveys a message”).

<sup>164</sup> *See Roberts*, 468 U.S. at 609 (holding that a national organization of men between the ages of eighteen and thirty-five may not restrict its membership because of the state’s compelling interest in preventing discrimination and the absence of a finding that the inclusion of women would undermine the group’s expressive activities); *see also Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537 (1987) (holding that the forced admission of women to comply with a California law prohibiting sex discrimination did not infringe the club’s First Amendment rights).

<sup>165</sup> It is general Christian doctrine that one’s sexuality or views on same-sex marriage would not ordinarily preclude one from membership in a church, but a church may have legitimate concerns—just as the Boy Scouts did—about same-sex marriage proponents assuming leadership roles. Even if a Christian church wanted to restrict its membership to heterosexuals, I know of no mainstream strand of Christianity whose tenets exclude homosexuals from membership because of their sexuality. However, given explicit theology on same-sex marriage, any exclusion would have to be directly related to an expressive showing contradicting these specific teachings.

Importantly for religious institutions, the integral-to-expressive-activity exception seems crafted precisely for the same-sex marriage context. The leading case upholding the right of association and defining this discrimination exception is *Boy Scouts of America v. Dale*.<sup>166</sup> In *Dale*, the Court held that freedom of association protected the Boy Scouts, a private group dedicated to teaching moral and religious virtues, from violating New Jersey's public accommodation antidiscrimination law when the Scouts chose to exclude an outspoken gay-rights activist from its membership.<sup>167</sup> The Boy Scouts' core values included guidelines that its scouts be "morally straight" and "clean," and while the Scout's internal documents were not specific that these goals indicated disapproval of homosexuality, the Supreme Court allowed the Boy Scouts to define for themselves what their teaching meant.<sup>168</sup>

Given this policy, the Court had to determine whether Dale's presence would "significantly burden" the Boy Scouts' desire not to promote the acceptability of the homosexual lifestyle.<sup>169</sup> Although Dale had been an exemplary scout otherwise, he publicly advocated his views favoring homosexuality on a number of occasions.<sup>170</sup> The Court stated that it is proper to "give deference to an association's view of what would impair its expression," and the Court concluded that the Scouts' decision to exclude Dale was permissible.<sup>171</sup> Importantly, the Court also noted that the expressive association right is not an impermeable "shield against antidiscrimination laws" just

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<sup>166</sup> 530 U.S. 640 (2000).

<sup>167</sup> *Id.* at 644. See N.J. STAT. ANN. §§ 10:5-4, -5 (West 2002) (prohibiting discrimination in New Jersey's public accommodations). Due to state courts' interpretations of New Jersey's public accommodation law, it provides more substantial coverage than similar laws in other states. *Dale*, 530 U.S. at 663 (Stevens, J., dissenting) (noting that the New Jersey Supreme Court has given its public accommodation law "a more expansive coverage than most similar state statutes").

<sup>168</sup> *Id.* at 651 ("We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."). The Boy Scouts were also allowed to introduce evidence of several position statements advising against the appropriateness of scout leaders being openly gay and stating that homosexual conduct violates the Scout Oath. *Id.* at 651-52.

<sup>169</sup> *Id.* at 653.

<sup>170</sup> *Id.* at 645 (noting that Dale served as co-president of his university's Lesbian/Gay Alliance, was interviewed by a newspaper regarding his gay-rights advocacy, and was identified in the newspaper article photograph as the Lesbian/Gay Alliance co-president).

<sup>171</sup> *Id.* at 653.

because an organization decides acceptance of a member would damage its message.<sup>172</sup>

The Court held that the test for whether an unwanted member violates expressive association was whether “the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”<sup>173</sup> Three factors were critical to the Court’s decision to allow the exclusion in this case: First, Dale was not just a scout leader who happened to be homosexual; rather, he was a vocal and currently active community leader for gay rights.<sup>174</sup> Second, the Boy Scouts actually and sincerely believed part of their identity or mission was to inculcate virtues that did not include homosexuality.<sup>175</sup> Finally, the Court was convinced that Dale’s “presence” as an adult member would “force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>176</sup>

#### B. *Application of the Expressive Association Defense to the Ocean Grove Case*

How promising is *Dale* for religious institutions in the context of the current same-sex marriage debate? The first point to underscore is that the right-of-association doctrine only protects religious groups and not religious believers individually. However, within the context of religious groups, the *Dale* majority’s decision offers a remarkable parallel to the predicament faced by religious institutions on the issue of same-sex marriage.

