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Same-Sex Family Equality And Religious Freedom

Ira C. Lupu & Robert W. Tuttle*

¶1 In the spring of 2009, a seismic shift—both institutional and substantive—occurred in the fight over the legal recognition of same-sex marriage. The institutional venue for the conflict changed as legislatures replaced courts as the primary decision-makers on the issue. Within a period of eight weeks, the legislatures of four states (Vermont, Connecticut, Maine, and New Hampshire) became the first legislative bodies in the United States to recognize same-sex marriage.¹ Moreover, among these states, only Connecticut was under court order to recognize such marriages.² Legislatures in the other three states were acting without any such pressure from the judiciary. Late in 2009, the District of Columbia City Council extended this trend by authorizing same-sex marriages in the District.³

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¹ The texts of the relevant statutes appear in notes to Part II, *infra*. Not all of the relevant political decisions have gone in this direction. In November 2009, the voters in Maine repealed this legislation through a referendum. See Abby Goodnough, *Gay Rights Rebuke May Change Approach*, N.Y. TIMES, Nov. 4, 2009, at A25, available at

http://www.nytimes.com/2009/11/05/us/05marriage.html?_r=1&scp=1&sq=gay%20rights%20rebuke%20may%20change%20approach&st=cse. In early December 2009, the New York State Senate rejected a bill authorizing the issuance of marriage licenses to same-sex couples. See Jeremy Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. TIMES, Dec. 2, 2009, at A1, available at

<http://www.nytimes.com/2009/12/03/nyregion/03marriage.html>. Similarly, in early January 2010, the New Jersey Senate rejected legislation that would have authorized same-sex marriage in that state. See Michael Farrell, *New Jersey Senate Rejects Gay-marriage Bill*, CHRISTIAN SCI. MONITOR, Jan. 7, 2010, available at <http://www.csmonitor.com/USA/Politics/2010/0107/New-Jersey-Senate-rejects-gay-marriage-bill>.

² The judicial origins of same-sex marriage in the United States trace back to the Massachusetts Supreme Judicial Court's pioneering decision in 2003, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). Prior to the Massachusetts Supreme Judicial Court decision, a Vermont Supreme Court decision led to the creation of civil unions for same-sex couples. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). Since the decision in *Goodridge*, several additional states have legalized same-sex marriage through judicial decision. See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (finding that sections of the California Family Code restricting civil marriage to heterosexual couples violated the state constitution); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (finding that Connecticut laws restricting civil marriage to heterosexual couples violated the state constitution); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (finding that the Iowa statute outlawing same-sex marriage violated the state constitution). The California ruling in *In re Marriage Cases* has since been superceded by the passing of Proposition 8, amending the California State Constitution to exclude same-sex couples from marriage. CAL. CONST. art. I, § 7.5. Several years later, a federal district court declared that amendment invalid under the federal constitution. *Perry v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 78817 (N.D.C.A. Aug. 4, 2010). That litigation continues on appeal.

³ Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. CODE § 46-401 (2009); see also Tim Craig, *DC Council Approves Same-Sex Marriage Bill*, WASH. POST, Dec. 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120101265.html>.

¶2 The substantive quality of the shift involves the role of religion. All of these legislative enactments include provisions designed to respect the liberty of religious communities to maintain their own teaching and practices on this subject. Each state's legislation explicitly guarantees the rights of clergy to decide whether to preside at same-sex marriages, and the rights of houses of worship to decide whether to make their facilities available to solemnize or celebrate a same-sex wedding.⁴ A few states go further by protecting the rights of religiously affiliated organizations to refuse to treat same-sex marriages equally with opposite-sex marriages.⁵ Despite some academic prodding, however, no state has yet been willing to grant public officials or vendors of goods and services related to weddings (e.g., photographers, caterers, wedding planners, florists, and the like) exemptions from state-created obligations to serve without discrimination based on sexual orientation.⁶

¶3 The conflict between state recognition of same-sex families and religious concerns has been brewing up recent storms. A wedding photographer in New Mexico became the target of successful legal action when she refused to provide photography services at a same-sex wedding ceremony.⁷ In a case that has become a poster child for the movement against same-sex marriage, the New Jersey Division of Civil Rights ruled that the state's public accommodation law prohibited a Methodist organization that operated a boardwalk pavilion, held open for events by people of all faiths, from excluding a same-sex commitment ceremony.⁸

¶4 Nor is this sort of conflict limited to the United States. In 2009, the Court of Appeals for England and Wales rejected a claim of religious discrimination by a Christian marriage registrar who was disciplined for refusing to register a same-sex civil partnership under English law.⁹ Similarly, a Canadian court held that a provincial marriage commissioner may be fined for refusing to perform a same-sex marriage.¹⁰

⁴ See discussion *infra* Part II.A.

⁵ See discussion *infra* Part II.C. The most significant early academic writing on the conflict between religious communities and gay rights is William Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997). Professor Eskridge's primary focus in that article was not on same-sex marriage, which was only a gleam in his eye at that time, but rather on the conflict between Georgetown University and a campus student group that championed gay rights. See *id.* at 2430–2443.

⁶ See discussion *infra* Part II.B.

⁷ See *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Dec. 16, 2009) (entering summary judgment against a commercial photographer for refusing on religious grounds to photograph a same-sex marriage ceremony), available at <http://www.telladf.org/userdocs/ElanePhotoOrder.pdf>. The New Mexico court rejected the photographer's arguments based on the First Amendment's Speech and Free Exercise Clauses, as well as her argument based on New Mexico's Religious Freedom Restoration Act. The complainant, Vanessa Willock, "did not seek monetary damages, but [successfully] sought her attorney's fees." *Id.* at 2.

⁸ *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't of Law and Pub. Safety Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf> (issuing a finding of probable cause). Applying abstention principles, the federal courts have refused to enjoin the proceeding. *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 2007 WL 3349787 (D.N.J. 2007), *aff'd*, 2009 U.S. App. LEXIS 15741 (3d Cir. July 15, 2009). We discuss *Ocean Grove* in detail in Part II, *infra*.

⁹ *Ladele v. Islington* [2009] EWCA (Civ) 1357 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.htm>.

¹⁰ *Nichols v. Saskatchewan Human Rights Comm'n*, 2009 Sask. R. 474 (July 17, 2009). Commissioner Nichols could have limited his commission to the performance of marriages for those within his own faith, but he had not done so.

And, though the decision was later reversed by an English court, a tribunal in the United Kingdom ruled in June 2009 that a Catholic adoption agency's refusal to place children with same-sex couples violated the governing regulations for the provision of adoption services.¹¹

¶5 As these examples show, the conflict between gay equality and religious freedom is not restricted to disputes over the legality of same-sex marriage—neither the United Kingdom, nor New Mexico, nor New Jersey license such marriages within their borders. Nevertheless, as the number of nations and states permitting such marriages increase,¹² disputes involving religiously affiliated institutions and vendors in industries related to marriage are likely to appear with increasing frequency in many jurisdictions in the United States and elsewhere.

¶6 A small but important academic literature exists on the potential conflicts between same-sex family formation and religious liberty. The earliest contributions to this debate typically asserted a wide variety of threats to religious liberty from the same-sex marriage movement, and implicitly relied on this bundle of threats to make a case against state recognition of same-sex marriages.¹³

¶7 More recently, however, a different category of academic appraisal has begun to appear. These writings focus on the need to shield religious liberty from the social and legal consequences that might follow from recognition of same-sex marriage.¹⁴ That is, these commentaries advocate some form of *modus vivendi* between those who support same-sex marriage and those who seek to protect the freedom of religious individuals and institutions to refrain from assisting such marriages or to oppose homosexual relationships more generally.

¶8 Now that a number of state legislatures have addressed this conflict, the time is especially ripe for a new assessment of the various forms this *modus vivendi* might take. Part I of this piece explores the social and legal dynamics of conflict between advocates of gay equality, including marriage equality, and advocates of a religiously-based freedom to oppose the morality and social legitimacy of an openly gay life. Part II develops and analyzes a typology of these conflicts. In Part II.A. we offer arguments to

¹¹ Catholic Care v. Charity Comm'n for Eng. & Wales [2009] UKFTT 376 (appeal taken from Eng.), available at http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareDecision_1609v2.pdf. An English judge later reversed and remanded this decision. See *Catholic Adoption Society Wins Ruling on Gay Parents*, YORKSHIRE POST, Mar. 17, 2010, available at <http://www.yorkshirepost.co.uk/news/Catholic-adoption-society-wins-ruling.6159217.jp>.

¹² In addition to the six jurisdictions in the United States that license same-sex marriages, such marriages are legally authorized in Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden. See Same-Sex Marriage—Legal Recognition of Same-Sex Couples, http://en.wikipedia.org/wiki/Same-sex_marriage (last visited May 13, 2010).

¹³ THOMAS M. MESSNER, HERITAGE FOUND., SAME-SEX MARRIAGE AND THE THREAT TO RELIGIOUS LIBERTY (2008), <http://www.heritage.org/Research/Reports/2008/10/Same-Sex-Marriage-and-the-Threat-to-Religious-Liberty>; George W. Dent, Jr., *Civil Rights for Whom? Gay Rights v. Religious Freedom*, 95 KY. L.J. 553 (2007); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007).

¹⁴ See, e.g., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY] (collecting essays with differing proposals on ways to accommodate same-sex marriage and religious freedom); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006) (arguing that the strenuous cultural conflict between gay rights and traditional religious views necessitates religious exemptions from laws protecting against discrimination based on sexual orientation).

buttress the freedom of clergy and communities of worship to refuse to lend their support to the solemnization and celebration of same-sex marriage. Part II.B. turns to the context in which advocates of religious liberty have had the least success, and in which arguments for exemptions seem least persuasive—the claims of religiously motivated individuals (not employed by religious organizations) to be free of obligations not to discriminate based on sexual orientation or the same-sex quality of a relationship. Part II.C. focuses on what we think are the most difficult issues—whether religiously affiliated organizations, such as charities and educational institutions, should be exempt from non-discrimination rules with respect to the status of marriage. Here, we identify the leading policy concerns that should be relevant to legislatures in deciding whether to exempt religious organizations from rules prohibiting discrimination against same-sex couples. In light of these considerations, we sketch an over-arching approach to schemes of legislative exemption in the context of goods and services incident to weddings, more general services provided to married couples, and employee benefits.

I. FRAMING THE CONFLICT

¶9 The American partnership between civil and religious institutions over marriage is longstanding. States have recognized the convenience and social authority that derive from permitting clergy to preside over marriages that have both religious and civil significance. In addition, all states provide that public officers, such as state court judges, local justices of the peace, or court clerks may preside at marriage ceremonies.¹⁵ Moreover, many church-originated doctrines with respect to prohibited marriages (e.g., underage, bigamous, and incestuous), divorce, and other issues relating to domestic life were absorbed first into the common law and then into the relevant statutory law of the American states.¹⁶

¶10 As family law in America became modernized in the second half of the twentieth century, the substantive criteria that governed divorce became increasingly distant from the criteria that operated within many religious communities, especially those with traditional views of marriage. In particular, civil divorce law moved sharply away from the norms of the Roman Catholic, Orthodox Jewish, Mormon, and other conservative religious communities. Nevertheless, for reasons of custom, convenience, and religious freedom—including the freedom to marry without any religious vows, symbols, or commitment—American law continued to recognize the simultaneous availability of pure civil marriage, administered by a public official, and joint civil-religious marriage, typically administered by a member of the clergy and governed by state laws.