One issue hotly contested in *Dale* was the specificity with which the Boy Scouts had expressed their opposition to homosexuality in the past. Instead of expressly declaring a moral stance against homosexuality, the Boy Scouts had expressed opposition using only comprehensive terms such as “morally straight.”<sup>177</sup> The dissent believed that the Boy Scouts’ documents failed to assert anything specifically condemning homosexuality.<sup>178</sup> The majority, however, did

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 648.

<sup>174</sup> *Id.* at 645 (noting that Dale was, among other things, co-president of his university’s Gay/Lesbian Alliance).

<sup>175</sup> *Id.* at 649-53 (“We cannot doubt that the Boy Scouts sincerely holds this view.”).

<sup>176</sup> *Id.* at 653.

<sup>177</sup> *Id.* at 667 (Stevens, J., dissenting).

<sup>178</sup> *See id.* at 665-71 (arguing that the Boy Scouts’ inclusion of terms like “morally straight” in the Scout Oath and Law did not support a finding that the organization

not require the Boy Scouts to use specific language regarding homosexuality and allowed the organization to self-interpret its more general language.<sup>179</sup> Moreover, Chief Justice Rehnquist stated that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”<sup>180</sup> Yet even under the stricter test advocated by the *Dale* dissent, many religious institutions would have little difficulty pointing to internal religious documents disavowing support for same-sex marriage.<sup>181</sup> Furthermore, given the *Dale* Court’s position that internal inconsistency is not a dispositive flaw, courts should not be able to balance a religious institution’s proscriptions against same-sex marriage with other seemingly contradictory principles generally promoting openness, tolerance, or love.

Religious organizations, even those within the same denomination, do not always agree on every point of theology or doctrine, and this observation is nowhere more accurate than in the United States, a country known for its religious diversity.<sup>182</sup> Certainly there are some individual churches, religious organizations, or even entire Christian denominations that already affirm or are moving toward affirming same-sex marriage.<sup>183</sup> However, the *Dale* Court makes it clear that unanimity of opinion is not required for First Amendment protection of expressive association. The majority stated that “[t]he fact that the [Boy Scouts] does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.”<sup>184</sup> This language is also beneficial for religious groups opposed to same-sex

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taught opposition to homosexuality, especially in light of the fact that they directed boys to seek advice on sexual matters from other sources).

<sup>179</sup> *Id.* at 650 (majority opinion).

<sup>180</sup> *Id.* at 651.

<sup>181</sup> Many Roman Catholic, Protestant, Evangelical, Jewish, and Muslim groups, as parts of established, institutionalized religions, would be able to cite internal documents similarly specific to those cited by the Ocean Grove Methodists. *See infra* note 206.

<sup>182</sup> Justice Scalia has quipped that while France is famous for having two religions and many different cheeses, the United States is famous for having just two cheeses and many different religions. Antonin Scalia & Stephen Breyer, *A Conversation on the Constitution: Perspectives from Active Liberty and A Matter of Interpretation* (Dec. 5, 2006) (remarks of Justice Antonin Scalia), <http://www.acslaw.org/node/3909>.

<sup>183</sup> *See* Graff, *supra* note 155, at 37 (“Several Christian denominations have also recognized the religious value and spiritual dignity that characterizes many same-sex relationships.”).

<sup>184</sup> *Dale*, 530 U.S. at 656.

marriage: Even if disapproval of same-sex marriage is the doctrine of many religious organizations, that belief is not always trumpeted from rooftops because it is a divisive issue. For any number of reasons, religious organizations may choose to minimize potential sources of controversy and conflict, even if the view is important to their identity.<sup>185</sup> Religious organizations are also comprised of diverse individuals, not all of whom would personally assent to every religious tenet the organization holds.<sup>186</sup> The *Dale* Court makes clear that this reality presents no limitation to the expressive association analysis. The Court affirmed that “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”<sup>187</sup> Moreover, given that opposition to same-sex marriage is not the *raison d’être* of any denomination, the Court affirmed that the association need not be organized for the “purpose” of advocating that particular expression.<sup>188</sup> Finally, the majority in *Dale* rejected the relevance of Justice Stevens’s comments in dissent regarding the increasing public acceptance of homosexuality.<sup>189</sup> Chief Justice Rehnquist concluded that this evolution is no argument at all to those who continue to reject more tolerant views towards homosexuality.<sup>190</sup> One purpose of a constitutional protection is to guarantee protection precisely when

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<sup>185</sup> See, e.g., Interview with William P. Wood, Senior Minister of First Presbyterian Church, in Charlotte, N.C. (Oct. 21, 2003) (“We are not an issues church.”).

<sup>186</sup> One commentator, discussing the increasing acceptance of same-sex relationships within certain religious groups, observed that

[i]ncreasingly, religious organizations, congregations, and individual spiritual leaders have concluded that their faiths require them to support equal marriage rights for same-sex couples. These beliefs have taken root among an array of religious communities, including mainstream denominations of American Judaism and Christianity. Even within religions that formally oppose same-sex marriage, individuals and organizations continue to agitate for doctrinal change.

Graff, *supra* note 155, at 24.

<sup>187</sup> *Dale*, 530 U.S. at 655.

<sup>188</sup> *Id.*; see also *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (holding that St. Patrick’s Day parade organizers could prevent gay-rights advocates from advocating their views at the parade despite the fact that the parade was not held for the purpose of espousing any views on homosexuality).

<sup>189</sup> *Dale*, 530 U.S. at 699-700 (Stevens, J., dissenting); see also *id.* at 660 (majority opinion) (dismissing Justice Stevens’s evidence as inapposite).

<sup>190</sup> *Id.* (“[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.”).

one's beliefs or actions are opposed by a majority: "The First Amendment protects expression, be it of a popular variety or not."<sup>191</sup>

How might the expressive association defense set forth above apply to the conflict between religious institutions and same-sex marriage that this Comment contemplates? The *Ocean Grove* case mentioned at the beginning of this Comment provides an excellent template for this analysis.

Resolution of the *Ocean Grove* case is still pending, but in December 2008, the New Jersey Division on Civil Rights found probable cause that the Ocean Grove Camp Meeting Association violated New Jersey antidiscrimination law when it refused to allow a lesbian civil union ceremony to occur on its premises.<sup>192</sup> Ocean Grove contested the ruling and stated that, consistent with its devoutly Methodist purposes, history, and goals, the use of its property for a same-sex civil commitment ceremony would violate its sincerely held religious principles and expressive association rights. In July 2009, the United States Court of Appeals for the Third Circuit remanded the case to the federal district court to decide Ocean Grove's request for declaratory relief on constitutional grounds regarding all of its property.<sup>193</sup>

Before proceeding further, a more detailed examination of the facts of the *Ocean Grove* case is in order. Ocean Grove dates back to 1869 when it was founded as an explicitly Christian ministry for worship, education, and recreation in a Christian seaside setting.<sup>194</sup> The New Jersey legislature incorporated the organization for the specific purpose of serving as a "Christian" resort for United Methodist members and friends, and from its inception the organization has described its mission in explicitly religious terms.<sup>195</sup>

<sup>191</sup> *Id.*

<sup>192</sup> See Op. N.J. Att'y Gen., Div. on Civil Rights, No. PN34XB-03008 (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-06CMA.pdf>; see also Associated Press, *supra* note 3 (reporting on the finding of probable cause).

<sup>193</sup> *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, Nos. 07-4253, 07-4543, 2009 WL 2048914, at \*1-2 (3d Cir. July 15, 2009).

<sup>194</sup> Act of March 3, 1870, ch. 157, 1870 N.J. Laws 397 (incorporating Ocean Grove "for the purpose of providing and maintaining for the members and friends of the Methodist Episcopal Church a proper, convenient and desirable permanent camp meeting ground and [C]hristian seaside resort").

<sup>195</sup> MORRIS S. DANIELS, *THE STORY OF OCEAN GROVE* 35 (1919) (quoting Ocean Grove's first president describing the Camp Meeting Association's "preeminently *Religious*" goals and stating that its "primary object" is to "keep its eye to the glory of God" and "to promote the highest forms of religious life").