¶11 Because marriage, far more than divorce, remained fixed in the minds of many as a joint venture between religious communities and the state, the same-sex marriage movement set off a storm of protest from traditional religious quarters.¹⁷ The response to

¹⁵ In Maryland, for example, justices of the peace could originally perform marriages, but now have been replaced in those duties by clerks of the circuit courts. *See* U.S. Marriage Laws: Maryland, http://usmarriagelaws.com/search/united_states/maryland/index.shtml (last visited May 13, 2010).

¹⁶ *See, e.g., Reynolds v. United States*, 98 U.S. 145, 164–65 (1878) (describing reception of ecclesiastical prohibition on plural marriage into common law and statutory law of England, and then U.S. colonies and states).

¹⁷ *See* Mary Anne Case, Lecture at the University of Chicago: Why Evangelical Protestants are Right When They Say that State Recognition of Same-Sex Marriages Threatens Their Marriages and What the Law

the first hints of legalized same-sex marriage in the 1990s,¹⁸ amplified loudly by the more pervasive and powerful response to the *Goodridge* decision in Massachusetts, was a flurry of opposition that gathered under the cultural and legal rubric of “the defense of marriage.”¹⁹ Thus, until very recently, the conservative religious response to the movement for same-sex marriage was the assertion, as a sword against that movement, of a religious understanding of marriage as exclusively a male-female bond.

¶12 As time went on, however, it became increasingly difficult to persuade moderate voters that religious opposition to same-sex marriage required legal prohibition of such marriage. By political necessity, in the fight over Proposition 8 in California, the religion-based arguments took a new turn. Opponents of same-sex marriage argued that if such unions were recognized by the state, as they had been at that point by the California Supreme Court,²⁰ religious communities would be coerced through a variety of means into accepting the legitimacy of such marriages. If these predictions were accurate, continued recognition of same-sex marriage would become a zero-sum game. The gains for same-sex families would come at the expense of religious communities that refused to accept the legal legitimacy of those families.

¶13 In the heated political struggle over Proposition 8, these assertions came to the forefront.²¹ To the extent voters believed that the freedom of their own religious leaders to preach as they chose on matters of sexuality and family, and the freedom of their own faith communities to accept or reject particular family arrangements, were at stake in the outcome, the voters were that much more likely to vote for Proposition 8. Exit polls conducted on Election Day in 2008 suggested that those arguments had indeed influenced the outcome.²²

¶14 This reframing of the debate between those advocating traditional religious concerns and proponents of same-sex marriage, however, carried within it the seeds of a

Should Do About It (Oct. 1, 2008), *available at* <http://www.law.uchicago.edu/node/57> (arguing that religious and civil marriage should be disaggregated, and that marriages with legal force in the civil law should be performed by civil officials rather than clergy).

¹⁸ In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court had appeared to pave the way for same-sex marriage in that state, but the state amended its Constitution to bar same-sex marriage before the litigation concluded. The story of the political reaction to *Baehr* is well-chronicled in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1076–80 (2d ed. 2004).

¹⁹ See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 26–29 (2006) (discussing the passing of the 1996 Federal Defense of Marriage Act). After *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), many states also scrambled to enact state constitutional amendments designed to protect against similar state court decisions. ESKRIDGE & SPEDALE, *supra*, at 41; *see generally* David Masci, *An Overview of the Same-Sex Marriage Debate*, PEW FORUM ON RELIGION & PUB. LIFE, Apr. 1, 2008, <http://pewforum.org/docs/?DocID=288>.

²⁰ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

²¹ *See, e.g.*, Jim Garlow, Op-ed, *Prop 8 Preserves Freedoms*, USA TODAY, Oct. 30, 2008, *available at* <http://blogs.usatoday.com/oped/2008/10/prop-8-preserve.html>; Bill May, Op-ed, *Prop. 8 Protects Rights of Those Who Support Traditional Marriage*, S.F. CHRON., Oct. 1, 2008, *available at* http://articles.sfgate.com/2008-10-01/opinion/17135681_1_same-sex-marriage-same-sex-couples-gay-couples (“[W]hen the rights of people opposed to same-sex marriage on moral or religious grounds conflict with the rights of same-sex couples, the courts will almost always side with same-sex couples.”); *The Divine Institution of Marriage*, LDS NEWSROOM (Church of Jesus Christ of Latter-Day Saints, Salt Lake City, Utah), Aug. 13, 2008, <http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage>.

²² *See* Martin Wisckol, *Gay Marriage Advocates Bristle at Religion's Role in Prop. 8 Win*, ORANGE CTY. REGISTER, Dec. 5, 2008, *available at* <http://www.oregister.com/articles/religious-church-campaign-2247442-state-gay>; *see also* CNN.com, *Election Center 2008: Exit Polls: California Proposition 8: Ban on Gay Marriage*, <http://www.cnn.com/ELECTION/2008/results/polls/#CAI01p1> (last visited July 8, 2009).

new and powerful reconciliation of competing interests. If opponents of same sex marriage believe that the practice is inherently sinful and destructive to the community, then compromise is very unlikely. But if opponents are primarily concerned about the loss of religious freedom for faith communities that do not accept same-sex marriage, then provision of assurances about protecting that freedom might well soften the opposition and pave the way to a *modus vivendi* between opposing sides.²³ What form might such a *modus vivendi* take?

II. SAME-SEX PARTNERS AND RELIGIOUS FREEDOM—A TYPOLOGY OF CONFLICT

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

¶16 One case, *Bernstein v. Ocean Grove Camp Meeting Association*,²⁴ provides an especially illuminating context for exploring the conflict. Ocean Grove Camp Meeting Association (OGCMA) is a Methodist ministry organization that owns Ocean Grove, New Jersey, an unincorporated beachfront community. OGCMA was formed in the late nineteenth century as a place for religious revivals, known as “tent meetings,” and summer vacations in a Christian environment.²⁵ The Association subdivided the property, and conveyed residential and commercial lots subject to ninety-nine year renewable leases.²⁶ OGCMA retained possession over the common areas, including places for worship and assembly, the boardwalk, and the beach.²⁷ Over the past century, OGCMA has maintained a vibrant ministry in the community, with worship and other religious activities at the core of the summer events.

¶17 In 2007, Harriet Bernstein and Luisa Paster, a lesbian couple who reside in Ocean Grove, asked to reserve the Boardwalk Pavilion²⁸ for their civil union commitment ceremony. OGCMA denied the request, explaining that the proposed use was inconsistent with church teaching that does not recognize same-sex marriage.²⁹ The couple filed a complaint with the state, alleging that the denial violated the New Jersey Law Against Discrimination (LAD). The state found probable cause to proceed with the investigation, ruling that the Boardwalk Pavilion was a “place of public accommodation” under LAD, and that OGCMA had impermissibly denied complainants access to the

²³ See David Blankenhorn & Jonathan Rauch, Op-Ed, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 21, 2009, at WK11, available at <http://www.nytimes.com/2009/02/22/opinion/22rauch.html>.

²⁴ *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. No. PN34XB-03008 (N.J. Dep't of Law and Pub. Safety Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>. A federal district court refused, on abstention grounds, to enjoin the proceeding. *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 2007 WL 3349787 (D.N.J. 2007), *aff'd*, 2009 U.S. App. LEXIS 15741 (3d Cir. July 15, 2009).

²⁵ MORRIS S. DANIELS, *THE STORY OF OCEAN GROVE: RELATED IN THE YEAR OF ITS GOLDEN JUBILEE 1869–1919*, at 23–42 (1919); see also *New Jersey v. Celmer*, 404 A.2d 1, 4–10 (N.J. 1979).

²⁶ *Celmer*, 404 A.2d at 3–4.

²⁷ *Bernstein*, No. PN34XB-03008, slip op. at 2–3.

²⁸ As described in the decision of the New Jersey Division for Civil Rights, “the Boardwalk Pavilion is a rectangular open-sided structure covered by a roof. It contains fixed wooden benches facing a small raised area usable as a stage. The benches also face the beach and ocean.” *Id.* at 3.

²⁹ *Id.* at 5.

Pavilion because of their sexual orientation.³⁰ In the wake of the complaint, a different state agency revoked OGCMA's property tax exemption for the parcel containing the Boardwalk Pavilion.³¹

¶18 For those concerned about recognition of same-sex marriage, the OGCMA case represents the first wave of an assault on religious liberty.³² Told from that perspective, this is a story of a religious ministry forced to open its place of worship, where regular worship services and daily religious education events are held, for use in a ceremony that the religious community believes is sinful. Civil liability and loss of tax benefits are the penalties for refusal.³³

¶19 Closer examination of the OGCMA case reveals a more complicated story. First, Ocean Grove functions as a diverse town, not simply a religious ministry. Second, OGCMA obtained public funding and a special property tax exemption for the Boardwalk Pavilion site based on a representation that the property would be open to the general public, rather than restricted to use by the religious group.³⁴ The advantageous property tax treatment was not a function of OGCMA's religious status, but rather a result of its promise not to develop the property and to provide open public access to the site. Third, until it denied the request from Bernstein and Paster, OGCMA consistently treated the boardwalk and Pavilion as public space. OGCMA accepted secular and religious reservations, subject to payment of a standard fee, and when not reserved the Pavilion was open for all to use.³⁵ OGCMA displayed no signs indicating that the boardwalk or Pavilion were private property.

¶20 The OGCMA case highlights the crucial distinction between public and private realms. The distinction reflects widely shared and legally embodied beliefs about the exercise of authority by individuals, intermediate associations, and state institutions. On the private side, the political community has only a limited authority to regulate the bonds of intimacy and association.³⁶ Various reasons can be given for this limit, including the relationship between privacy and personal flourishing, the role of independent associations in the development and preservation of liberal political order, the value of pluralism in belief and expression, and the recognition that unfettered public control over private life has historically led to dire abuses.³⁷ But we also recognize that the political community has a legitimate interest in ensuring that all people have equal access to publicly available goods and services, whether provided by the state, commercial entities, or others. This interest primarily arises from concern about those

³⁰ *Id.* at 7.

³¹ *Id.* at 6.

³² SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 14, at 78; MESSNER, *supra* note 13, at 9.

³³ For example, the Ocean Grove controversy features prominently in a recent statement of religious conservatives: "In New Jersey, after the establishment of a quasi-marital 'civil unions' scheme, a Methodist institution was stripped of its tax exempt status when it declined, as a matter of religious conscience, to permit a facility it owned and operated to be used for ceremonies blessing homosexual unions." Manhattan Declaration: A Call of Christian Conscience, <http://www.manhattandeclaration.org/the-declaration> (last visited May 13, 2010).

³⁴ *Bernstein*, No. PN34XB-03008, slip op. at 4–6. For more detail on the Green Acres tax exemption, see Real Property Taxation of Recreation and Conservation Lands Owned by Nonprofit Organizations, N.J. ADMIN. CODE § 7:35-1.1 (2010).

³⁵ *Bernstein*, No. PN34XB-03008, slip op. at 3–4.

³⁶ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 584–85 (2003); *Boy Scouts of America v. Dale*, 530 U.S. 640, 655–656 (2000); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

³⁷ *See* Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989).

who are excluded from such benefits. Exclusion may imperil health and safety, limit opportunities for personal development, deny political and social equality, or impose psychic distress. State policies protecting against such exclusion also express the political community's concerns about its own character and experience, because such exclusion may result in segregation and conflict.³⁸

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

¶22 Instead of focusing on the subjective experiences of those involved in such conflicts, the law should attend to objective characteristics that can guide primary conduct, lead to principled decisions, and better reflect the interests at stake. Under the New Jersey Law Against Discrimination, a facility or activity that is "private" has no obligation to comply with non-discrimination rules, but a "place of public accommodation" must comply, and may only exclude for good—non-discriminatory—reasons.³⁹ The distinction between public and private focuses on the scope of invitation and the character of the use. The OGCMA extended a broad invitation to use the Pavilion, on a casual basis for anyone visiting the boardwalk, and by reservation for anyone willing to pay the fee. Although the Association held worship events in the Pavilion, the facility was also used for events that had no religious connection, including secular weddings. Moreover, the dispute arose in the context of an already blurred line between religious and civil community, analogous to the situation in other privately-owned towns, where expectations of individual civil liberties are protected even on private lands.⁴⁰ Most importantly, OGCMA expressly promised, as a condition of

³⁸ The classic source for these arguments is GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944). See also Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255, 265–72 (2005) (critiquing economic analysis of discrimination that fails to account for psychic cost to victims); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1428, 1448–49 (1996) (describing legal and policy reasons for supporting broad application of public accommodations laws); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1625–30 (1991) (assessing justifications for anti-discrimination laws); John H. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1347–56, 1365–68 (1989) (describing economic arguments for anti-discrimination laws); see generally Joe R. Feagin, Kevin E. Early, Karyn D. McKinney, *The Many Costs of Discrimination: The Case of Middle-Class African Americans*, 34 IND. L. REV. 1313 (2001); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992).

³⁹ Law Against Discrimination, N.J. STAT. ANN. § 10:5-1 (2002).

⁴⁰ See *Marsh v. Alabama*, 326 U.S. 501, 509–10 (1946) (holding that a private, company-owned town could

receiving its Green Acres tax exemption, that the public would have equal access to the property.

¶23 While treatment of the Pavilion as a public accommodation might offend the religious sensibilities of OGCMA, the Pavilion's character as a public accommodation distanced OGCMA from an expressive affiliation with particular uses of the facility. If the Pavilion had been available only for worship or other events connected with the Association's religious ministry, then OGCMA would have had a stronger claim that forced inclusion of the same-sex ceremony intruded on their legitimate expectations for the space. But if OGCMA had not been selective with respect to other uses of the Pavilion, and had not been a visible co-sponsor of all prior events, then OGCMA cannot reasonably be perceived as endorsing the same-sex ceremony. Bernstein and Paster did not ask OGCMA to furnish a minister to officiate at their ceremony, or to publicize the ceremony in the Association's newsletter, or in any other way to participate in the event. Of course, OGCMA had—and indeed eventually exercised—the power to withdraw the Pavilion from public use by refusing all reservations of the space, or by adopting religiously selective criteria for its use.⁴¹ But, taken alone, the decision to exclude Bernstein and Paster did not convert the Pavilion into a private space.

¶24 This public-private divide can be traced into the three settings that we examine below. These include the right of clergy and religious communities to choose which marriages to solemnize; the rights of religiously motivated individuals who oppose same-sex marriage to refuse to facilitate it; and the rights of religious organizations to selectively withhold various goods or benefits from those in intimate same-sex partnerships.

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

¶25 The debate over Proposition 8 in California included assertions that clergy and faith communities would be forced against their will to solemnize same-sex marriages.⁴² Although such a coercive policy is politically inconceivable, it could be designed in a constitutionally defensible way. For example, the government could treat the celebration of civil marriage as a public accommodation, and prohibit discrimination by providers of that service. Or, the government could impose a condition on its grant of the authority to solemnize marriages, requiring the celebrant to be willing to serve all couples.

not circumscribe the free speech rights of individuals within its borders); N.J. Coal. Against the War in the Middle E. v. J.M.B Realty, 650 A.2d 757, 780 (N.J. 1994) (holding that the free speech rights of citizens could be exercised within a privately owned mall).

⁴¹ Following the decision to deny Bernstein and Paster's request to use the Pavilion, OGCMA changed its policy on use of the facility. It ended the practice of allowing people to reserve the Pavilion for weddings. Bernstein v. Ocean Grove Camp Meeting Ass'n, No. No. PN34XB-03008, slip op. at 5–6 (N.J. Dep't of Law and Pub. Safety Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>. After that change in policy, another lesbian couple, Janice Moore and Emily Sonnessa, attempted to reserve the Pavilion for a commitment ceremony and OGCMA again denied the request. However, when Moore and Sonnessa complained to the state civil rights division, the state found no probable cause to further pursue their allegations. Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, 2009 U.S. App. LEXIS 15741 (3d Cir. July 15, 2009).

⁴² See, e.g., Posting of Joe Matthews to The New American Foundation, The Blockbuster Democracy Blog, <http://www.newamerica.net/blog/blockbuster-democracy/2009/prop-8-decision-word-and-question-12046> (May 26, 2009, 11:57 CST).

¶26

In response to fears of this character, the states that have enacted same-sex marriage legislation have provided explicit assurances that neither clergy nor religious communities will be forced to cooperate in these ways. For example, section 7(a) of the Connecticut law provides that “[n]o member of the clergy authorized [by state law] to join persons in marriage . . . shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion [as guaranteed by the federal and state constitutions].”⁴³ And section 7(b) of the Connecticut law provides that “[n]o church or qualified church-controlled organization . . . shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church or qualified church-controlled organization.”⁴⁴ The recent same-sex marriage legislation in Vermont,⁴⁵ Maine,⁴⁶ New Hampshire,⁴⁷ and the District of Columbia⁴⁸ all contain similar provisions concerning the freedoms of clergy and religious communities.

⁴³ An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 7(a), *available at* <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

⁴⁴ *See id.* § 7(b). The law also exempts any religiously affiliated organization from any obligation “to provide services, accommodations, advantage[s], facilities, goods or privileges to an individual if the request for such services is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of [the organization’s] religious beliefs and faith.” *Id.* § 17. In Part II.C., below, we discuss this broader exemption for “celebration” as well as “solemnization” of a marriage.

⁴⁵ Section 9 of the Vermont legislation, An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, provides in part: “This section does not require a member of the clergy [or any religious society] to solemnize any [particular] marriage.” S. 115, 2009–2010 Leg. Sess. (Vt. 2009) (enacted) (amending VT. STAT. ANN. tit.18, § 5144). Section 11 of the Act provides in part: “[A] religious organization . . . or a [religiously affiliated] organization . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage.” S. 115, 2009–2010 Leg. Sess. (Vt. 2009) (enacted) (amending VT. STAT. ANN. tit. 9, § 4502).

⁴⁶ Section 5 of Maine’s legislation (now repealed, *see supra* note 1), An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, was enacted to amend title 19-A, section 655 of the Maine Revised Statutes to include:

3. Affirmation of Religious Freedom. This Part does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition as guaranteed by the Maine Constitution, Article 1, Section 3, or the First Amendment of the United States Constitution. A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.

L.D. 1020, 124th Leg., Reg. Sess. (Me. 2009) (as passed by Leg., May 6, 2009), *available at* http://www.mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC82.pdf.

⁴⁷ The New Hampshire law, An Act Affirming Religious Freedom Protections with Regard to Marriage, N.H. REV. STAT ANN. § 457:37 (2010), includes the following provision:

Notwithstanding any other provision of law, a religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if such request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of their religious belief and faith.

The New Hampshire law also contains the following provision relating to clergy:

¶27 Lawyers and scholars share a common intuition that the First Amendment, as well as state constitutional guarantees, protect these categories of religious freedom, but thus far there has been little explanation of why this is so. Our analysis of other, less muscular claims of religious liberty will unfold more cleanly if we first explain the conventional wisdom that neither clergy nor faith communities can be directly coerced into celebrating weddings for anyone, same-sex couples included.

¶28 The idea that clergy are agents of the state, authorized to solemnize civil marriage, and therefore subject to considerable state control, is deeply inconsistent with a core aspect of religious liberty. The appropriate focus of this discussion is not the state's role in marriage, but rather is the state's relationship with clergy, which is—and long has been—extremely limited. In colonial America, some states licensed clergy, and therefore exercised precisely this sort of control over which clergy—and which faiths—could solemnize a marriage.⁴⁹ But full religious liberty cannot co-exist with state control over the clergy. This understanding is reflected in modern decisions like *McDaniel v. Paty*,⁵⁰ in which the Supreme Court invalidated a statute that disabled clergy from serving in a state legislature, as well as in *Locke v. Davey*,⁵¹ in which the Court upheld an exclusion of clergy training from a state scholarship program. This insulation of clergy from both controls and support normally attached to other learned professions is also reflected in common law decisions rejecting the concept of clergy malpractice.⁵² In addition, the “ministerial exception” bars judicial review of a wide range of legal issues arising from the employment relationship between clergy and religious communities.⁵³ Thus, across a broad range of legal contexts, our constitutional tradition recognizes a very strong policy that the state keep its hands off the selection, training, and role of the clergy. These matters are constitutionally committed to the exclusive jurisdiction of communities of faith.

¶29 Accordingly, the state may not require those ordained by faith communities as clergy to lend their imprimatur or participation to any social function, matrimonial or otherwise. The state may strip the clergy of the power to solemnize civil marriage,⁵⁴

Members of the clergy as described in RSA 457:31 or other persons otherwise authorized under law to solemnize a marriage shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment to the United States Constitution or by part I, article 5 of the New Hampshire constitution.

Id. § 457:37.

⁴⁸ The Religious Freedom and Civil Marriage Equality Amendment Act of 2009 provides similar protections for clergy (section 2 (c)) and religious organizations (section 2(d)). D.C. CODE § 46-406(c) & (d) (2009).

⁴⁹ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1438–39 nn.157–158) (discussing the licensing of dissenting preachers in colonies with Anglican establishments).

⁵⁰ 435 U.S. 618 (1978).

⁵¹ 540 U.S. 712 (2004).

⁵² See, e.g., *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948 (Cal. 1988).

⁵³ See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 558–561 (5th Cir. 1972) (holding that the free exercise clause requires interpreting civil rights statute to impliedly provide exemption for sex discrimination claims with respect to employment of clergy). For discussion of the broad character and widespread acceptance of the ministerial exception, see Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and their Leaders*, 7 GEO. J. L. & PUB. POL'Y 119 (2009).