Indeed, Ocean Grove's first president stated that all would be welcome provided that they understood the association's Christian purposes and had "sympathy with our objects."<sup>196</sup> Today, the association's bylaws stipulate that all voting Board of Trustees members must be United Methodists.<sup>197</sup> While the association leases some of the land it owns in the city of Ocean Grove (it owns the whole community), it controls the Boardwalk Pavilion at issue in this case, which has housed worship services since the 1880s and is used today for worship services, children's Bible School programs, summer concerts, and Gospel Music Ministry programs, which are held two to three times daily during the summer.<sup>198</sup> "The Association considers all of its events to be instrumental in bringing members of the community to faith in Jesus Christ."<sup>199</sup> Although the public is welcome to occupy the facility when it is unused, the public must "abide by [Ocean Grove's] rules and regulations" when doing so.<sup>200</sup> Finally, while the Pavilion has on occasion been rented to the public in the past for wedding ceremonies, it "has not . . . been made generally available to the public for any other purposes."<sup>201</sup>

The plaintiffs in *Ocean Grove* are Harriet Bernstein and her partner, Luisa Paster, who sought to rent the Boardwalk Pavilion as the location for their private, same-sex civil union commitment ceremony. Ocean Grove denied the couple's request to use the facility for this purpose, citing "the Association's religious beliefs as reflected in the United Methodist *Book of Discipline* and the Holy Bible."<sup>202</sup> After unsuccessfully petitioning Ocean Grove's board of trustees for reconsideration, the couple filed a grievance with the New Jersey Division on Civil Rights.<sup>203</sup>

How should this glimpse into the ongoing conflict of same-sex marriage and religious freedom be resolved under the expressive

<sup>196</sup> *Id.*

<sup>197</sup> Memorandum in Support of Motion for Preliminary Injunction at 5, *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, No. 3:07-cv-03802 (D.N.J. Aug. 25, 2007).

<sup>198</sup> *Id.* at 7.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 8.

<sup>203</sup> A second lesbian couple, Janice Moore and Emily Sonnessa, also challenged Ocean Grove's denial, but the New Jersey Division on Civil Rights found no probable cause for their allegations. *See Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, Nos. 07-4253, 07-4543, 2009 WL 2048914, at \*1-2 n.2 (3d Cir. July 15, 2009).

association doctrine? In the United States District Court for the District of New Jersey, Ocean Grove lost its motion for a preliminary injunction against the state's enforcement action. However, the court's decision rested on federal abstention grounds and did not reach the merits of Ocean Grove's First Amendment arguments.<sup>204</sup>

The test that Ocean Grove must pass is whether the presence of the same-sex civil commitment ceremony would affect "in a significant way the [association's] ability to advocate [its] public or private viewpoints."<sup>205</sup> First, did the ceremony implicate one of the association's public or private viewpoints? Of central import in *Dale* was the manner in which the Boy Scouts had—both prior to and during litigation—announced their opposition to homosexuality as an important goal of their organization. Whereas the Boy Scouts had only ambiguous general phrases that opposed advocating homosexuality prior to litigation, Ocean Grove, as an arm of the United Methodist Church, could point to specific, official church documents to detail the institution's position on homosexuality and same-sex marriage. Ocean Grove could specifically cite to the United Methodist *Book of Discipline* to make utterly clear its stance on same-sex marriage and homosexuality.<sup>206</sup> Even were these texts less clear, Ocean Grove would be free to interpret its own views on whether using its facility for a same-sex commitment ceremony would violate its expressive interests.<sup>207</sup> Given the legal test from *Dale*, this freedom

<sup>204</sup> *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, No. 07-3802, 2007 WL 3349787 (D.N.J. Nov. 7, 2007) (holding that the *Younger* abstention doctrine counseled the federal district court to allow the New Jersey courts to continue adjudicating the pending state proceeding due to issues that implicated important state interests and plaintiff's ability to raise constitutional challenges in state court).

<sup>205</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>206</sup> On marriage, the *Book of Discipline* both affirms the Church's view of traditional marriage and disapproves of same-sex marriage. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH 2008, SOCIAL PRINCIPLES, ¶ 161C (2009) ("We affirm the sanctity of the marriage covenant that is expressed in love, mutual support, personal commitment, and shared fidelity between a man and a woman."); *id.* ¶ 341 ("Ceremonies that celebrate homosexual unions shall not be conducted by our ministers and shall not be conducted in our churches."). Regarding homosexuality, the *Book of Discipline* states clear opposition to the compatibility of homosexual practice with Methodist teaching. *Id.* ¶ 161F (noting that the "United Methodist Church does not condone the practice of homosexuality and consider[s] this practice incompatible with Christian teaching").

<sup>207</sup> *Cf. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575 (1995) ("[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

of choice, the association's history, and the Methodist Church's unambiguous texts all point to a sincerely held expressive belief justifying exclusion of the same-sex commitment ceremony on the association's property.

Second, does the nature of the threat posed by the same-sex civil commitment ceremony pose a "significant" expressive harm to Ocean Grove? In *Dale*, the threat arose from the fact that membership in the Boy Scouts would be extended to a publicly known, outspoken leader of the gay rights movement. In Ocean Grove's case, there is arguably less of a threat from the notoriety of the couple—neither individual had been a well-known gay rights advocate—but more of a threat from the act they would be performing on Ocean Grove's property. The fact that same-sex civil commitment ceremonies never officially occur in a United Methodist Church worship space strongly suggests that the occurrence of even one such event would generate significant publicity. Just as there has been media interest in the developments of this case, presumably there would have been public notice that a same-sex ceremony was performed.

Had the ceremony occurred, the public would be justified in wondering whether the United Methodist Church had sanctioned the ceremony, whether the church had changed its longstanding policy against same-sex marriage, whether there was internal dispute about the status of that longstanding policy, or whether same-sex ceremonies would now be a regular occurrence in United Methodist Church facilities. For the majority in *Dale*, it was not Dale's expected use of the bully pulpit or any other public action that the Boy Scouts believed would hinder its expressive association ability; rather, it was the mere presence of Dale as a member that would have potentially caused the Boy Scouts to convey a message of acceptance to homosexuality that it does not wish to convey.<sup>208</sup>

Given this analysis, and the *Dale* Court's admission that it "must . . . give deference to an association's view of what would impair its expression," the harm in this case appears at least as damaging as the harm in *Dale*.<sup>209</sup> Under a doctrine of expressive association similar

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<sup>208</sup> *Dale*, 530 U.S. at 692 (Stevens, J., dissenting) ("The majority . . . does not rest its conclusion on the claim that Dale will use his position as a Bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality . . .").

<sup>209</sup> *Id.* at 653 (majority opinion). The effect of the damage in the Ocean Grove case is not distinguishable from *Dale* simply because the lesbian couple did not seek to become "members" of Ocean Grove.

to the one enunciated in *Dale*, it is likely that the Ocean Grove pavilion owners would have a strong chance of mounting an equally successful defense.

C. *Application of the Expressive Association Doctrine to the Ocean Grove Case According to Justice Stevens's Dale Dissent*

Given that *Dale* is the Court's first major attempt at giving shape to the expressive association doctrine—and that the *Dale* Court divided five to four—how might the *Ocean Grove* case come out under the doctrine as understood by Justice Stevens in the *Dale* dissent? In some respects, the facts of the *Ocean Grove* case ameliorate problems identified with the majority's analysis in *Dale*. However, Justice Stevens's dissent appears animated by a fundamentally different view towards how protective the courts should be of the expressive rights of private groups and the potential discrimination that individuals could face as a result. Even if one ultimately concludes, as I do, that the *Ocean Grove* case would likely come out the same way as under Chief Justice Rehnquist's understanding of the doctrine, there is no shortage of ammunition in Justice Stevens's opinion suggesting a court could resolve the *Ocean Grove* case differently.

First, how does Justice Stevens's dissent view expressive association law? The dissent exhibited less affinity for expressive association law but did acknowledge the existence of such a right, citing the Court's decision in *Roberts v. United States Jaycees*.<sup>210</sup> But the dissent was also quick to point out that there is no absolute right to association for expressive purposes and that before the *Dale* decision the Court had “never once” found an expressive association right that trumped state antidiscrimination law.<sup>211</sup> The dissent focused its attention on two prior expressive association cases, *Rotary Club*<sup>212</sup> and *Roberts*, and highlighted that expressive association claims failed in both because the groups were simply trying to enforce “exclusionary membership” policies and that allowing a member to join against their wishes would not jeopardize their message.<sup>213</sup> Justice Stevens's dissent thus made clear that to qualify for protection, a group must have more than just

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<sup>210</sup> *Id.* at 678 (Stevens, J., dissenting) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

<sup>211</sup> *Id.* at 679.