⁵⁴ Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 14, at 201–

though such a move would cause great inconvenience and enormous howls of protest. But the state cannot commandeer the clergy in the state's efforts to gain social approval for a particular form of marriage, be it inter-faith, inter-racial, same-sex, or otherwise. In this context, as in many others, the First Amendment diffuses and separates powers, remitting the question of who may be entitled to religious marriage entirely to the judgment of clergy and the faith communities they represent.⁵⁵

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

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

¶32 *Boy Scouts of America v. Dale*⁵⁶ suggests that more general principles of freedom of association similarly support provisions of this character. The Boy Scouts and other non-commercial voluntary associations also represent normative communities, and they are entitled to exclude from membership or leadership those who do not share their beliefs. The lesson of *Dale* is that non-discrimination laws may not constitutionally trump the freedom to form and maintain such associations, however divergent from the mainstream their views may be. Like the *OGCMA* case, *Dale* arose from a complaint, brought under the New Jersey Law Against Discrimination, alleging that a public accommodation engaged in discrimination based on sexual orientation.⁵⁷ The difference between *Dale* and *OGCMA* is telling. In *Dale*, the complainant sought a position of leadership, in which he would represent the Boy Scouts through guiding the character formation of members and facilitating relations with the general public.⁵⁸ In *OGCMA*, however, Bernstein and Paster asked to use a facility that was not specifically identified with Methodist worship, that ordinary observers would see as public space, and that had been available for rental by anyone willing to pay the fee.⁵⁹ *Dale* was asking for the Boy Scouts' blessing; Bernstein and Paster were asking for equal access to public space.

¶33 These differences suggest an important limit on the reach of both *Dale* and *OGCMA*. The ruling in *Dale* applies only to the expressive activities of non-commercial entities.⁶⁰ Commercial entities do not enjoy the same protected interest in associational

207 (proposing bifurcation of civil and religious marriage).

⁵⁵ For a similar conception of the role of the Religion Clauses in separating private from governmental power, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

⁵⁶ 530 U.S. 640 (2000).

⁵⁷ *Id.* at 645.

⁵⁸ *Id.* at 644 (describing Dale's application for a position as assistant scoutmaster of a troop).

⁵⁹ See discussion *supra* notes 28–35.

⁶⁰ For a failed attempt to create a similar associational freedom for a commercial enterprise, see *State v.*

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

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

¶34 Some commentators have argued that the law should accommodate the religious concerns of individuals who object on religious grounds to same-sex marriage, and whose jobs or livelihoods would require them to facilitate such a marriage in some way.⁶¹ For example, Professors Robin Fretwell Wilson and Douglas Laycock have defended the notion that public employees such as marriage license clerks, and private vendors in the wedding industry should be afforded a “right . . . to refuse to facilitate same-sex marriages, except where such a refusal imposes significant hardship on the same-sex couple.”⁶²

¶35 Now that state legislatures have gotten into the same-sex marriage business, these arguments have begun to appear in the political arena.⁶³ In the process leading up to Connecticut’s recent legislation on same-sex marriage, a group of legal academics (including Wilson and Laycock) proposed a broad exemption for all individuals and religious entities from laws that would impose on them, in violation of their sincerely held religious beliefs, a duty to provide goods and services related to the solemnization of any marriage.⁶⁴ Unlike the scholarly works of Wilson and Laycock, this proposal made

Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985) (holding that a state law prohibiting religious discrimination in employment did not violate First Amendment rights of for-profit health club operated by “born-again” Christians), *appeal dismissed*, 478 U.S. 1015 (1986). *Cf. Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 340–346 (1987) (Brennan, J., concurring) (suggesting that a blanket Title VII exemption for religious organizations to engage in religion-based hiring can be most persuasively justified with respect to non-profit entities).

⁶¹ Laycock, *supra* note 54, at 194–201; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Health-Care Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 14, at 77–102; *see also* Thomas Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 1 (2010); Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 NEXUS 101 (2009); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 B.Y.U. J. PUB. L. 475 (2008).

⁶² Laycock, *supra* note 54, at 198.

⁶³ *See* Jacqueline L. Salmon, *Religious Exemptions in Same-Sex Laws Under Scrutiny*, WASH. POST, May 14, 2009, *available at*

http://newsweek.washingtonpost.com/onfaith/godinygovernment/2009/05/by_jacqueline_l_salmon_as.html.

⁶⁴ Letter from Thomas C. Berg, Carl H. Esbeck, Robin Fretwell Wilson, and Richard W. Garnett to Christopher G. Donovan, Speaker of the Conn. House, on Religious Liberty Implications of Raised Bill 899 (Apr. 20, 2009), *available at* <http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Berg.etal.pdf>. Professor Laycock also submitted a letter endorsing the recommendations made in the April 20th letter and expanding on the arguments in support of such exemptions. Letter from Douglas Laycock to Christopher G. Donovan, Speaker of the Conn. House (Apr. 21, 2009), *available at* <http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Laycock.pdf>. This same group of scholars, with the addition of Professor Michael Perry, has submitted similar letters to the relevant committees of other state legislatures, including that of New Jersey. *See* Posting of Rick Garnett to Mirror of Justice Blog, <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/12/religious-liberty-and-ssm-in-new-jersey.html>

no exception for serious hardship to same-sex couples. The Connecticut legislature soon thereafter enacted a provision that protected religious organizations from any such duty to provide such goods or services,⁶⁵ but omitted the proposed exemption for individuals and businesses.

¶36

The question of such an exemption for individuals and firms is largely a matter of legislative discretion, because neither same-sex couples nor providers of commercial goods enjoy significant constitutional protection in the areas affected by this dispute. Same-sex couples have no federal constitutional right to be free from discrimination, based on sexual orientation, in the non-governmental provision of goods and services.⁶⁶ Although roughly half the states prohibit discrimination based on sexual orientation,⁶⁷ the contours of that protection can be modified by legislation.⁶⁸ Likewise, the federal constitution's Free Exercise Clause does not require the accommodation of commercial or public actors who have religious objections to serving same-sex couples.⁶⁹ In order to successfully assert the protection of the Free Exercise Clause, such actors would need to show that anti-discrimination rules from which they seek exemption are not "neutral, generally applicable regulatory law[s]."⁷⁰ Because protections for same-sex couples do

(Dec. 5, 2009, 17:21 EST).

⁶⁵ An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples, 2009 Conn. Pub. Act No. 09-13, § 17 (exempting all religiously affiliated organizations from any obligation "to provide services, accommodations, advantage[s], facilities, goods or privileges to an individual if the request for such services . . . is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of [the organization's] religious beliefs and faith").

⁶⁶ To the extent that the exemptions would apply to conduct by private actors, the conduct at issue would not constitute state action. On this point, we disagree with Professor Feldblum, who suggests that states are under an affirmative constitutional duty to protect same-sex couples from private discrimination. Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 14, at 152–154. Same-sex couples, however, may have state and federal constitutional protections with respect to the conduct of public officials. See *infra* text accompanying notes 95–110.

⁶⁷ See, e.g., Nancy K. Ota, *Queer Recount*, 64 ALB. L. REV. 889, 894 (2001).

⁶⁸ *Romer v. Evans*, 517 U.S. 620 (1996) holds that there is a constitutional limit on the power to modify such legislation on a wholesale basis at the expense of minorities defined by sexual orientation. The circumstances of modification in *Romer*, however, were quite extreme, and there is no reason to doubt the validity of an exemption narrowly tailored to religious objectors in the private sector.

⁶⁹ See *Stormans v. Selecky*, 586 F.3d 1109, 1127–1137 (9th Cir. 2009) (explaining that the Free Exercise Clause does not exempt pharmacies from regulation requiring them to fill all prescriptions); *N. Coast Women's Care Med. Group, Inc. v. Benitez*, 189 P.3d 959, 965–969 (Cal. 2008) (explaining that neither state nor federal constitutions support exemption of physicians group from state law prohibition on discrimination, based on sexual orientation, against lesbian patient seeking fertility treatment). After the 9th Circuit rejected the Free Exercise claim in *Stormans v. Selecky*, but before the case could go to trial on other issues, the parties announced a settlement, pursuant to which Washington State agreed to develop a rule that would permit pharmacies or pharmacists to engage in facilitated referrals of patients to other pharmacies when a drug is out of stock, or when the patient's selected pharmacy or pharmacist refuses to supply the drug for any reason, including conscientious religious objection. See *Washington State Pharmacy Board Backs Down On Rules In Pre-Trial Compromise*, <http://religionclause.blogspot.com/2010/07/washington-state-pharmacy-board-backs.html> (July 8, 2010, 7:30 EST). A state-based Religious Freedom Restoration Act might provide such protection against the imposition of anti-discrimination laws on commercial vendors who refuse on religious grounds to provide services to same-sex couples, but the one decision on point to date rejected such a claim. *Elane Photography v. Willock*, No. D-202-CV-200806632, slip op. at 17–18 (N.M. 2d Jud. Dist. Ct. Dec. 16, 2009), available at <http://www.telladf.org/userdocs/ElanePhotoOrder.pdf>.

⁷⁰ *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 880 (1990). In *Smith*, the Supreme Court repudiated the prior Free Exercise regime, pursuant to which states had to justify substantial state-imposed burdens on religious freedom as necessary to serve compelling state interests. *Id.* After

not specifically target religious conduct or motives, the Free Exercise Clause offers no support for exemption claims.

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

¶38 The proposed regime of exemptions attempts to minimize the suffering caused by this collision, and to maximize the opportunity for all people to participate fully in public and commercial life.⁷¹ Under such a regime, religious objectors would be exempted from a duty to serve same-sex couples, unless a specific refusal of service would impose a “significant hardship” on those seeking the service.⁷² Proponents contend that same-sex couples would rarely be refused services even under a broad exemption; few merchants would be willing to pay the economic cost of rejecting a whole class of consumers, and same-sex couples would be able to quickly find substitute providers if confronted with a seller unwilling to assist them.⁷³ Thus, proponents argue, there is no reason to believe that same-sex couples would be systematically denied access to publicly available goods and services.

¶39 For those who are sensitive to both sides of this conflict, the proposed exemption has significant appeal. Such an exemption seems especially effective in addressing the criticism, made by religious conservatives, that official recognition of same-sex intimacy would require all people to support the practice. Nonetheless, the proposed exemption invites skepticism and careful scrutiny because it is legally anomalous. In no other respects are individuals and for-profit entities excused, on religious grounds, from compliance with non-discrimination laws.⁷⁴

¶40 Exemption proponents have pointed to what they assert are two analogous regimes of religious exemptions—the obligation of employers to make reasonable accommodations for the religious beliefs and practices of employees, and the right of healthcare providers and institutions not to provide abortion-related services. We think those two schemes are quite different in character from the proposed exemption for those who refuse service to same-sex couples. The differences suggest reasons for legislators to be reluctant to grant the proposed exemption.

Smith, that strict test is no longer triggered by the application of religion-neutral, generally applicable state laws to religious conduct.

⁷¹ Wilson, *Matters of Conscience*, *supra* note 61, at 97–102; Laycock, *supra* note 54, at 197–201.

Professor Andrew Koppelman also proposes a regime of exemptions, but is less explicit about the details. Koppelman, *supra* note 14, at 146.

⁷² Wilson, *Matters of Conscience*, *supra* note 61, at 101; Laycock, *supra* note 54, at 198.

⁷³ Koppelman, *supra* note 14, 132–35.

⁷⁴ Non-profit religious entities are generally exempt from prohibitions on religion-based discrimination in employment decisions. Civil Rights Act of 1964, tit. VII, § 702, 42 U.S.C. § 2000e-1 (2006).