<sup>212</sup> *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987).

<sup>213</sup> *See Dale*, 530 U.S. at 682 (Stevens, J., dissenting) (discussing principles articulated in *Jaycees* and *Rotary Club* regarding how to prevail on a claim of expressive association).

“some connection” between its expression and its exclusions.<sup>214</sup> The dissent’s overall tenor suggested that this bloc of the Court envisions a more limited expressive association doctrine than does the *Dale* majority, particularly when used to avoid compliance with important state antidiscrimination laws.<sup>215</sup>

The dissent likewise held a different view towards what a group must do to make its policy position clear and to connect that policy to the group’s expressive activities. According to the dissent, the Court should make an active inquiry into the content of the group’s message to ensure that it actually articulates and holds a certain view and to consider whether the group’s message would be “significantly affected” by compliance with antidiscrimination law.<sup>216</sup> Presumably out of a concern that groups not be allowed to discriminate by contriving sham beliefs,<sup>217</sup> Justice Stevens’s framework would require an organization to show, with evidence adopted prior to the litigation, that its position was unequivocal,<sup>218</sup> internally consistent,<sup>219</sup> and publicly expressed.<sup>220</sup> Contrary to the majority’s approach in allowing a group to testify itself regarding what it believes and how contrary expression would harm its mission, Justice Stevens’s approach demands exacting proof and anticipation about how a group’s views might be challenged in litigation. Despite this more rigorous analysis, *Ocean Grove* would quite possibly still meet this heightened test because of its official connection to the United Methodist Church and the specific, public documents that describe Methodist theology regarding same-sex marriage.

Even with the facts in the *Ocean Grove* case, that outcome is not guaranteed when groups must prove the clarity and certainty of their positions without the benefit of any contemporaneous commentary on how the group interprets its documentation. For *Ocean Grove*, a

<sup>214</sup> *Id.*

<sup>215</sup> Justice Stevens opened his dissent with a rousing recognition of New Jersey’s desire to “eradicate the cancer of unlawful discrimination of all types” from society. *Id.* at 663 (quoting *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 478 (N.J. 1978)).

<sup>216</sup> *Id.* at 686 (“[T]hat inquiry requires our *independent* analysis, rather than deference to a group’s litigating posture.”).

<sup>217</sup> *Id.* at 687 (“If this Court were to defer . . . there would be no way to mark the proper boundary between genuine exercises of the right to associate . . . and sham claims . . .”).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 671-73.

<sup>220</sup> *Id.* at 672.

court resolute not to uphold its rights to expressive association could offer a number of arguments to combat the group's own interpretation of its beliefs. For one, the court could argue that the group's connection with the United Methodist Church is too attenuated for it to rely on the national church's theological statements. This concern could be particularly damaging if a court were persuaded by the fact that some para-church organizations are more liberal than the official orthodoxy of the national church itself and that, without specific incorporation of the national church's theology or documents, the para-church's beliefs would not be sufficiently articulated.

Perhaps as well, a court could attempt to use conflicting statements made in church documents to suggest the lack of a coherent message. For example, despite concluding that homosexuality is inconsistent with church teaching, the United Methodist *Book of Discipline* states that "all persons" need the church's ministry, that homosexuals are persons of "sacred worth," and that the church's ministry is "for and with all persons."<sup>221</sup> Even though the Boy Scouts explicitly stated that homosexuality and leadership in scouting were incompatible, the Court decided that the Boy Scout's position was "far more equivocal" when its whole context was considered.<sup>222</sup> Further, with the requirement that the belief be expressed publicly rather than relegated exclusively to internal documents, one wonders whether courts would entertain extensive examinations into how often the policy on same-sex marriage had been publicly discussed, emphasized, or referenced when Ocean Grove formulated its policies for renting the pavilion for marriage services.

Depending on one's perspective, Justice Stevens's approach displays the virtue or vice of a court telling a religious organization what morality should mean to them instead of following the presumption of letting the private organization interpret and express its own values. Naturally, an organization should have to present some reasonable evidence that its claim is not a sham, but Justice Stevens's approach seems to insist that a private organization prove its own views not just to the point of reasonableness but so that those beliefs could stand up in court against any potential inconsistencies.<sup>223</sup>

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<sup>221</sup> BOOK OF DISCIPLINE, *supra* note 206, ¶ 161F.