1. Religious Accommodations in the Workplace

¶41 In developing their arguments for religious objections to facilitating same-sex marriage, Professors Laycock and Wilson point to the model of religious accommodation in the workplace.⁷⁵ At first glance, the parallel seems very strong. Under Title VII of the 1964 Civil Rights Act and analogous state employment discrimination laws, employers have an affirmative obligation to accommodate the religious needs of their employees.⁷⁶ This obligation is designed to ensure that religious adherents are not arbitrarily or invidiously excluded from the workplace, but are instead given a reasonable opportunity to take up any occupation.⁷⁷ Thus, Title VII protects individuals from employment discrimination based on religious belief and religious conduct.⁷⁸

¶42 Under this regime, if an employee shows that compliance with a workplace obligation would require the employee to violate a religious obligation, then the burden shifts to the employer to show that the employee's religious need cannot be accommodated without imposing an "undue hardship" on the employer.⁷⁹ The balancing of religious commitment and secular hardship is thus a significant feature of the law of the workplace.

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

¶44 If, however, the bakery owner believes that the bakery itself should not serve same-sex couples, those couples have neither the information nor the authority to assess the relative significance of the bakery's claim, the availability of measures less burdensome than complete denial of service, or even the extent of the burden that the refusal imposes on same-sex couples generally. Instead, the couple knows only that they must seek out a different bakery, and must hope that the next one is willing to serve them. Even if the bakery has the burden of showing, in a legal action for discrimination, the sincerity of its religious objection and the lack of significant hardship on the same-sex couple, the power and information imbalance remain.

⁷⁵ See Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 51–52 (2008); Laycock, *supra* note 54, at 199.

⁷⁶ The leading decisions on the duty and its scope are *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

⁷⁷ See Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 784 (1995–1996).

⁷⁸ Civil Rights Act of 1964, tit. VII, § 702, 42 U.S.C. § 2000e(j) (2006); see also MASS. GEN. LAWS ANN., ch. 151B, § 4 (2006); N.J. STAT. ANN. § 10:5-12(q) (2008); N.Y. EXEC. LAW § 296 (McKinney 2009).

⁷⁹ *Webb v. Philadelphia*, 562 F.3d 256, 259 (3rd Cir. 2009) (applying the burden shifting scheme to religious accommodation claims under Title VII in the Third Circuit); *E.E.O.C. v. Firestone Fibers & Textiles, Co.*, 515 F.3d 307 (4th Cir. 2008) (applying the scheme in the Fourth Circuit); *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007) (applying the scheme in the Eleventh Circuit).

¶45 Wilson and Laycock contend that the problem of information asymmetry can be alleviated by a public notice requirement,⁸⁰ through which religious objectors must inform customers of the unavailability of service to same-sex couples. But such a requirement, as Laycock acknowledges, may impose even greater burdens on same-sex couples. In some areas at least, public pronouncements of exclusion might make such refusals even more common.⁸¹ More importantly, however, that information fails to address the real imbalance between merchant and customer. Advance knowledge that a particular store does not serve same-sex couples may help avoid some measure of dignitary harm, but does nothing to assist those couples in locating providers that are willing to serve them. A more appropriate informational requirement would demand that, as a condition of the exemption, religious objectors provide customers with a list of ready and willing providers.

¶46 The analogy between accommodation of employees and exemption of service providers is also questionable because of the different character of the burdens imposed by the respective exemptions. In the employer-employee relationship, as in almost every other setting in which religious exemptions are claimed, the costs of the burden can be broadly distributed. For example, the military service exemption for conscientious objectors imposes a direct burden on government, which must seek a broader pool of potential draftees. Individual potential draftees also experience an increased, though widely diffused, burden in the form of a marginally greater risk of being conscripted. Likewise, a statute that exempts religious users of particular drugs from controlled substances laws imposes a direct burden on government, which must implement and administer a scheme for ensuring that such use is limited to the exempted religious group and purposes. The exemption also imposes an indirect, though likely insubstantial, burden on other citizens, who could be exposed to risks from those who use the controlled substance. In the employer-employee relationship, the employer bears the direct burden of a religious accommodation, but any economic cost can be spread among all customers.⁸²

¶47 The proposed religious exemptions to public accommodation laws, however, impose their direct costs on a discrete set of customers. When a same-sex couple is denied service, the couple must absorb the full burden of such a denial—measured in the time and other expense incurred in locating a willing provider, along with the dignitary harm of being refused access to services that are otherwise available to the public.⁸³ This

⁸⁰ See Wilson, *Matters of Conscience*, *supra* note 61, at 98; Laycock, *supra* note 54, at 198–99 (envisioning “a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises”).

⁸¹ See Laycock, *supra* note 54, at 199.

⁸² Seen in this light, the burden of religious accommodation does not materially differ from other burdens imposed on employers, such as the duty to make reasonable accommodations for disabled employees. The employer has the information to assess the reasonableness of potential accommodations, and the ability to spread among all customers the costs required to make such an accommodation.

⁸³ As such, the harm to same-sex couples from the Wilson-Laycock proposals is qualitatively distinct from the burden imposed by any other religious accommodation. See generally Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589 (2000). The closest analogies to what Wilson and Laycock propose can be found in statutes that accommodate the practice of faith healing. Parents who refuse traditional medical care for their children, and instead seek spiritual healing, are often granted partial exemptions from laws regulating child abuse and neglect—up to the point at which the child’s health is placed in serious danger by the refusal of medical care. See Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the*

direct burden would also be unique to same-sex couples, because religious objectors have no general right to refuse service to other groups of people.⁸⁴

2. Conscientious Objection to Participation in Abortions

¶48 Professor Wilson's argument for exemptions invokes parallels with rights of conscientious objection in the context of abortion.⁸⁵ Before conscience clauses, she contends, those who sought abortion attempted to force doctors and hospitals to provide such services.⁸⁶ Conscience clauses limit the overreaching claims of patients; such clauses specify that health care providers and facilities are not required to perform certain acts to which they are morally opposed.⁸⁷ Religious believers, she contends, should have a similar right not to facilitate same-sex relationships.

¶49 The widespread acceptance of a right to conscientious objection rests on a shared recognition that abortion has a moral character that is categorically distinct from other practices, medical or otherwise. Exemptions from mandatory provision of abortion services, like exemptions from conscription in times of war, focus specifically on those who might be forced to terminate human life.⁸⁸ In other words, the exemption reflects the specific moral character of the act, rather than a more general deference to the subjective demands of conscience. Thus, proponents of exemptions have been much less

Prosecution of Faith Healing Parents, 29 U.S.F. L. REV. 43, 51 n.41 (1994) (listing statutory exemptions for faith-healing parents). The burden of such an accommodation quite obviously falls on the ill child, who is denied conventional medical care out of deference to the parents' religious beliefs. But the parent-child relationship is distinguishable from the merchant-customer relationship. Most importantly, the Constitution recognizes a zone of deference to parental judgments, in which the state does not ordinarily intrude. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the free exercise clause and parental rights to control upbringing of children supports exemption from duty of Amish parents to send children to accredited school until the age of sixteen); see also *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that a mother's fundamental liberty interests under the federal Constitution were violated by a state law that gave visitation rights to child's paternal grandparents). This zone can be explained by the (controversial) presumption of parents' special care and concern for the child, knowledge of the child's particular needs, and interest in forming the child's religious identity. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). Merchants have no such bond with or authority over their customers, so imposition of burdens in the context of arms'-length commercial dealings cannot be similarly justified.

⁸⁴ The question of third-party burdens is constitutionally significant. The Supreme Court has repeatedly recognized Establishment Clause limits on the state's power to burden third parties as a means for accommodating the religious concerns of others. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). For a general discussion, see Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 107–112 (2007). The proposed exemption avoids constitutional problems only if it is limited to circumstances in which a refusal of services does not cause substantial harm to those refused.

⁸⁵ Wilson, *Matters of Conscience*, *supra* note 61, at 81–85, 93.

⁸⁶ *Id.* at 79.

⁸⁷ *Id.* (referring to the "primogenitor of healthcare conscience clauses, the Church Amendment"). See, e.g., ARK. CODE ANN. § 20-16-304 (2009); COLO. REV. STAT. § 25-6-102 (2009); MASS. GEN. LAWS ANN. ch. 112, § 12I (2009); TENN. CODE ANN. § 68-34-104 (2009).

⁸⁸ In addition, healthcare professionals and institutions are frequently exempted from obligations to perform sterilization procedures; this exemption is based on the close connection, within some religious traditions, between interference with conception and the taking of human life.

successful in enacting broader measures that would exempt healthcare professionals and facilities from any obligation to provide services they might deem objectionable.⁸⁹

¶50 By contrast, the proposed religious exemption in the context of same-sex marriage is not focused on any specific act, much less an act that involves the taking of human life. A provider of goods or services is covered if he or she has a sincere religious objection to performing acts that facilitate same-sex relationships.⁹⁰ Neither the “religious” character of the objection nor the concept of “facilitation” offer meaningful external constraints on the provider’s claimed exemption.

¶51 The exemption applies to any action that would facilitate a same-sex marriage, with “facilitation” defined in purely subjective terms. As Laycock points out, cooperation in wrongdoing is a well-established legal, moral, and theological category, with a rich history of sophisticated analysis.⁹¹ But that analysis is beside the point in this context because only one person’s opinion determines whether particular conduct would facilitate same-sex marriage—that of the one who seeks an exemption. Citing *Thomas v. Review Board of the Indiana Employment Security Division*,⁹² in which the Supreme Court held that a member of the Jehovah’s Witnesses should be excused from working in a munitions factory, Wilson asserts that “objectors get to decide how offensive a task is, not the rest of the world.”⁹³

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

¶53 This concern would be alleviated if exemption proponents restricted their claim to acts directly connected with the solemnization of same-sex marriage, such as celebration of or other direct participation in the wedding ceremony. Framed in that way, the exemption would be narrowly tailored to a specific act about which some members of the public have significant moral ambivalence—the state endorsement of same-sex intimacy. Such an exemption would allow individuals to distance themselves from that

⁸⁹ For example, the Obama administration has now proposed to rescind the regulations, promulgated in the waning days of the Administration of George W. Bush, designed to widen the scope of conscientious exemptions for health care workers in the United States. See Rescission of the Regulation Entitled “Ensuring that {HHS} Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 Fed. Reg. 10,207 (Mar. 10, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-5067.pdf>.

⁹⁰ Wilson, *Matters of Conscience*, *supra* note 61, at 100; Laycock, *supra* note 54, at 195; Koppelman, *supra* note 14, at 135.

⁹¹ Laycock, *supra* note 54, at 195–96.

⁹² 450 U.S. 707 (1981).

⁹³ Wilson, *The Limits of Conscience*, *supra* note 75, at 92.

endorsement, without permitting a categorical refusal of goods and services to same-sex couples. With the exemption so narrowed, the analogy to the abortion regime is considerably stronger.

¶54 When applied to goods and services provided by the government, however, the analogy to conscientious objection in the abortion context is especially inappropriate. The right to abortion is a negative liberty,⁹⁴ and thus the state has a duty not to interfere with the exercise of that right.⁹⁵ But the state has no constitutional obligation to facilitate access to abortion, and indeed the state has a legitimate interest in protecting nascent life, as long as the state does not impose an “undue burden” on the right to abortion.⁹⁶ From that perspective, the balancing of burdens between providers and patients is entirely appropriate; patients only have a right to object when the state places significant obstacles in the way of access.

¶55 Same-sex marriage, however, is not a negative liberty, at least with respect to the state. The state creates and maintains a monopoly over the legal institution of marriage. Anyone who wishes to marry must obtain a license from the state—even if the marriage is later celebrated by a religious official.⁹⁷ Because the state creates this benefit, denial of access to marriage has a very different character from the state’s denial of funding for, or other restrictions on, abortion services. With respect to abortions, the state satisfies its obligation simply by refraining from coercively restricting access.⁹⁸ The right to marry, however, is the affirmative right of access to the state’s administrative process for granting that benefit. It rests on a claim of equality, not a claim of fundamental liberty.

¶56 This distinction between abortion and same-sex marriage is important for assessing Wilson’s argument that public employees should be exempt from duties involving same-sex marriage. She suggests several measures for accommodating religious objections of those responsible for processing marriage applications.⁹⁹ For example, the marriage clerk’s office could identify clerks willing to process applications from same-sex couples; if no one in that office was willing to process the applications, the office could direct the couple to a different office or arrange to have the couple’s paperwork processed elsewhere.¹⁰⁰ This might require same-sex couples to drive longer distances or wait a

⁹⁴ *Id.*; see also *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 510 (1989) (“Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor . . . do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions.”).

⁹⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1994) (“[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”).

⁹⁶ *Id.* at 885 (plurality opinion) (holding that a state may require 24-hour waiting period prior to abortion to encourage choice of carrying pregnancy to term instead of terminating it by abortion); see also *Webster*, 492 U.S. 490 (holding that a state may open public hospitals to childbirth while closing them to abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that the government may fund medical expenses of childbirth but not abortion).

⁹⁷ Wilson, *Matters of Conscience*, *supra* note 61, at 97 (explaining that officials authorized by the state to issue marriage licenses “stand as an entryway into legal marriage”).

⁹⁸ See, e.g., *Casey*, 505 U.S. at 874 (“The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”).

⁹⁹ Wilson, *Matters of Conscience*, *supra* note 61, at 98–99.

¹⁰⁰ *Id.*

longer period of time in order to obtain a marriage license, Wilson concedes, but “it does not frustrate a couple’s ability to marry.”¹⁰¹

¶57 This comparison ignores the couple’s interest in equal treatment under law. The extension of rights of conscience to such equality interests has no analogy or support in existing law. Under Article VI of the U.S. Constitution, all executive and judicial officers of the states must swear or affirm their duty to support the Constitution,¹⁰² and many state constitutions require executive and judicial officers to make a similar oath or affirmation.¹⁰³ Thus, under both the equal protection clause of the 14th Amendment, and related equality provisions of state constitutions,¹⁰⁴ such state officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals.¹⁰⁵

¶58 In this regard, the provision in the New Hampshire statute that relieves all persons authorized by law to officiate at a marriage from the obligation to solemnize any particular marriage deserves special attention.¹⁰⁶ We have discovered no law on the question whether a Justice of the Peace or other official authorized to officiate is under a statutory duty to perform marriages when requested, and we expect no such specific duty exists.¹⁰⁷ The task—involving a face-to-face pronouncement in words that others are

¹⁰¹ *Id.* at 99.

¹⁰² U.S. CONST. art. VI, cl. 3.

¹⁰³ *See, e.g.*, ALA. CONST. art. XVI, § 279; CAL. CONST. art. 20, § 3; CONN. CONST. art. II, § 1; DEL. CONST. art. XIV, § 1; MD. CONST. art. I, § 9; MONT. CONST. art. III, § 3; NEB. CONST. art. XV, § 1; N.Y. CONST. art. XVIII, § 1; OHIO CONST. art. XV, § 7; PA. CONST. art. VI, § 3; VT. CONST. ch. II, § 56; WIS. CONST. art. IV, § 28.

¹⁰⁴ In Massachusetts, Iowa, California, and Connecticut, the highest state courts place the right to same-sex marriage explicitly on state constitutional guarantees of equality. The four decisions are cited in note 2, *supra*.

¹⁰⁵ These concepts of the general duty of public officials and employees inform the leading appellate decision on the subject of religion-based exemptions from the duty to serve all impartially. *See Rodriguez v. Chicago*, 156 F.3d 771 (7th Cir. 1998) (rejecting police officer’s request for religious accommodation that would excuse him from having to guard an abortion clinic). Concurring in *Rodriguez*, Judge Posner argued that government officials should never be free to refuse to serve a particular class:

The objection to recusal . . . is not the inconvenience to the police department, the armed forces, or the fire department, as the case may be, though that might be considerable in some instances. The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect.

Id. at 778–79 (Posner, J., concurring). *See also* *Ryan v. Dep’t of Justice*, 950 F.2d 458 (7th Cir. 1991) (upholding discharge of FBI agent who refused on religious grounds to investigate anti-war activists); *Parrott v. District of Columbia*, 1991 WL 126020 (D.D.C. 1991) (holding that a police department is not under a legal duty to make a reasonable accommodation of officer’s religious attitudes about abortion and relieve him of duty to protect abortion clinic).

¹⁰⁶ An Act Affirming Religious Freedom Protections with Regard to Marriage, N.H. REV. STAT. ANN. § 457:37 (2010) (“Members of the clergy as described in RSA 457:31 or other persons otherwise authorized under law to solemnize a marriage shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment to the United States Constitution or by part I, article 5 of the New Hampshire constitution.”). The Maine statute, now repealed by referendum, contained a similar provision. An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, ME. REV. STAT. ANN. tit. 19-A, § 655(3) (repealed 2009), *available at* http://www.mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC82.pdf.

¹⁰⁷ Indeed, it would be quite surprising if high-level judges, both state and federal, were under any such legal duty. We could imagine Supreme Court Justices, and other prominent jurists, being quite busy with weddings if they were obliged to officiate on request.

married—might well be understood as deeply personal as well as professional, and therefore subject to the exercise of unfettered discretion.¹⁰⁸ Consistent with this theory of the role, the New Hampshire scheme confers exactly this sort of broad-based discretion: the enactment does not single out same-sex marriages as the only kind that would trigger relief from an otherwise applicable duty to marry all. Even if such a discretion-conferring provision is constitutionally defensible, any state that issues licenses for same-sex marriages has a constitutional duty to supply public officials for the task of performing such marriages. If no public officials were willing to perform same-sex marriages, these couples could quite literally and legitimately complain that they were not being afforded equal protection of the laws.¹⁰⁹

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

¶60 Of course, exemptions of the type discussed in this part can serve as a bargaining chip in the legislative negotiations that are on the horizon in a number of states. If acceding to them will get a same-sex marriage deal done, the temptation to go along would be quite understandable. But if we were representing the campaign for same-sex marriage, we would be extremely unlikely to concede to these exemptions without very widespread and substantial policy benefits in return. Given the state-by-state character of these legislative negotiations, it is hard to see how and where any such bargain could be struck.¹¹⁰

¹⁰⁸ In this respect, the act of marrying a couple is readily distinguishable from an administrator's processing of marriage paperwork. The former involves a public and personal declaration of the couple's marriage (e.g., "I now pronounce you husband and wife . . ."), while the latter does not require the administrator to express any personal approval of the act.

¹⁰⁹ *Romer v. Evans*, 517 U.S. 620, 633 (1996) (holding that a state may not put an entire "class of persons [outside] the right to seek specific protection from the law"). Because we cannot imagine such a widespread and total refusal of official participation in a state that has been legislatively willing to recognize same-sex marriage, we do not speculate on the remedy that would follow from a violation. An order requiring all public officials to stop performing opposite-sex marriages until the problem has been solved would probably do the trick.

¹¹⁰ Gay rights groups might be attracted to a bargain that involved repeal of federal Defense of Marriage Act (DOMA) in exchange for some guarantee of religious exemptions from state non-discrimination laws. See David Blankenhorn & Jonathan Rauch, Op-Ed., *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 21, 2009, at WK11, available at <http://www.nytimes.com/2009/02/22/opinion/22rauch.html>. But the coordination problems in putting together such a deal seem very formidable, and any federal statutory protection for religious freedom against state law would raise constitutional questions about the scope of congressional power to protect religion. See *Boerne v. Flores*, 521 U.S. 507, 534–36 (1997) (holding that Congress lacks power under section 5 of the 14th Amendment to protect religious freedom against state laws that do not violate the free exercise clause).

C. Religious Organizations and the Status of Same-Sex Families

¶61 The third, and most difficult, category of potential conflicts relates to a broad array of religiously affiliated organizations, and the extent of their freedom to refuse to recognize the equal status of same-sex families. These cases may concern the celebration of weddings, but they more typically involve whether such organizations will treat same-sex married couples as equal to opposite-sex couples for purposes of eligibility for other goods, services, or benefits. Cases in this category have given rise to some of the highest profile conflicts in the field, for example: the case of *Ocean Grove Meeting Association*, discussed above; the decision by Catholic Charities of Boston to surrender its license as an adoption agency rather than place children with same-sex couples, as state law requires;¹¹¹ and the refusal by Yeshiva University to make its married student housing available to a same-sex couple.¹¹² Also included in this category of cases are those involving benefits for the spouses of employees of religiously affiliated organizations, and benefits provided by religiously affiliated fraternal benefit associations.

¶62 In this third category, patterns of convergence and divergence have appeared among the jurisdictions that have thus far legislated on same-sex marriage. Connecticut, New Hampshire, and Vermont all exempt religiously affiliated organizations from any obligation to “celebrate” a marriage, and all three exempt religiously affiliated fraternal benefit associations from any obligation to accept as members, or pay insurance benefits to, parties to same-sex unions.¹¹³ Connecticut alone, however, has a special exception for social services, including adoption, delivered by religious organizations, so long as those services are funded exclusively from private sources.¹¹⁴ And only New Hampshire has a provision that exempts religious organizations from any obligation to provide goods or services “if such request for such [goods or] services . . . is related to . . . *the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals*, and such . . . promotion of marriage is in violation of their religious belief and faith.”¹¹⁵ None of the legislating states enacted a provision explicitly relating to spousal benefits for employees of religiously affiliated organizations.

¶63 In this third category, only the cases involving celebration of same-sex weddings present any plausible claim of constitutionally mandated exemptions. But many of these disputes, in which conflicting intuitions, policies, and principles are manifest, present

¹¹¹ Father Robert J. Carr, *Boston’s Catholic Charities to Stop Adoption Service Over Same-Sex Law*, CATH. ONLINE NEWS, Mar. 10, 2006, available at http://www.catholic.org/national/national_story.php?id=19017.

¹¹² See *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099, 1101 (Ct. App. N.Y. 2001) (reinstating complaint by lesbian couple alleging that the University’s policy of refusing same-sex couples access to married student housing violated state law prohibition on discrimination based on sexual orientation). The University did not raise a defense of religious freedom in the case. *Id.*

¹¹³ An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13, available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>; An Act Affirming Religious Freedom Protections with Regard to Marriage, N.H. REV. STAT. ANN. §§ 457:37(III)–(IV) (2010); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, VT. STAT. ANN. tit. 8, § 4501(b) (2009).

¹¹⁴ 2009 Conn. Pub. Acts No. 09-13, § 19 (“Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.”).

¹¹⁵ N.H. REV. STAT. ANN. § 457:37(III) (emphasis added); see also *infra* Part II.C.2. (comparing the New Hampshire approach to the District of Columbia’s approach).

plausible cases for permissive legislative accommodation, and the divergences among the states suggest that this third category presents the most fruitful arena for legislative compromise. In this section of the paper, we sketch some overarching policy concerns that we believe may fruitfully guide legislative deliberation about such accommodations. In Part III.C.2, below, we apply these principles to some of the particular cases within this category.