<sup>222</sup> *Dale*, 530 U.S. at 671, 676 ("[Boy Scouts] never took any clear and unequivocal position on homosexuality.")

<sup>223</sup> *See, e.g., id.* at 675.

From the perspective of religious institutions, Justice Stevens's approach presents several challenges. Such a rigorous test may prevent a private organization from adjusting its views in a sensitive way so as not to create distracting controversy: Justice Stevens's dissent emphasized the fact that the Boy Scouts did not make public their more explicit policies about how to handle homosexual leadership.<sup>224</sup> Failure to do so does not necessarily mean that a group's views are not sincerely held, but especially in matters as delicate as opposition to same-sex marriage, sometimes treading lightly with a more subtle footprint is the more pragmatic course. These same concerns might prompt an organization to reject taking "any clear and unequivocal position on homosexuality" as Justice Stevens's dissent suggested is required.<sup>225</sup>

These same complaints pertain to the way Justice Stevens's approach would consider the prospective harm that would occur to a group's expression. As opposed to Chief Justice Rehnquist's approach that allows the group itself to decide whether and how severe an impediment exists to the institution's expressive association, under Justice Stevens's approach this matter is for the court to decide. It is, however, not difficult to imagine a court accepting the documentary proof of a group's legitimate belief against same-sex marriage but holding that allowing one or a handful of same-sex ceremonies to take place indirectly under its auspices would not be a substantial burden to the group's expression.<sup>226</sup> All told, even under Justice Stevens's approach, Ocean Grove may reasonably expect to satisfy the requirements for a successful expressive association defense in its case, but Justice Stevens's approach presents more serious hurdles; presumably, fewer religious institutions would qualify under that regime.

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<sup>224</sup> *Id.*

<sup>225</sup> Justice Stevens concluded that despite the Boy Scouts' internal policy statements declaring that the Boy Scouts do "not believe that homosexuality and leadership in Scouting are appropriate," "*nothing* in these policy statements supports" the Boy Scouts' claim. *Id.* at 671, 676 (emphasis added) (internal quotation marks omitted).

<sup>226</sup> *See id.* at 684 ("The evidence before this Court makes it exceptionally clear that [Boy Scouts] has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality.").

D. *Implications of the Expressive Association  
Doctrine for Religious Institutions*

Given the expressive association doctrine and its articulation in *Dale*, the defense does appear to offer a vibrant source of First Amendment protection for religious institutions that seek to avoid liability for violating antidiscrimination laws with respect to same-sex marriage. Under the majority's framework in *Dale*, the case is easier to prove, because the right of the private group to state for itself its beliefs and the expressive consequences of violating those beliefs leaves less room for a court's exercise of its independent judgment. Yet, even under Justice Stevens's paradigm, religious groups that have documentation of their specific beliefs will benefit as long as their doctrines and views on same-sex marriage are clear and well-preserved. Though the legal case would be more difficult under this framework, it is plausible that religious groups could still find sufficient protection in many cases.

CONCLUSION

Despite the Massachusetts and California Supreme Courts' bold declarations to the contrary, if anything is clear in the wake of the recent landmark same-sex marriage decisions, it is the assurance of a turbulent future for the free exercise of religious proponents of traditional marriage. Because marriage is a fundamentally religious concept for most American religious institutions, government enforcement of same-sex marriage poses a challenge to many religious institutions on religious and not just political grounds. Given traditional and still-prevailing theological views about the nature and scope of religious activity, many religious institutions will argue that it is their religious duty to offer a public defense of traditional marriage and to avoid any public involvement contrary to their expressive identity. As the *Ocean Grove* case illustrates, this religious duty will in many instances directly conflict with state or federal same-sex antidiscrimination laws.

Ironically, to confront this new wave of legal conflict, religious institutions that oppose same-sex marriage will likely find firmer constitutional ground under the expressive association doctrine than under the Free Exercise Clause. Despite at least one prominent interpretation of the Clause's text and intent for affording strong free exercise rights to religious institutions, the Court's jurisprudence in *Smith* and *Lukumi* has stymied robust constitutional protection against

neutral, generally applicable statutes. The expressive association doctrine, however, especially as articulated by the *Dale* Court, offers a potentially more successful First Amendment defense for religious institutions seeking to avoid liability for violating same-sex antidiscrimination laws.