1. Guiding Principles and Policies

i) The continuum of religious exclusivity.

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

¶165 Not all religiously affiliated organizations, however, exclude non-adherents from participation in the benefits or activities of the organization. For reasons of altruism, needed financial support, or both, some organizations have voluntarily opened their services and facilities without regard to membership status in the faith. This pattern obtains quite frequently in religiously affiliated organizations, such as Catholic Charities, Lutheran Social Services, or Jewish Community Centers, which provide social services or recreational opportunities regardless of faith affiliation.

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

ii) Problems of administration.

¶167 Recognizing exemptions for public employees and private vendors involves the difficult enterprise of measuring conflicting hardships and perhaps testing the religious sincerity of exemption claimants. In contrast, exempting religiously affiliated organizations on these questions can be done in ways that entail no such problems of

administration. First, as the legislation has emerged, no balancing of hardships is involved in applying institutional exemptions—in all of the legislating states, religious entities may exclude same-sex couples from goods related to solemnization and celebration of marriage without regard to the availability of alternative providers.

¶168 Second, unlike the situation of individuals, whose religious sincerity in this context may come into legitimate question, no test of sincerity can ever be sensibly applied to a faith community's determinations on issues of sexuality. Whatever the theological origins of the community's norms, they will not seem to be the idiosyncratic result of any particular individual's response to same-sex intimacy. Rather, such norms will have been the product of institutional judgment over time, and thus are not readily subject to meaningful probes of sincerity.

iii) The potential withdrawal of valuable social resources.

¶169 If some individual objectors to same-sex marriage withdraw from their current vocation because of the unavailability of exemptions from laws mandating non-discrimination, social costs are likely to be rather small. Others, willing to serve all, will take their place as marriage license clerks or providers in the wedding industry. One cannot, however, make the same confident prediction about religious organizations as non-profit providers of social services, including adoption, foster care, or education. If religious organizations withdraw as providers of such services, the social costs might be considerable.¹¹⁶ In non-profit markets for social services, we have little confidence that other providers will expand, or new providers will enter, to pick up the slack.

iv) The presence of state subsidy and support.

¶170 By force of the Constitution, states may have to tolerate conduct that they do not want to actively support. Even beyond constitutional duty, states may choose to respect the private right to engage in such conduct, but nevertheless decide not to affirmatively support it. In various post-*Dale* cases involving the Boy Scouts, for example, courts have upheld state or local decisions, driven by concern over anti-gay discrimination, to withdraw public subsidy or support from the Scouts.¹¹⁷ As exemplified by Connecticut's same-sex marriage legislation, a state may thus decide to exempt from non-discrimination principles some service activity of religious institutions that exclude same-sex families, but only if the funding for such activities is exclusively private.¹¹⁸

¶171 A long line of decisions in the Supreme Court teaches that government may withhold subsidies, from religious entities as well as others, from institutions that do not comply with subsidy conditions designed to advance reasonable government policies.¹¹⁹

¹¹⁶ The decision by Catholic Charities of Boston to surrender its license as an adoption agency in Massachusetts, rather than make adoption placements with same-sex couples, may represent an example of such a loss. See discussion *infra* Part II.C.2.ii.

¹¹⁷ *Boy Scouts v. Wyman*, 335 F.3d 80, 98 (2nd Cir. 2003); *Evans v. City of Berkeley*, 129 P.3d 394, 404–05 (Cal. 2006).

¹¹⁸ 2009 Conn. Pub. Acts No. 09-13, § 19 (“Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.”).

¹¹⁹ *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003); *Nat’l Endowment of the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (plurality opinion). Indeed, most recently, the Supreme Court reaffirmed this principle in a case in which the gay rights movement was on the other side. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 59–60 (2006). See also *Locke v. Davey*, 540 U.S. 712, 725 (2004). The proposition in the text will be tested, in a way highly relevant to the issues raised in this part of

There is thus little doubt concerning the constitutional validity of governmental decisions to tolerate certain conduct by religiously affiliated institutions while refusing to subsidize the same behavior.¹²⁰

2. Three Subsets of Conflict

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

i) Goods and services incident to wedding ceremonies.

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

Notwithstanding any other provision of law, a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith.¹²¹

¶74 For reasons sketched in Part II.A., above, the core of this provision is required by the Constitution. Communities of faith cannot be legally compelled to solemnize any class of marriages, and the state should not be in the business of deciding which religiously affiliated organizations have a sufficient nexus to communities of faith, and their houses of worship, to be entitled to the same freedom of choice. If, for example, a particular chapel at DePaul University is reserved for Roman Catholic worship and ceremonies, the state should have no greater power to compel availability of that space for a same-sex wedding than the state would have for Holy Name Cathedral.

the paper, during this 2009–10 Supreme Court Term in *Christian Legal Society v. Martinez*, 319 F. App'x 645 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 795 (2009) (No. 08-1371) (challenging the right of a state law school to refuse to provide funding and other benefits to a student organization that excludes openly and unrepentantly gay students from eligibility to be an officer or voting member).

¹²⁰ A useful analogy can be found in federal policies with respect to religious selectivity in hiring by religious organizations. The Supreme Court has upheld the validity of the provision in Title VII of the 1964 Civil Rights Act that permits such selectivity, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987), but there is considerable controversy over permitting such selectivity in government-funded social services. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 51–57, 102–05 (2005–06).

¹²¹ An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 17, available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

¶75 Moreover, the extension of this provision’s coverage to *all* “services, accommodations, advantages, facilities, goods or privileges . . . if the request for such services is related to the solemnization of a marriage or celebration of a marriage” seems constitutionally salutary. The availability of goods and services like reception halls for a wedding celebration, a church-supplied musician for a wedding or wedding reception, or pre-marital counseling for couples within the faith tradition all seem part of an indivisible enterprise—the determination by authorized representatives of a religious community as to which unions it will bless.

¶76 Notably, the exemption is only relevant for religious institutions that fall within the definition of “public accommodation” with respect to particular goods, services, or facilities.¹²² Thus, if New Jersey had adopted the laws enacted in Connecticut, Vermont, and New Hampshire, OGCMA would have been free to exclude same-sex couples from using the Boardwalk Pavilion for marriage ceremonies, even though the facility was otherwise open to the public. A for-profit enterprise, however, even if closely connected with a religious entity, would not be covered by this exemption.

¶77 Moreover, the existing statutory exemptions are limited to goods and services used to celebrate or solemnize a marriage. Again returning to the example of OGCMA, if the Boardwalk Pavilion remained a public accommodation, the Association could prohibit its use for purposes of same-sex weddings, but would not receive a general privilege to discriminate based on sexual orientation. Thus, in such a regime of exemptions, OGCMA would be required to allow same-sex couples to use the Pavilion, on equal terms with other couples, for any activities but same-sex weddings. Seen in this light, the exemption balances the Association’s desire not to have its religious message compromised or distorted by a same-sex wedding in its Pavilion, with same-sex couples’ interest in having access to the set of goods and services generally available to the public.

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

Any refusal to provide services, accommodations, advantages, facilities, goods or privileges in accordance with this section shall not create any

¹²² Organizations that do not fall within the definition of public accommodations would be under no pre-existing duty to serve without discrimination based on sexual orientation, and so would not need any such legislative exemption. In contrast, the same-sex marriage legislation in the District of Columbia explicitly links the exemption for religious organizations to whether or not the organization provides particular services, accommodations, or goods to members of the general public. *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. CODE § 46-406(e) (2009). If these organizations do make such services, accommodations, or goods available to members of the general public, they are treated as public accommodations under District law and must treat same-sex couples on the same terms as opposite-sex couples. Under the District’s law, these organizations remain free to make any exclusion required by their religious beliefs only if they limit such services, accommodations, or goods to members of their own faith. *Id.* The District exemption is thus narrower than that provided in Connecticut, Vermont, and New Hampshire, which appear to permit exclusion of same-sex couples from goods and services that may be made available to the general public, including members of the public who do not share the organization’s faith or beliefs. *See supra* note 115 and accompanying text. These state laws permit exclusion of any couple from the provision of goods and services when inclusion would violate the organization’s religious beliefs, but do not mandate, as a condition on the right to exclude, any limitation of goods and services to those who follow the organization’s beliefs.

civil claim or cause of action, or result in any state action to penalize or withhold benefits from such religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society.¹²³

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

ii) Services provided to married couples.

¶80 The relevant arguments of constitutionality and policy become more balanced, nuanced, and complex when the context shifts from celebration of a wedding to recognition of marital status. Others who have contended for religious exemptions have tended not to identify or emphasize this distinction,¹²⁴ but it is of great conceptual significance. Solemnization and celebration of a wedding are one-time events in the life of a particular couple, and represent a religious organization’s highest level of engagement and imprimatur. By contrast, the availability of goods and services may represent significant material opportunities over a lengthy period of time for a same-sex couple, and, in at least some circumstances, represent considerably less significant symbols of approval from a religious organization.

¶81 With respect to the availability of such services, important differences appear among the recent legislative enactments on the subject of same-sex marriage. The most prominent divergence is that displayed in the New Hampshire law, which goes beyond the otherwise parallel provisions in Vermont and Connecticut by exempting religious organizations from any obligation to provide goods or services “if such request for such [goods or] services . . . is related to . . . *the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such . . . promotion of marriage is in violation of their religious belief and faith.*”¹²⁵

¶82 The New Hampshire law authorizes religious entities to apply their own definition of marriage to questions of the distribution, based on marital status, of goods and services related to the promotion of marriage.¹²⁶ This recognition of authority is not limited to

¹²³ 2009 Conn. Pub. Acts No. 09-13, § 17. In the absence of such exemptions, the remedial consequences for prohibited denials of service might include civil damages, fines, injunctions against provision of such goods or services without full compliance with the relevant law, and loss of state-created benefits.

¹²⁴ See, e.g., Marc D. Stern, *Same Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 14, at 1-56 (discussing the rights of same-sex couples without distinguishing issues related to wedding ceremonies from those related to marital status).

¹²⁵ An Act Affirming Religious Freedom Protections with Regard to Marriage, N.H. REV. STAT. ANN. § 457:37(III) (2010) (emphasis added). The law in the District of Columbia also exempts religious organizations from any duty to provide “services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage, that is in violation of the entity’s religious beliefs” D.C. CODE § 46-406(e). The District law, in contrast to the New Hampshire law, does not specify the relevant means for the “promotion of marriage,” and is limited to organizations that do not make such means available to members of the general public.

¹²⁶ N.H. REV. STAT. ANN. § 457:37(III).

same-sex couples, and religious communities may choose to exercise it in other ways. For example, a church may exclude from its services for married couples those divorced and remarried individuals whose status is inconsistent with the church's strict limits on the availability of divorce.

¶83 For a variety of reasons, the calculus of accommodation is more evenly balanced between same-sex couples and religious institutions in the context of the particular benefits covered by the New Hampshire scheme.¹²⁷ With respect to most or all of the items on the list of exempt services—those aimed at the “promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals”¹²⁸—there is good reason to expect that the religious organization is consistently applying religious norms for the determination of eligibility, and that the services involve activities with explicitly religious content. That is, such services are likely to be delivered in a religiously exclusive way. When religious marriage rests on norms that diverge from those of civil marriage, religious entities should be free to carry them forward through a variety of contexts in which marital status is relevant. Thus, state exemption policy with respect to religious organizations' treatment of same-sex couples might appropriately be tailored to those areas of service in which the likelihood of consistent expression and application of religious norms seems highest.

¶84 This insight sheds important light on a range of problems involving the provision of social service or other benefits to married couples. For example, some religiously affiliated universities prefer members of their own faith for admission as students, and federal law does not restrict such a preference.¹²⁹ With respect to such schools, legislatures should consider accommodating the school's desire to prefer students of its own faith for married student housing. Because a same-sex marriage would effectively (or formally) disqualify a participant from good standing in some faiths, those faiths should be free to treat same-sex couples like all those who do not measure up to the faith community's standards.

¶85 The likelihood of consistent religious inclusion and exclusion is not the only relevant consideration in the calculus of accommodation. As noted above, the risk of withdrawal of valuable and not easily replaced social services is also a significant policy consideration. This variable illuminates the now-famous withdrawal of adoption services by Catholic Charities of Boston,¹³⁰ a case that sadly illustrates the social costs that may be incurred when religious charities are faced with nondiscrimination requirements in tension with faith principles. Catholic Charities of Boston surrendered its license as an adoption agency rather than facilitate placements with same-sex couples. State law required all adoption agencies, secular or religious, to follow broad nondiscrimination

¹²⁷ Note that the scheme does not cover all goods and services that might be designated for married couples (e.g., visitation rights for a same-sex spouse in a religiously affiliated hospital are not included in the exemption).

¹²⁸ N.H. REV. STAT. ANN. § 457:37(III).

¹²⁹ Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (2006), forbids discrimination based on race, color, or national origin by recipients of federal financial assistance, but does not forbid religious selectivity by such recipients. To the best of our knowledge, no state forbids religious preference in student admissions by religiously affiliated universities.

¹³⁰ Carr, *supra* note 111.

guidelines,¹³¹ and the state legislature was unwilling to provide an exemption for religiously affiliated agencies that did not want to make such placements.¹³²

¶186 Such a requirement, though permitted by the federal constitution, generates obvious trade-offs if it drives from the market large and well-respected providers of a particular social service. Nothing in the relevant market conditions makes it likely that other providers, new or pre-existing, will fill the void left in Massachusetts by the withdrawal of Catholic Charities as a provider of adoption services. A policy of permissive accommodation would have allowed Catholic Charities and other religiously affiliated adoption agencies to single out same-sex couples—including those legally married in Massachusetts—as ineligible for adoption services, but would have maintained the pre-existing provision of service to couples and children in need. Perhaps in response to the Massachusetts tale, Connecticut has exempted religious organizations, offering social services such as adoption, from any obligation to serve same-sex couples, as long as the government does not fund the service.¹³³

iii) *Employee benefits for spouses.*

¶187 This final sub-set of cases is materially significant to same-sex married couples, and symbolically significant to religious organizations opposed to same-sex marriage. If one member of a same-sex couple is employed by a religious organization that provides spousal benefits to employees, should legislatures permit the religious organization to exclude same-sex spouses from such benefits?¹³⁴

¹³¹ MASS. GEN. LAWS ANN. ch. 151b, § 4 (2008).

¹³² For discussion and a critique of developments in Massachusetts, see Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297 (2008); see also Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 831–843 (2007).

¹³³ An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same-Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 19 (“Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose”).

¹³⁴ This issue is significantly complicated by federal law, which preempts state requirements to provide some kinds of benefits to same-sex spouses of employees. The Employee Retirement Income Security Act (ERISA) has a broad provision that preempts state regulation of employee pensions. 29 U.S.C. § 1144(a) (2006). Under the federal Defense of Marriage Act (DOMA), a “spouse” must be a member of the opposite sex, and that definition applies to ERISA, which then preempts state definitions of “spouse” for purposes of all employee pension plans governed by the federal statute. 1 U.S.C. § 7 (2006). An employer may choose to offer pension benefits to same-sex spouses, but ERISA preempts state laws that would require provision of such benefits. See Karen Levchuk, *Civil Unions—Considerations for New Hampshire Employers as the Rights of Marriage Are Extended to Civil Union Partners and their Dependents*, 49 N.H. B.J. 10, 10–12, 13–15 (2008) (describing effect of DOMA and federal preemption on specific types of employee benefits); Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. REV. 99, 102–112 (2006) (describing effect of federal law on benefits provided by private employer, and on state regulation of such benefits); but see Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373 (2001) (arguing that ERISA should not be read to preempt state laws that would require employers to provide equal benefits to same-sex spouses of employees); Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267 (1998) (same). To make matters even more complicated, many employee benefit plans offered by religious institutions—“church plans”—are specifically exempted from ERISA, and thus ERISA preemption would not apply. 29 U.S.C. § 1003(b). Thus, a religious institution’s employee benefit plan may be subjected to state regulation even when a secular private employer’s benefit plan would not. Levchuk, *supra*, at 13. As Sherman notes, this is “a somewhat ironic result, inasmuch as some religious institutions are among the most conspicuous opponents

¶88 On one, very important level, the conflict suggested by this question is less stark than it may seem. Religious organizations already have the statutory right, under federal law and the law of most states, to limit employment to those who belong to and maintain the employers' faith.¹³⁵ If religious employers are opposed to same-sex intimacy, they thus have the prerogative to exclude from employment all who engage in intimate same-sex conduct.¹³⁶ Participation in a same-sex marriage would be an admission that an employee was engaged in such conduct, and therefore not acting consistently with the faith. Accordingly, religiously affiliated organizations could refuse to hire, or could dismiss, employees who made requests for benefits for a same-sex intimate partner.

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

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

¶91 Perhaps the existence of a legal escape from the obligation to pay such benefits to same-sex spouses is sufficient to solve the problem presented by this class of conflicts. There is no obvious policy reason to permit religiously affiliated employers, educational or otherwise, to gain the benefits of the work done by gay employees without incurring the detriment of paying benefits to their spouses to the precise same extent as those paid to opposite sex spouses. Under the current regime of employment law, such employers have a variety of lawful paths open to them—refuse on religious grounds to hire openly gay employees; end the payment of spousal benefits to all employees; or include the same-sex spouses (or, civil union partners, in states where that relationship is a functional

of domestic partner benefits." Sherman, *supra*, at 396. Because church plans are not covered by ERISA, our discussion will ignore the possible implications of federal preemption of state regulation of religious employers' benefit plans.

¹³⁵ The federal statutory exemption for religious organizations from Title VII's prohibition on religious discrimination in employment is codified at 42 U.S.C. § 2000e-1(a) (2006). Most states have similar exemptions. For a survey of state provisions, see IRA C. LUPU & ROBERT W. TUTTLE, *ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: THE STATE OF THE LAW* app. B (2002). The current version of the proposed Employment Non-Discrimination Act of 2009 (ENDA), H.R. 3017, 111th Cong. § 4(a)(2) (1st Sess. 2009), which would extend Title VII of the 1964 Civil Rights Act to discrimination based on a person's "actual or perceived sexual orientation or gender identity," includes an exemption for all religious organizations that are exempt from Title VII's prohibition on religious discrimination. H.R. 3017 § 6. If ENDA, as enacted, retains this exemption for religious employers, they would remain free under federal law to exclude openly gay employees, whether or not the employer explicitly invoked religious reasons for doing so.

¹³⁶ See, e.g., *Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991).

equivalent of marriage) in whatever benefits are paid to opposite-sex spouses.¹³⁷ An exemption of religiously affiliated employers from the obligation to cover same-sex spouses to the same extent as opposite-sex spouses would add still another choice to that list, and reduce legal pressure (though not other, informal pressure) to maintain a regime of equality.

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

¶93 The closest that any of them came to this problem was in the provisions related to the rather different context of fraternal benefit societies. Vermont, Connecticut, and New Hampshire each has a provision that exempts such societies from any obligation “to provide insurance benefits to any person if to do so would violate the fraternal benefit society’s free exercise of religion”¹³⁸ Such protections of fraternal benefit societies, such as the Knights of Columbus and others which may have religious criteria for membership, arise in the more compelling constitutional context of associational relationships rather than employment relationships. Accordingly, these societies presented a more constitutionally appealing and relatively cost-free case for accommodation than do religiously affiliated employers not generally engaged in making religious distinctions among employees.

III. CONCLUSION

¶94 In the first few years after *Goodridge v. Department of Public Health*,¹³⁹ the spread of Defense of Marriage Acts had religious forces on the offensive against the recognition and spread of same-sex marriage. California’s Proposition 8 had appeared to confirm that trend. But more recent events, including the dramatic and uncoerced recognition of such marriages by the legislatures of New Hampshire, Vermont, and the District of

¹³⁷ Yet another possibility is the “San Francisco option,” a compromise reached between that city and its Roman Catholic Archdiocese, pursuant to which Catholic Charities of San Francisco permits employees to designate any adult member of his or her household for purposes of employer-provided health insurance. See Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1998/07/10/MN68088.DTL> (“Rather than specifically giving health benefits to the gay employees at Catholic Charities, [Archbishop] Levada agreed to provide health insurance to any member of the employee’s household—be it a sister, a mother or a gay lover.”). In connection with the enactment of a same-sex marriage law in the District of Columbia, a variety of civil rights and civil liberties groups have suggested a similar arrangement be structured by the Roman Catholic Archdiocese of Washington. See Memorandum from the ACLU of the National’s Capital, et al. to Hon. Vincent Gray & Council of the District of Columbia (Nov. 20, 2009) (on file with the authors). In March 2010, however, just two days before the District’s same-sex marriage legislation went into effect, the Archdiocese of Washington instructed the local Catholic Charities organization that it should no longer make health benefits available to the spouses of any new employees or any current employees not already enrolled in the spousal benefit program. William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, WASH. POST, Mar. 2, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html>. In this way, Catholic Charities will be treating alike married employees, without regard to the sex of the marital partner.

¹³⁸ See, e.g., An Act Affirming Religious Freedom Protections with Regard to Marriage, N.H. REV. STAT. ANN. § 457:37(III) (2010); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, VT. STAT. ANN. tit. 8, § 4501(10) (2009).

¹³⁹ 798 N.E.2d 941 (Mass. 2003).

Columbia, indicate that significant social and political forces are pulling strongly in the other direction.¹⁴⁰ Moreover, the demographics associated with this issue suggest that, in the medium to long run, the forces that support same-sex marriage are destined to prevail.¹⁴¹ In the future, religious coalitions opposed to such marriage may well have to adjust to a political world in which legislative compromises will be important to the future of religious freedom on the question of marriage.

¶95

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

¹⁴⁰ The repeal of the Maine legislation suggests that a majority of voters, in the privacy of the ballot box, are not yet willing to approve of same-sex marriage. The vote to repeal the legislation was very close—52.8% in favor of repeal, 47.8% against repeal. *2009 Election Results*, N.Y. TIMES, Nov. 9, 2009, <http://elections.nytimes.com/2009/results/other.html>.

¹⁴¹ See Adam Nagourney, *Same-Sex Marriage Holds Peril for GOP*, N.Y. TIMES, Apr. 28, 2009, available at http://www.nytimes.com/2009/04/29/us/politics/29memo.html?_r=1&scp=10&sq=demographics%20of%20gay%20rights%20issues&st=cse (reporting polls showing that fifty-seven percent of respondents under forty supported same-sex marriage, compared to thirty-one percent of respondents over forty).